2012 IL App (2d) 110874-U
No. 2-11-0874
Order filed December 31, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ADRIANA HERNANDEZ, a Minor, by her Mother, HEATHER RITTER, Plaintiff-Appellant, v. SCHOOL DIRECTORS OF DISTRICT U-46, COUNTY OF COOK, DUPAGE, and KANE, and STATE OF ILLINOIS and/or BOARD OF EDUCATION OF ELGIN SCHOOL DISTRICT U-46, Defendant-Appellees.	)	Appeal from the Circuit Court of Kane County. No. 10-L-478 Honorable Robert B. Spence, Judge, Presiding.

JUSTICE McLaren delivered the judgment of the court.
Presiding Justice Burke and Justice Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant had no constructive notice pursuant to section 3-102 of the Tort Immunity Act where the record indicated that the dangerous condition was inconspicuous, there was no notice of any prior injuries, and the device that allegedly caused plaintiff's injury had been inspected daily; the trial court's dismissal of plaintiff's negligence counts is affirmed.

Defendant did not engage in a course of conduct that was willful or wanton pursuant to section 1-210 of the Tort Immunity Act where there was no indication that the

defect that caused plaintiff's injury existed for any length of time, the device was inspected daily, and defendant did not know of any other injuries caused by the device; the trial court's dismissal of plaintiff's willful and wanton counts affirmed.

Defendant did not owe a duty to preserve the alleged evidence because defendant's employee did not manifest an intention to preserve the evidence, acknowledge the significance of the evidence in potential future litigation, did not know plaintiff would file a claim and plaintiff did not request the evidence and did not request that defendant preserve it; the trial court's dismissal of plaintiff's spoliation count is affirmed.

¶ 2 Plaintiff, Adriana Hernandez, a minor, by her mother, Heather Ritter, appeals the dismissal of her complaint against defendant, School Directors of District U-46, County of Cook, Du Page, and Kane, and State of Illinois. Plaintiff's third-amended complaint (complaint) sought damages for injuries she allegedly suffered from a defective shoe scraper near the entrance of her elementary school and for spoliation of evidence.

¶ 3 On appeal, plaintiff argues the trial court erred by dismissing: (1) her negligence and willful and wanton counts pursuant to the notice provision of section 3-102(a) of the Local Governmental and Governmental Employee Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/3-102(a) (West 2010)); (2) her willful and wanton counts because there was a genuine issue of material fact regarding whether defendant had constructive notice of the dangerous shoe scraper; (3) her spoliation of evidence count because there was sufficient evidence that defendant owed her a duty to preserve the dangerous shoe scraper; (4) her negligence counts since negligence actions against school districts are not subject to immunity; (5) her negligence counts because the trial court improperly applied the "recreational purpose" clause under section 3-106 of the Tort Immunity Act (745 ILCS 10/3-106 (West 2010)); (6) her complaint because the court improperly interpreted the "policy decision/discretionary-ministerial act" clause of section 2-201 of the Tort Immunity Act; and (7) her spoliation count on the basis of section 2-201 of the Tort Immunity Act (745 ILCS 10/2-201 (West

2010)) because there was not evidence that throwing away the shoe scraper was a "policy decision" or a "discretionary act." We affirm.

¶ 4 I. BACKGROUND

¶ 5 On May 9, 2011, plaintiff, filed a five-count complaint against defendant[1] alleging negligence (counts I and III), willful and wanton conduct (counts II and IV), and spoliation of evidence (count V). Plaintiff alleged that on or about May 14, 2010, a:

> "[S]hoe scraper was utilized by students to remove debris from their shoes coming into the school building; that the point of the fishhook was very sharp and the Plaintiff[,] coming in from the school grounds on the date in questions, fell and cut the top of her right foot on that fishhook-like extension which was not necessary for removal of debris from the shoes of the students."

Plaintiff further alleged that "the cut on the top of plaintiff's foot was at least 4.5 cm x 4.0 cm involving 30 stitches on her foot."

