SECOND DIVISION
June 30, 2017

No. 1-16-0631

INEEKA, INC., an Illinois corporation, Plaintiff-Appellant, v. BOND CORP., an Illinois corporation, Defendant-Appellee.	)))))))))	Appeal from the Circuit Court of Cook County No. 12 L 9576 The Honorable Jeffrey Lawrence, Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Mason concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court's grant of summary judgment in favor of defendant was proper.

¶ 2 Plaintiff, Ineeka, Inc., appeals from an order entered in favor of defendant, Bond Corp., on Bond's motion for summary judgment and from the subsequent jury trial judgment and order. Ineeka, Inc., argues that the court erred in granting Bond's motion for partial summary judgment on Ineeka's negligence claim that Bond did not have a duty to have personnel on location during its chemical heating operation and therefore could not be found negligent as a matter of law. For the following reasons, we affirm the court's entry of summary judgment.

¶ 3 BACKGROUND

¶ 4 The following facts are undisputed. Bond Corp. (Bond) manufactures tack cloths, which are essentially textiles coated with proprietary chemical formulas (also known as tackifiers) to

make the cloth sticky, or "tacky." It takes several hours to heat the chemicals to the proper temperature before they can be applied to the cloth. Part of Bond's manufacturing process involved attaching heaters to timers and immersing the heaters in preheating drums of tackifier. The timers would automatically begin preheating the chemicals in the early morning hours. This preheating process occurred without Bond personnel present. Bond's manufacturing facility was equipped with a sprinkler system and alarm system, which were both regularly inspected and maintained. There were also fire extinguishers in the Bond facility for suppression of chemical fires.

¶ 5 In the early morning of February 18, 2011, a fire occurred at Bond's manufacturing facility. The precise time that the fire started is unknown, but a 911 call was placed at 4:11 a.m., and reports suggested that the Chicago Fire Department arrived on the scene within a few minutes. The precise cause and origin of the fire is unknown.

¶ 6 On January 17, 2013, plaintiff filed its first amended complaint alleging that its tea inventory, which had been stored in a building down the street from Bond's building, was damaged by smoke from the fire at the Bond facility. Plaintiff alleged that Bond was negligent by: (1) failing to monitor its building when it knew or should have known that heating chemicals overnight could cause its building to erupt in fire, (2) failing to monitor its building when it knew or should have known that early detection of fire would prevent or mitigate loss to surrounding buildings, (3) failing to adopt policies and procedures adequate to secure against the risk of fire and to allow for early detection of fire, (4) failing to maintain the Bond building in a reasonably safe manner by leaving flammable materials near equipment that could result in a fire, and (5) failing to maintain its equipment in a reasonably safe manner. Plaintiff further alleged that the fire was not the result of arson, weather phenomena, or other malfunction or "Act of God," and

that buildings do not erupt in fire in the absence of negligence. Bond answered the complaint, and the parties engaged in extensive discovery.

¶ 7 On March 19, 2015, plaintiff filed a motion for leave to file a second amended complaint. The proposed second amended complaint alleged that "multiple 55-gallon drums of volatile chemicals were regularly heated *** beyond their flash points each night, with no one on watch," that vapors from the heated drums could not properly escape, that heating the chemicals with no one present "substantially" increased the risk of fire, that "on information and belief, the relevant areas of the Bond Building [*sic*] was equipped with multiple dry chemical fire extinguishers that could have been used to suppress any fire *** but with not one person on duty to monitor the operation, the fire extinguishers were useless," that Bond failed to inform the Chicago Fire Department of all of the chemicals being used at its facility, and that Bond failed to inform its own safety consultant that it was heating volatile chemicals beyond their flash point unattended in the middle of the night. Plaintiff also sought to add a claim for punitive damages based on Bond's "Reckless or Willful and Wanton" conduct.

¶ 8 At the hearing on the motion for leave to file a second amended complaint, Bond indicated that it would be moving for summary judgment on plaintiff's first amended complaint. The trial court set a briefing schedule on the motion for summary judgment, and entered and continued plaintiff's motion for leave to file a second amended complaint.