¶ 6 On May 31, 2011, defendant filed a motion to dismiss plaintiff's complaint pursuant to sections 2-615 and 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-615, 2-619(a)(9) (West 2010)). Defendant argued that the negligence and willful and wanton counts should be dismissed pursuant to section 2-615 of the Code because plaintiff failed to state a claim of premises liability as required by section 3-102 of the Tort Immunity Act. Further, defendant argued that "the complaint" should be dismissed under section 2-615 of the Code because plaintiff's

[1]In her complaint, plaintiff refers to defendant as one entity, as follows, "the DEFENDANT, a duly organized school district known as School directors of District U-46, County of Cook, DuPage and Kane [S]tate of Illinois, and/or the Board of Education of Elgin School District U-46."

allegations were conclusory and, thus, failed to state a claim under section 3-102 of the Tort Immunity Act. Defendant contended that plaintiff pled "no facts establishing that [defendant] had actual or constructive knowledge of the complained of condition on the shoe [scraper], but failed to remedy it." Defendant further contended that plaintiff's allegations "do not under any circumstances *** amount to willful and wanton conduct." In addition, defendant argued that the negligence and willful and wanton counts should be dismissed pursuant to section 2-619 of the Code, because defendant "had neither actual nor constructive knowledge of any alleged defect on the shoe [scraper]." Again, defendant cited section 3-102(a) of the Tort Immunity Act. Defendant also argued that the willful and wanton counts should be dismissed under section 2-619 of the Code because the school sidewalk where the shoe scraper was located was immediately adjacent to the school playground and, therefore, constituted recreational property pursuant to section 3-106 of the Tort Immunity Act.

¶ 7 Regarding the negligence counts, defendant argued that it had no actual knowledge of the defect on the shoe scraper prior to plaintiff's injury. Defendant contended that this issue was not in dispute. It supported this argument with the trial court's order granting defendant's motion to deem admitted facts contained in defendant's three requests for admission and its response to plaintiff's request to admit facts. The trial court's order granted defendant's motion to deem admitted facts contained in defendant's three requests for admission. Defendant's three requests to admit to plaintiff stated: (1) "Admit that you have no evidence of any individual, other than Plaintiff, who sustained an injury on the 'foot scraper' "; (2) "Admit that you have no evidence of any individual, other than Plaintiff, who sustained injury as a result of what you characterize to be a 'fish hook like metal attached to the scraper that cut the plaintiff's foot' "; and (3) "Admit that prior to May 14,

2010, you had used the 'foot scraper right next to the door of the school' that you claim had a 'fish hook like metal attached to the scraper,' but never sustained an injury." Defendant denied plaintiff's request to admit the following facts: "That other students or persons prior to the date of the occurrence in question had injured themselves on other foot scrapers at other locations with the U-46 district"; "That the school district knew of the sharp protrusion extending from the foot scraper and that it existed on the foot scraper in question"; "That the school district knew that other identical foot scrapers located within the U-46 school district had a sharp metal extension from the foot scraper"; and, "That the school district knew that other similar foot scrapers located within the U-46 school district had a sharp metal extension from the foot scraper."

¶ 8 Defendant supported its lack of constructive notice arguments with the deposition testimony of Marcia DeHaan, Angelica Ernst, Juan Negron, and Tim Swenhaugen and with the affidavits of Negron and Ernst which defendant attached to its motion. Defendant argued that the testimony of these witnesses established that the "splinter" was inconspicuous and almost invisible to the naked eye, and that defendant had no knowledge of any other student being injured due to the shoe scraper. Thus, defendant argued, the negligence counts should be dismissed.

¶ 9 In addition, defendant argued that plaintiff's spoliation claim (count V) should be dismissed pursuant to sections 2-615 and 2-619 of the Code. Defendant argued that no duty existed "under which [defendant] was required to preserve the shoe [scraper because defendant] did not voluntarily undertake to preserve it through its subsequent remedial measures." Defendant also contended that plaintiff could not establish her underlying claims. Further, defendant argued that the spoliation count should be dismissed because "a reasonable person would not have foreseen that [plaintiff] intended to file this lawsuit involving the shoe [scraper]." Defendant argued that plaintiff's

spoliation count should be dismissed because plaintiff failed to plead specific facts to establish duty and causation. Defendant also argued that plaintiff cannot establish her underlying claims, thereby negating the causation element of her spoliation claim. In addition, defendant argued that the spoliation count should be dismissed pursuant to section 2-201 (745 ILCS 10/2-201) of the Tort Immunity Act because Swenhaugen exercised an act of discretion and judgment by removing the shoe scraper.

¶ 10 Defendant attached the affidavit of DeHaan who testified as follows. At the time of plaintiff's injury, DeHaan had been Huff Elementary's school nurse for five years. DeHaan knew of no other student who had been injured by the shoe scraper prior to plaintiff. On the day of the incident, plaintiff came into DeHaan's office and said that she had tripped and hurt her foot on something steel near the door near the playground. There was a "large laceration" on the top of plaintiff's foot so DeHaan called plaintiff's mother to take plaintiff to the emergency room. Plaintiff's mother told DeHaan that, while plaintiff was running, she tripped on the shoe scraper by the back door near the playground. DeHann described the metal hook as a "splinter *** that was bent down." DeHaan further testified that:

> "[I]t was peeled down so that I couldn't even see it when I went out there. I initially went out looking around and couldn't figure it out. It was only when I went behind there and actually—it was the same color as the [shoe scraper] and it just wasn't evident—saw that it was ***. So even if looking across the top of it, you didn't see it unless you got behind the wall, between the wall and the [shoe scraper], and looked in that. And I felt along there because I knew something had to be sharp somewhere and found it that way."

¶ 11 DeHaan was asked what the "metal on the hook looked like? [W]as it worn? Was it rusty?" DeHaan replied:

> "Yeah it was—it was—when you looked at it from the top behind, it was the same color as the [shoe scraper], yeah. *** When I tried to look at it, you know, it looked like maybe it was — couldn't tell it had been there a long, you know. I tried to look at it because it was a very mysterious thing."

¶ 12 DeHaan testified that after plaintiff left school with her mother, DeHaan immediately called the school custodian, Juan Negron, who wrapped the shoe scraper with duct tape because DeHaan did not "want it to happen again."

¶ 13 DeHaan's accident report states the following:

> "Student running and tripped over a metal bar that is used to clean mud from shoes before entering school building. Upon investigation, it was discovered that there was sharp steel sliver from the edge of the [shoe scraper] that was bent down behind the [shoe scraper] forming a hook shape."

¶ 14 Defendant also attached the affidavit of DeHaan who stated the following. Plaintiff told DeHaan that plaintiff cut her foot "while running and tripping over a metal [scraper] that was being used to clean mud from students' shoes after they left the playground." Prior to treating plaintiff on May 14, 2010, and while serving as Huff's school nurse beginning in the 2005-06 school year, she was unaware of any other student who was injured as a result of the shoe scraper described in plaintiff's complaint.

¶ 15 Defendant attached the affidavit of Ernst. Ernst stated in her affidavit that she had been the principal of Huff Elementary school since the 2008-2009 school year. Ernst also stated the

following. As principal, she was notified of injuries during school hours. Ernst was never notified that anyone had been injured as a result of "what is characterized in [plaintiff's complaint] as a 'fishhook like extension' on the shoe [scraper]." While Ernst was principal at Huff she was unaware of "what has been characterized in [plaintiff's complaint] as a 'fishhook like extension' on, or any other purported defect to the shoe [scraper]." The shoe scraper is located on a concrete walk adjacent to the school's playground. Ernst spoke with plaintiff's mother, Heather Ritter, three days after the incident, and Ritter did not indicate that she intended on filing a lawsuit against defendant based on the incident. Ernst did not know that Ritter came to the school on May 23, 2010, to take photos of the shoe scraper.

¶ 16 During her deposition, Ernst testified that the shoe scraper had been present for about two or three years prior to plaintiff's injury and Ernst knew of no one else who had injured themselves on the shoe scraper. Ernst was not aware of a fish hook-like extension on the shoe scraper or any other dangerous condition on the shoe scraper prior to plaintiff's injury. Ernst did not know who removed the shoe scraper or when it was removed.

¶ 17 Defendant attached the deposition of Swenhaugen who testified as follows. Swenhaugen had been a maintenance technician assigned to five buildings in the U-46 district for about six and one-half years when the incident involving plaintiff at Huff Elementary occurred. He was assigned to Huff Elementary when the incident occurred. Negron told Swenhaugen that a girl had cut her foot on the shoe scraper and that Negron had placed duct tape and paper towel around it. Swenhaugen removed the shoe scraper on the Wednesday after the incident. The shoe scraper was embedded in the concrete and took about 15 minutes to remove. To remove the shoe scraper Swenahugen had to kneel down a couple of feet from it and use a saw. No one told Swenhaugen to remove the shoe

scraper and he did not talk with anyone such as the principal or the school nurse before he removed it. Swenhaugen testified, "I decided to remove it" because Negron told me about the incident. He examined the shoe scraper without the duct tape on it. There was nothing readily visible to him that could have caused plaintiff's injury. Swenhaugen did not notice any piece of metal sticking out, any hook, or "anything on there." Swenhaugen testified, "I mean I was right up close and personal with this scraper. And I did not notice a protrusion or hook." After removing the shoe scraper from the concrete, he threw it in the garbage dumpster. Swenhaugen did not consider that there might be a lawsuit related to the shoe scraper before he disposed of it. The shoe scraper was rusty and had been in place for at least three years. He knew of no shoe scrapers in the district with frayed or protruding metal on it. Swenhaugen never discussed the incident with Ernst. The only person he spoke to about the incident was Negron.