¶ 9 Bond's motion for summary judgment argued that defendant's liability expert, Steven Chasteen, had been deposed and that he had no opinion as to the origin, ignition source, or start time of the fire, and had not identified Bond's heating of chemicals as an ignition source of the fire. Bond contended that plaintiff would not be able to establish the cause or origin of the fire, and thus could not establish that Bond breached any duty owed to the plaintiff. Bond asserted

that Chasteen could only speculate as to whether the presence of a person at the Bond facility at the time of the fire might have resulted in an earlier detection of the fire, and that Illinois does not impose a duty to "post a person at premises at all times for the potential detection of a fire." Bond contended that the injury to plaintiff's tea inventory was neither foreseeable nor likely, and that requiring a person to be present at all times to monitor for fire would be "onerous, and not likely capable of being met."

¶ 10 While Bond's motion for summary judgment was pending, plaintiff sought leave to amend its proposed second amended complaint in order to set forth a separate count for *res ipsa loquitur*. Furthermore, the amended proposed second amended complaint did not contain a claim for punitive damages. On July 28, 2015, the trial court granted plaintiff leave to file the corrected proposed second amended complaint (second amended complaint), and further ordered that Bond's motion for summary judgment was deemed applicable to the second amended complaint.

¶ 11 Plaintiff responded to Bond's motion for summary judgment by contending that Bond admitted that it was conducting an unattended overnight chemical heating operation on the date of the fire, and that Bond had voluntarily adopted a Safety Program acknowledging the fire risk of heating polybutenes past their flash point, which produces ignitable vapors. Plaintiff argued that Bond was performing its heating operation in two areas of its facility, identified as Store 1 and Store 2. Plaintiff asserted that there was evidence in the record that Bond was heating chemicals unattended overnight without proper ventilation in Store 2, and that Chicago Fire Department Fire Marshall Jason Mardirosian determined that Store 2 was the "area of origin" of the fire. Plaintiff argued that Bond's conduct "violated the spirit and letter of its Safety Program, not to mention basic common sense," that Bond had a duty (1) of ordinary care to guard against

injuries that "naturally flow as a reasonably probable and foreseeable consequence" of its actions, (2) to not conduct the overnight heating operation unattended, and (3) to post watch over the heating operation. Plaintiff further asserted that the imposition of a duty on Bond was not contingent on knowing the original cause of the fire.

¶ 12 Plaintiff also argued that the fire was called in at 4:11 a.m., that the Chicago Fire Department arrived at 4:15 a.m., and that despite water suppression efforts, the fire continued to grow and spread. The first "objective indication" that the fire department knew it was fighting a chemical fire came at 5:00 a.m., and there was evidence in the record that a fire department's access to material safety data (MSD) sheets is important for fire suppression for fires involving chemicals. Plaintiff contended that there was evidence in the record showing that polybutene fires are exacerbated by water suppression.

¶ 13 On August 14, 2015, after hearing oral argument, the trial court made an oral ruling granting summary judgment in favor of Bond "on the issue of duty [to have] someone posted in that building, because I do not believe, under common law or any statute, that that exists." Next, the trial court granted partial summary judgment in favor of Bond on the issue of causation, finding that there was no evidence in the record to establish any genuine issue of material fact as to the ignition source of the fire or the specific origin of the fire. The trial court was clear, however, that plaintiff could re-plead and go forward on the issue "of whether or not Bond's actions in this case *** caused the exacerbation of this fire." The court's written order indicated that summary judgment was granted in favor of Bond as "to any theory as to negligence in cause, origin or ignition of the fire and any theory as to posting a person in the Bond building." In light of the trial court's rulings, the plaintiff filed a third amended complaint, followed by a fourth

amended complaint, which omitted any reference to Bond not having a person present at its building at the time of fire.