¶ 18 Defendant attached the deposition of Negron, who testified as follows. Negron was the custodian at Huff Elementary when the incident occurred involving plaintiff, and he had been the school's custodian for about five years. He checked the shoe scraper every day and cleaned it if it was dirty.

¶ 19 Defendant also attached the affidavit of Negron which stated that while serving as Huff Elementary's custodian he was "responsible for maintaining the school sidewalk where the metal strip on which [plaintiff] claims to have been injured was located." Further, Negron stated that he "was unaware of the particular object on the metal strip that apparently caused injury to [plaintiff]."

¶ 20 In addition, defendant attached plaintiff's attorney's notice of attorney lien dated June 23, 2010.

¶ 21 Plaintiff filed a reply to defendant's motion to dismiss. Plaintiff attached to her reply portions of the depositions of DeHaan, Negron, Ernst, and Swenhaugen, and photos of the shoe scraper covered in duct tape near the door where it was located. Plaintiff argued, in part, that defendant had constructive notice of the dangerous shoe scraper. Plaintiff supported this argument with Ernst's deposition testimony that, as far as she knew, the scraper had been present for three years; Negron's testimony that he cleaned it from time to time; and Swenhaugen's testimony that it was rusty and had been there for quite some time.

¶ 22 Plaintiff also argued that defendant's conduct was willful and wanton. Plaintiff supported this argument with Ernst's testimony that one of her duties was to stand outside the door where the scraper was located during recess hours, and Negron's testimony that he cleaned the scraper from time to time.

¶ 23 In addition, plaintiff argued that she properly pled a cause of action for spoliation. Plaintiff argued that defendant exercised control over the scraper, and, therefore had a duty to preserve it. Plaintiff supported this argument with the deposition testimony of Negron who testified that he placed duct tape on the scraper. Plaintiff also argued that she did not have to first lose her underlying cause of action to sustain an actual injury or establish causation and damages. Further, plaintiff also noted that defendant had been sued before when other "students have been injured in other U-46 properties."

¶ 24 On August 4, 2011, after a hearing on defendant's motion to dismiss, the trial court dismissed plaintiff's complaint with prejudice. The trial court stated, in part, that it dismissed the negligence counts because there no evidence of actual or constructive notice pursuant to section 3-102 of the Tort Immunity Act. It stated that, in part, it dismissed the willful and wanton counts because the

complaint failed to allege sufficient facts to state a cause of action and the affidavits did not establish such conduct. The trial court stated that it dismissed the spoliation count because there was no voluntary undertaking, there was remedial action, and the shoe scraper was not removed in anticipation of litigation.

¶ 25 On September 1, 2011, plaintiff filed a notice of appeal.

¶ 26 II. ANALYSIS

¶ 27 A. Negligence

¶ 28 On appeal, plaintiff argues that the trial court erred by dismissing her complaint pursuant to the notice provision of section 3-102(a) of the Tort Immunity Act. Defendant argues that the trial court properly dismissed plaintiff's negligence counts pursuant to section 2-619(a)(9) of the Code.

¶ 29 A section 2-619 motion to dismiss admits the sufficiency of the plaintiff's complaint, but asserts a defense outside of the complaint that defeats it. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. In ruling on a section 2-619 motion, a trial court may consider pleadings, depositions, and affidavits attached to the pleadings. *Johannesen v. Eddins*, 2011 IL App (2d) 110108, ¶ 16. "Immunity from suit under the Tort Immunity Act is an 'affirmative matter' properly raised under section 2-619(a)(9)." *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 377 (2003). The affirmative matter must be apparent on the face of the complaint or the defendant must support the motion with other matter such as affidavits or depositions. *Id.*; *Callaghan v. Village of Clarendon Hills*, 401 Ill. App. 3d 287, 290 (2010). Initially, the defendant bears the burden of proof of the affirmative matter. *Id*. at 291. If the defendant satisfies its initial burden of proof, the burden shifts to the plaintiff to show that "the defense is unfounded or requires the resolution of an essential element of material fact before it is proven." *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*,

156 Ill. 2d 112, 116 (1993). We review *de novo* a lower court's ruling on a motion to dismiss. *Patel v. Home Depot USA, Inc.*, 2012 IL App (1st) 103217, ¶ 8. "On appeal from a section 2-619 motion, the reviewing court 'must consider whether the existence of a genuine issue of material fact should have precluded dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law.' " *O'Casek v. Children's Home & Aid Society of Illinois*, 229 Ill. 2d 421, 436 (2008) (quoting *Kedzie & 103rd Currency Exchange, Inc.*, 156 Ill. 2d at 116-17).

¶ 30 Plaintiff argues that there was a genuine issue of material fact regarding whether defendant had constructive notice of the dangerous shoe scraper because such notice was apparent from the passage of time. Defendant argues that for the purpose of whether defendant had constructive notice pursuant to section 3-102 of the Tort Immunity Act, the focus must be on the defective condition; in this case, the splinter on the shoe scraper, rather than the shoe scraper itself. We agree with defendant.

¶ 31 Section 3-102(a) of the Tort Immunity Act provides in pertinent part that a local public entity:

> "[S]hall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a *condition* that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition." (Emphasis added.) 745 ILCS 10/3-102(a) (West 2010).

¶ 32 When determining whether a public entity had constructive notice under section 3-102(a), courts have focused on the defective or dangerous condition. See *e.g.*, *Glass v. City of Chicago*, 323 Ill. App. 3d 158, 163 (2001) (the court focused on how long the hole in a sidewalk which caused the plaintiff's injury had existed, rather than the sidewalk itself); *Ramirez v. City of Chicago*, 318 Ill. App. 3d 18, 22-23 (2000) (the court focused on how long the uneven sidewalk slabs that caused the

plaintiff's injury had been uneven, rather than the entire sidewalk); *Mtengule v. City of Chicago*, 257 Ill. App. 3d 323, 328-29 (1993) (the court focused on how long the traffic light had been twisted in the wrong direction rather than how long the traffic light had been present).

¶ 33 In this case, plaintiff's complaint focuses on the defective condition wherein she alleges that "a shoe scraper with a fishhook like metal extension" was a "dangerous condition" that defendant "knew, or in the exercise of ordinary and reasonable care, should have known." Thus, the condition at issue is the metal hook or splinter and not the entire shoe scraper. Therefore, we must determine whether there was a genuine issue of material fact regarding whether defendant had constructive notice of the metal hook or splinter.

¶ 34 Constructive notice of a condition exists where the condition existed for such a length of time, is so conspicuous or is plainly visible that the public entity should have known of it, by exercising reasonable care and diligence. *Siegel v. Village of Wilmette*, 324 Ill. App. 3d 903, 908 (2001).

¶ 35 In this case there was evidence that the shoe scraper itself had existed for at least three to five years and that it was rusty. However, there was no evidence regarding the length of time the metal hook or splinter had existed. Further, there was ample evidence that the metal hook or splinter on the shoe scraper was inconspicuous. Nurse DeHaan testified that she could not see it even when she was "crouched down" looking at the shoe scraper. DeHaan testified that she was "expecting something to be sticking up or something. Looked across the top; didn't see anything at all," and "it just wasn't evident," Swenhaugen testified that, although he was "up close and personal" with the shoe scraper for 15 minutes while removing it, he did not see a metal hook. Negron testified and stated in his affidavit that, although he checked the scraper daily to keep it clean, he was not aware

of the defect. In addition, it is uncontroverted that defendant had no knowledge of any shoe scraper causing injury to any other student. Accordingly, there is no genuine issue of material fact regarding constructive notice. Therefore, the trial court properly granted defendant's motion to dismiss plaintiff's negligence counts.

¶ 36 Plaintiff cites *C.D.L., Inc. v. East Dundee Fire Protection District*, 252 Ill. App. 3d 835 (1993), and *Baker v. Granite City*, 311 Ill. App. 586 (1941), to support her argument. In *C.D.L., Inc.* the court focused on how long the brake fluid leak had existed and how conspicuous it was. *C.D.L., Inc*. at 845. It did not focus on the fire truck or the brakes. In *Baker*, a jury awarded the plaintiff damages for injuries she sustained when she fell into a catch basin. *Baker*, 311 Ill. App. at 588. The trial court granted the defendant's motion for judgment notwithstanding the verdict. *Id*. The appellate court reversed and remanded the case because there was evidence that the cover "was filled with rust and corrosion" and it could be inferred that the condition of the cover "was not created in a short period of time." *Id.* at 593. Thus, in both *C.D.L., Inc.* and *Baker*, there was evidence that the defective condition had existed for a long enough time to constitute constructive notice. Also, in *C.D.L., Inc.*, there was evidence that the defective condition was conspicuous. In this case, there was no evidence that the defective condition, the metal hook or splinter, existed for any length of time. Further, although the metal hook or splinter may have been rusty, it was inconspicuous. Thus, constructive notice could not be inferred by the rust. Accordingly, *C.D.L., Inc.* and *Baker*, are distinguishable from this case.