¶ 14 Prior to trial, Bond filed a motion *in limine* seeking to bar any reference, argument, or evidence regarding "the absence of a person in the facility overnight or while the liquids were preheating," consistent with the trial court's summary judgment ruling. The trial court granted the motion, and the case proceeded to a jury trial on the issue of whether Bond was negligent in exacerbating the fire. The jury returned a verdict in favor of Bond, and the trial court entered judgment on the verdict. Plaintiff's posttrial motion for a new trial was denied. Plaintiff filed a timely notice of appeal, identifying the trial court's August 3, 2015, summary judgment order, the trial court's entry of judgment on the jury's verdict, and the denial of its posttrial motion for a new trial.

¶ 15 ANALYSIS

¶ 16 On appeal, the issue before us is whether Bond owed plaintiff a duty of care to have a person present while conducting its overnight heating operation. According to plaintiff, the circuit court erred when it found that, as a matter of law, Bond was not required to have personnel on location during the night when it heated barrels of chemicals past their flash point via automatic timers. Plaintiff does not challenge the jury's verdict.

¶ 17 Before we address the merits of plaintiff's claim, we must consider whether plaintiff's claim is properly before this court. Although the issue is not addressed by the parties, we find that plaintiff has abandoned the claim that Bond was negligent for failing to post a watchman at the Bond facility during its overnight heating operation.

¶ 18 Our review of the record in this case reveals that plaintiff filed a third and fourth amended complaint subsequent to the circuit court's ruling on Bond's summary judgment

motion, ultimately proceeding to trial on the fourth amended complaint. Plaintiff's fourth amended complaint failed to raise the issue of Bond's negligence in failing to post a watchman at the facility while conducting its overnight heating operation and failed to make reference to and incorporate its arguments raised in either its first amended or second amended complaints. "The issue of the propriety of the trial court's grant of summary judgment is not properly before this court, for when an amendment is filed that is complete in itself and that does not refer to or adopt by reference the prior pleadings, the earlier pleadings are effectively withdrawn and cease to be a part of the record for most purposes." *Gilley v. Kiddel*, 372 Ill. App. 3d 271, 274 (2007) (citing *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp*., 96 Ill. 2d 150, 154 (1983)). Although plaintiff argues it was ordered to "delete all references" to Bond's alleged duty to have an employee monitor the overnight heating operation, nothing prevented plaintiff from including the allegation in its third and fourth amended complaint in order to preserve the issue for appeal. As plaintiff failed to refer to or adopt the earlier pleadings, plaintiff has abandoned the issue it now asks us to review.

¶ 19 Bond, however, does not raise the issue of abandonment. And even if plaintiff did not abandon its argument that Bond was negligent for failing to post a watchman, plaintiff is still not entitled to any relief here. Plaintiff acknowledges that there is no statutory or common law duty to post a person at a premise at all times for the potential detection of fire. Plaintiff further acknowledges that there is no "blanket requirement to post a watchman or have personnel present when chemicals are heated," but argues that "the jury in this case should have been able to decide if the cost to [Bond] to have personnel present at night to operate the chemical fire extinguishers and oversee the chemical heating operations outweighed the risk to the public of a fire." Plaintiff's statement appears to conflate the concept of foreseeability as it relates to the

existence of a duty, which is question of law for a court, with the concept of foreseeability as it relates to proximate cause, which is generally a question for a jury.

¶ 20 Plaintiff's first amended complaint alleged that Bond failed to properly monitor its building "when it knew or should have known that early detection of fire would prevent or mitigate loss to *** surrounding premises," including plaintiff's warehouse. Plaintiff argues that Bond knew from the MSD sheet for the tackifier chemicals and its own Safety Program that heating the tackifier chemicals created a risk of fire since the heated chemicals gave off flammable vapors. Plaintiff contends that Bond's heating operation "was certainly the type of operation which any reasonable person would recognize could give rise to a fire which foreseeably could become out of control without personnel present to utilize the chemical fire extinguishers."

¶ 21 Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014). A trial court's ruling on summary judgment is reviewed *de novo*. *Standard Mutual Insurance Co. v. Lay*, 2013 IL 114617, ¶ 15.