¶ 37 B. Willful and Wanton Conduct

¶ 38 Next, plaintiff argues that the trial court erred by dismissing her willful and wanton counts because there was a genuine issue of material fact regarding whether defendant had constructive

notice of the dangerous shoe scraper. As stated above, we must focus on the metal hook or splinter and not the entire shoe scraper.

¶ 39 Section 1-210 of the Tort Immunity Act defines "willful and wanton conduct" as "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property." 745 ILCS 10/1-210 (West 2010). The term "willful and wanton," as used in the Tort Immunity Act, "includes a range of mental states, from actual or deliberate intent to cause harm, to conscious disregard for the safety of others or their property, to utter indifference for the safety or property of others." *Harris v. Thompson*, 2012 IL 112525, ¶ 41

¶ 40 In this case, the record establishes that, although the rusty scraper was present for years, there was no evidence regarding how long the metal hook or splinter had been present. In fact, Negron inspected the shoe scraper every day and did not detect it. Further, the defect was too inconspicuous to detect even when viewed in close proximity. In addition, there was no evidence that any other student sustained an injury on any shoe scraper on defendant's property. Thus, viewed in a light most favorable to plaintiff, the pleadings and attached documents establish that there is no genuine issue of material fact regarding whether defendant engaged in a course of conduct that was willful or wanton. See *Conoway v. Hanover Park Park District*, 277 Ill. App. 3d 896, 902 (1996) (The court held that the plaintiff could not establish a *prima facie* case of willful and wanton conduct because he failed to establish that the defendant knew or should have known about the danger posed by glass and debris in a drainage ditch.). Accordingly, the trial court properly granted defendant's motion to dismiss plaintiff's willful and wanton counts.

¶ 41 Plaintiff argues that the question of whether defendant's failure to discover the dangerous condition and remedy the hook on the shoe scraper amounted to willful and wanton conduct is a question of fact to be determined by a trier of fact. Plaintiff cites *Murray v. Chicago Youth Center*, 224 Ill. 2d 213 (2007), to support her argument. In *Murray*, the plaintiff, a 13-year-old boy, suffered a catastrophic injury after attempting to perform a somersault on a mini-trampoline at the defendant's school. The Illinois supreme court held that there was a genuine issue of material fact regarding whether the defendant was willful and wanton, precluding summary judgment. *Id*. at 246. The court explained that it was well known that mini-trampolines and improperly executed somersaults are associated with catastrophic injuries, and that the defendant's trampoline program was unsafe in many ways. *Id*. In this case, there is no evidence that this shoe scraper, or shoe scrapers generally, are associated with catastrophic or any other type of injuries. To the contrary, the record establishes that defendant had no actual knowledge of any other student being injured due to a shoe scraper. Thus, *Murray*, is distinguishable from this case.

¶ 42 C. Spoliation of Evidence

¶ 43 Next, plaintiff argues that the trial court erred by dismissing her spoliation of evidence claim because there was sufficient evidence that defendant owed plaintiff a duty to preserve the dangerous shoe scraper. Plaintiff contends that the evidence meets the "relationship" prong of the two-part test announced in *Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188, 195 (1995). Further, plaintiff argues that the question of whether the "foreseeability" prong of the *Boyd* test was satisfied must be submitted to the trier of fact.

¶ 44 Spoliation of evidence is a form of negligence. *Dardeen v. Kuehling*, 213 Ill. 2d 329, 335-36 (2004); *Boyd*, 166 Ill. 2d at 194-95. Therefore, a plaintiff claiming spoliation of evidence must prove

that: (1) the defendant owed the plaintiff a duty to preserve the evidence; (2) the defendant breached that duty by losing or destroying the evidence; (3) the loss or destruction of the evidence was the proximate cause of the plaintiff's inability to prove an underlying lawsuit; and (4) as a result, the plaintiff suffered actual damages. *Dardeen*, 213 Ill. 2d at 336; *Boyd*, 166 Ill.2d at 194, 196.

¶ 45 Generally, there is no duty to preserve evidence. *Boyd*, 166 Ill. 2d at 195. In *Boyd*, the Illinois supreme court set forth a two-prong test which a plaintiff must meet to establish an exception to the general no-duty rule. *Id*. Under the first, or "relationship," prong of the test, a plaintiff must show that an agreement, contract, statute, special circumstance, or voluntary undertaking has given rise to a duty to preserve evidence on the part of the defendant. *Id*.; *Dardeen*, 213 Ill. 2d at 336. Under the second, or "foreseeability," prong of the *Boyd* test, a plaintiff must show that the duty extends to the specific evidence at issue by demonstrating that "a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action." *Boyd*, 166 Ill. 2d at 195. The plaintiff must satisfy both prongs of the *Boyd* test, otherwise the defendant has no duty to preserve the evidence at issue. *Dardeen*, 213 Ill. 2d at 336.

¶ 46 On appeal, plaintiff argues that defendant voluntarily assumed a duty to preserve the shoe scraper by the affirmative conduct of Swenhaugen removing the shoe scraper from the sidewalk. A voluntary undertaking requires a showing of affirmative conduct by the defendant evincing defendant's intent to voluntarily assume a duty to preserve evidence. *Boyd*, 166 Ill. 2d at 195.

¶ 47 In *Boyd*, 166 Ill. 2d at 191, the plaintiff was injured at work when a portable propane heater belonging to the plaintiff exploded. Two representatives from the plaintiff's employer's workers' compensation insurer visited the plaintiff's home. The insurance representatives took the heater, telling the plaintiff's wife that they needed it to investigate her husband's workers' compensation

claim and that they would inspect and test it to determine the cause of the explosion. *Id*. The claims adjustor took the heater to the insurance office and placed it in a closet, where it was lost and never tested. *Id*. The plaintiff and his wife filed a complaint against the insurer for negligent spoliation of evidence, claiming that the loss of the heater adversely affected their products liability action against the manufacturer. *Id*. at 192. The Illinois supreme court held that the plaintiffs' complaint satisfied the relationship prong of the two-prong duty test because the insurer voluntarily assumed a duty to preserve the heater. *Id*. at 195. The relevant factors were that the insurer's representatives removed the heater from the plaintiffs' home, took it into their possession for the purpose of investigating the workers' compensation claim, and knew that the heater was evidence relevant to future litigation. *Id*.

¶ 48 The facts in this case do not meet what the court required in *Boyd* to establish a voluntary undertaking to preserve evidence. Unlike the defendant in *Boyd* cases, Swenhaugen did not manifest an intention to preserve the shoe scraper as evidence or even acknowledge the significance of the shoe scraper as evidence in potential future litigation. Swenhaugen did not relocate the shoe scraper to a place where it would be protected from loss or destruction; rather, he disposed of the shoe scraper in a dumpster. Although Swenhaugen looked at the shoe scraper as he was sawing it, this falls short of taking affirmative steps to preserve it as evidence. A voluntary undertaking requires some affirmative acknowledgment or recognition of the duty by the party who undertakes the duty. *Rogers v. Clark Equipment Co.*, 318 Ill. App. 3d 1128, 1134-35 (2001). In the absence of any affirmative conduct showing Swenhaugen's intent to undertake a duty to preserve the shoe scraper, plaintiff has no support for its argument that Swenhaugen assumed a duty to her through a voluntary

undertaking. Thus, the trial court properly granted defendant's motion to dismiss plaintiff's spoliation count.

¶ 49 Plaintiff argues that there is a genuine issue of material fact regarding whether defendant performed an affirmative duty to preserve the shoe scraper when Swenhaugen "separated the shoe scraper from the sidewalk with a [saw] and threw it away." Plaintiff cites *Combs v. Schmidt*, 2012 IL App (2d) 110517, to support her argument.[2] In *Combs*, the plaintiff filed a complaint against the defendants alleging spoliation of evidence after defendants demolished a home about two months after a deadly house fire. *Id.* ¶¶ 4, 8. The trial court granted summary judgment in favor of defendants. *Id.* ¶ 9. This court reversed, reasoning that, although there was no actual request to preserve evidence, "there was the functional equivalent of one." *Id.* ¶ 23. Before the fire, the plaintiffs complained to the defendants about electrical wiring problems in the house. *Id.* ¶ 24. This was "sufficient to put [the] defendants on notice that they were potential litigants." *Id.* ¶ 25. In this case, there is no evidence that plaintiff or anyone else had complained about the shoe bar; thus, defendant was not put on notice that it was a potential litigant. Therefore, *Combs* is distinguishable from this case.

¶ 50 Plaintiff also argues that the second, or "foreseeability," prong of the *Boyd* test must be submitted to a trier of fact. We need not address this issue because plaintiff failed to establish the first, or "relationship" prong of the *Boyd* test and, therefore failed to establish that defendant owed a duty to preserve the shoe scraper. See *Dardeen*, 213 Ill. 2d at 336 (unless both prongs of the *Boyd* test are satisfied, "there is no duty to preserve the evidence at issue").