¶ 22 It is well-settled that every person "owes a duty of ordinary care to all others to guard against injuries that naturally flow as a reasonably probable and foreseeable consequence of an act, and such a duty does not depend upon contract, privity of interest or the proximity of relationship, but extends to remote and unknown persons." *Widlowski v. Durkee Foods*, 138 Ill. 2d 369, 373 (1990). "The touchstone of this court's duty analysis is to ask whether a plaintiff and a defendant stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff." *Marshall v. Burger King*

Corp., 222 Ill. 2d 422, 436 (2006). If a course of action creates a foreseeable risk of injury, the individual engaged in that course of action has a duty to protect others from such injury. *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, ¶ 19.

¶ 23 It is undisputed here that there is no common law requirement to post a watch to guard against the start or spread of a fire. It is also undisputed that Bond was not subject to any statutory duty to post a watch to guard against fire. But that does not resolve the question of whether Bond owed plaintiff a duty of care under the circumstances of this case. In the absence of a common law or statutory duty, we consider four factors to determine whether a duty exists: (1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing that burden on the defendant. *Cunis v. Brennan*, 56 Ill. 2d 372 (1974); *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 226 (2010). The weight to be accorded these factors depends upon the circumstances of the case. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 14. "In the absence of a showing from which the court could infer the existence of a duty, no recovery by the plaintiff is possible as a matter of law and summary judgment in favor of the defendant is proper." *Rowe v. State Bank of Lombard*, 125 Ill. 2d 203, 215 (1988). Whether a duty exists in a particular case is a question of law for a court to decide. *Marshall*, 222 Ill. 2d at 429.

¶ 24 We begin by considering whether Bond owed plaintiff a duty because the injury to plaintiff's tea inventory was foreseeable. " '[W]hat is required to be foreseeable is the general character of the event or harm *** not its precise nature or manner of occurrence.' " *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 442 (2006) (quoting *Bigbee v. Pacific Telephone & Telegraph Co.*, 34 Cal. 3d 49, 57-58 (1983)). In *Cunis*, 56 Ill. 2d 372, 375-76, our supreme court discussed the nature of foreseeability as it applies to negligence cases:

"[I]n determining whether there was a legal duty, the occurrence involved must not have

> been simply foreseeable, as the plaintiff contends; it must have been reasonably foreseeable. The creation of a legal duty requires more than a mere possibility of occurrence. Negligence as defined in the Restatement (Second) of Torts (1965), section 282, is conduct which falls below the standard established for the protection of others 'against unreasonable risk of harm.' Harper and James, in their Law of Torts, observe: 'Not what actually happened, but what the reasonably prudent person would then have foreseen as likely to happen, is the key to the question of reasonableness.' [Citation.] And Prosser [citation] comments: 'No man can be expected to guard against harm from events which are not reasonably to be anticipated at all, or are so unlikely to occur that the risk, although recognizable, would commonly be disregarded.' In judging whether harm was legally foreseeable we consider what was apparent to the defendant at the time of his now complained of conduct, not what may appear through exercise of hindsight. We will not look back, as it was felicitously put by Justice Cardozo, 'at the mishap with the wisdom born of the event * * *.' [Citation.] But courts will be retrospective for another purpose. Section 435(2) of the Restatement (Second) of Torts (1965) provides: 'The actor's conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm.' " (Emphasis in original.) *Id*. at 375-76.

¶ 25 We note that there are a few cases where a landowner has been held liable for fire damage to adjoining property, each such case involves a fire that started as a result of a negligent act by the landowner where the resulting injury was foreseeable. See *Masinelli v. McDonald*, 251 Ill. App. 3d 398, 401-02 (1993) (landowner may be held liable for failure to repair defective

fireplace flue); *Powell v. Star Fireworks Manufacturing Co*., 162 Ill. App. 3d 647, 650-51 (1987) (landowner may be held liable for fire that resulted from methane gas leak). Here, plaintiff's argument is not that a fire was a foreseeable result of Bond's negligent actions. Rather, plaintiff argues that the damage to its tea inventory was a foreseeable injury as a result of "Bond's unattended nightly chemical heating operation [that] was certainly the type of operation which any reasonable person would recognize could give rise to a fire which foreseeably could become out of control with no person present to utilize the chemical fire extinguisher." Plaintiff further asserts, "The fact that the Bond Safety Program required chemical fire extinguishers with employees trained in how to use them combined with the fact that the heating was occurring *via* timers at night with no personnel present certainly created a foreseeable unreasonable risk." However, plaintiff has provided no evidence or persuasive argument that the presence of a person in the Bond facility would have had any bearing on the cause or spread of the fire.