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[2]Appellant's leave to cite *Combs v. Schmidt*, 2012 IL App (2d) 110517 as additional authority was granted on October 17, 2012.

¶ 51 However, even if plaintiff had established the first, or "relationship" prong of the *Boyd* test, she cannot establish that defendant owed her a duty to preserve the shoe scraper because she cannot establish the second, or "foreseeability" prong of the *Boyd* test. The "foreseeability" prong of the test is used to determine "whether that duty extends to the evidence at issue—*i.e.*, whether a reasonable person should have foreseen that the evidence was material to a potential civil action." *Dardeen*, 213 Ill. 2d at 336. Generally, the existence of a duty is a question of law for the court to decide. *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, ¶ 14.

¶ 52 In this case, there was no evidence that Swenhaugen should have foreseen that the evidence was material to a potential civil action. The record indicates that Swenhaugen decided, on his own, to remove and dispose of the shoe scraper after Negron told him that plaintiff had injured herself on it. Plaintiff's attorney's lien did not arrive until after Swenhaugen removed the shoe scraper and plaintiff's mother did not request the shoe scraper or that defendant preserve it. See *Dardeen*, 213 Ill. 2d at 338) (the Illinois supreme court held there was no duty to preserve the evidence, because, in part, the plaintiff never requested the evidence from the defendant and never asked the defendant to preserve it). Therefore, we determine that there is no genuine issue of material fact regarding foreseeability. Accordingly, the trial court properly dismissed plaintiff's spoliation count.

¶ 53 To support her argument, plaintiff cites *Martin v. Keeley & Sons, Inc.*, 2011 IL App (5th) 100117, *rev'd*, 2012 IL 113270[3]. We first note that the appellate court case cited by plaintiff has been reversed by the supreme court. *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270 (this opinion has not been released for publication in the permanent law reports). However, the Illinois supreme

[3]Appellant's leave to cite *Martin v. Keely & Sons, Inc.*, 2012 IL 113270, as additional authority was granted on October 29, 2012.

court did not base its decision on the foreseeability prong of *Boyd* test. Rather, the supreme court declined to "address the 'foreseeability' prong of the *Boyd* test, because [the] plaintiffs have not established that a duty to preserve evidence arose under the 'relationship' prong of the test." *Id*. ¶ 53. Assuming, *arguendo*, that the appellate court's decision regarding the foreseeability prong has some persuasive value, we will discuss it here.

¶ 54 In *Martin*, the plaintiffs were injured while installing a handrail on a bridge that the defendant was reconstructing when the plaintiffs fell from scaffolding supported by an I-beam that collapsed. *Martin*, 100117 at ¶ 3. The plaintiffs filed a complaint for negligent manufacture of the I-beam against its manufacturer. The plaintiff also filed a complaint for spoliation of evidence against the defendant alleging that the defendant breached its duty to preserve the I-beam by destroying it. *Id*. ¶ 4. The trial court entered summary judgment in favor of the defendant holding that the defendant did not owe a duty to the plaintiffs pursuant to *Boyd*. *Id*. ¶ 15. The appellate court reversed the trial court, holding, in part, that there was a genuine issue of material fact regarding whether a reasonable person would have foreseen that the I-beam was material to a potential civil action. *Id*. ¶ 25. The material facts giving rise to the court's decision were that, after the accident, the defendant's president inspected the I-beam, took many pictures of it, knew that it was important to document the scene of the accident and that, "at the very least, [knew] workers' compensation claims would stem from the accident." *Id*. ¶ 24. In this case, Swenhaugen did not inspect the shoe scraper, did not document the scene of plaintiff's accident and took no pictures of the shoe scraper. Further, here there was no evidence that Swenhaugen knew that there would be any type of claim made by plaintiff regarding the accident. Plaintiff's attorney's lien did not arrive until after Swenhaugen removed the shoe scraper and plaintiff's mother did not request the shoe scraper or ask that defendants preserve

it (see *Dardeen*, 213 Ill. 2d at 338) (the Illinois supreme court held there was no duty to preserve the evidence, because, in part, the plaintiff never requested the evidence from the defendant and never asked the defendant to preserve it). Therefore, *Martin* is distinguishable from this case.

¶ 55 Because we have determined that the trial court properly dismissed each count of plaintiff's complaint for the reasons stated above, we need not address plaintiff's remaining arguments.

¶ 56 III. CONCLUSION

¶ 57 For the reasons stated, we affirm the trial court's order dismissing plaintiff's third amended complaint with prejudice.

¶ 58 Affirmed.