¶ 26 Bond responds that it had never previously experienced an overnight fire in its facility, that the precise origin and ignition source of the fire remain unknown, and that it "was neither foreseeable nor likely the absence of a human present would result in either a fire or its growth."

¶ 27 We have no doubt that possibility of fire exists in every context. We also have no doubt that it is foreseeable that in a manufacturing facility or a hotel or an apartment building "where there are inadequate or inoperative smoke detectors and fire extinguishers, a fire could move unchecked throughout the structure to the point where it would spread to buildings immediately adjacent to it before firefighters could arrive or despite their arrival." *Bartelli v. O'Brien*, 307 Ill. App. 3d 655, 661 (199). However, given the record before us, we cannot find that the start or spread of fire in the Bond manufacturing facility and the complained of smoke damage to plaintiff's tea inventory several buildings away was legally foreseeable because Bond did not

post a person to watch for fire and utilize chemical fire extinguishers. The evidence in the record establishes that Bond had a working fire alarm system that did alert first responders and a sprinkler system that did initiate required fire suppression systems until first responders arrived. Ineeka has provided no evidence to show that the presence of a person would have prevented the fire, detected the fire early enough to prevent or hinder its spread, or suppressed the fire to an extent that the smoke that caused loss to the inventory of tea would or could have been avoided.

¶ 28 Not only was the occurrence of a fire starting and spreading in the Bond manufacturing facility not foreseeable under the circumstances alleged by plaintiff, the likelihood of an injury under these circumstances was non-existent. As stated, Bond had a working fire alarm system to alert first responders of a fire and a working sprinkler system that would begin fire suppression efforts until first responders could arrive. It is pure speculation that the presence or absence of an individual at the Bond facility would affect the foreseeability of injury to plaintiff's tea inventory caused by smoke billowing across the area to plaintiff's building some distance from the fire.

¶ 29 As for the third and fourth factors, the magnitude of the burden imposed on defendant and the consequences of imposing the burden, plaintiff fares no better. We agree with Bond. Neither common law nor Illinois law impose a duty to post a human presence to monitor for the outbreak of fire, for either the purpose of more expedient extinguishment or for providing information to first responders. The consequences of imposing such a duty, *i.e.*, the cost, the inability to leave the facility unattended and the concomitant exposure of the posted human to the peril of fire, mandate rejection of such a duty. We note that our supreme court has recognized individuals are generally required to avoid open and obvious dangers such as fire.

> "In cases involving obvious and common conditions, such as fire, height, and bodies of water, the law generally assumes that persons who encounter these conditions will take

> care to avoid any danger inherent in such condition. The open and obvious nature of the condition itself gives caution and therefore the risk of harm is considered slight; people are expected to appreciate and avoid obvious risks." *Bucheleres v. Chicago Park District*, 171 Ill. 2d 435, 448 (1996).

In addition, it would be nearly impossible for one person armed with a chemical fire extinguisher to monitor all areas of the multi-room facility simultaneously for the existence of fire or to retard its growth. Bond had a working fire alarm and sprinkler system in place throughout the facility and was presumably in compliance with local fire and building codes. Given the lack of evidence regarding how this fire started, when it started, whether it was the type of fire that was susceptible to prompt suppression or whether the smoke it produced could have been mitigated, we find the grant of summary judgment was not in error.

¶ 30 Given that Ineeka failed to provide any evidence from which we could infer the existence of a duty, no recovery by the plaintiff is possible as a matter of law and summary judgment in favor of the defendant is proper. *Row*, 125 Ill. 2d at 215 (1988).

¶ 31 CONCLUSION

¶ 32 For the foregoing reasons, the judgment of the circuit court granting summary judgment in favor of Bond is affirmed.

¶ 33 Affirmed.