

2013 IL App (2d) 130557-U  
No. 2-13-0557  
Order filed December 6, 2013

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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OLGA BELTRAN,	)	Appeal from the Circuit Court
	)	of Kendall County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 10-L-124
	)	
WAL-MART STORES, INC.,	)	
THREE FIRES	)	
COUNCIL INC., BOY SCOUTS	)	
OF AMERICA,	)	
and CHURCH OF THE	)	
GOOD SHEPHERD,	)	Honorable
	)	Timothy J. McCann,
Defendants-Appellees.	)	Judge, Presiding.

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JUSTICE JORGENSEN delivered the judgment of the court.  
Justices Zenoff and Birkett concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not err in granting summary judgment in defendant's favor.

¶ 2 Plaintiff, Olga Beltran, was injured in a fall when she and a Boy Scout (technically, a Cub Scout, but, for simplicity, we refer herein to Boy Scouts), who was fundraising outside of a

Wal-Mart store in Oswego, collided. She sued Wal-Mart for negligence.<sup>1</sup> The trial court granted summary judgment in Wal-Mart's favor, and plaintiff appeals. We affirm.

¶ 3

### I. BACKGROUND

¶ 4 The event at issue was captured on a surveillance video that is part of the record and which we have reviewed. On September 26, 2009, at approximately 12 p.m., some members of a Boy Scouts troop appear outside one set of entrance doors to the Oswego Wal-Mart (the store had two sets of entrance doors: one near the grocery and one near the pharmacy. The events at issue took place near the pharmacy doors). The video camera was positioned above the entry doors, facing out toward the parking lot. From that vantage point, the video shows a sidewalk area leading from the doors to three concrete pillars, which appear to mark the dividing line between the sidewalk entrance area and the parking lot. The pillars are located on a textured, skid-resistant surface between the sidewalk and parking lot. In the lower left corner of the screen, the sliding doors form a corner with a brick portion of the building, and in that corner is a garbage can.

¶ 5 After 12 p.m., two Boy Scouts are seen occasionally walking back and forth across the sidewalk directly in front of the doors. At 12:15:13, an unidentified Wal-Mart employee is seen walking across the screen from right to left and then out of view. The two Boy Scouts walk out of view in the same direction. At 12:15:40, the employee re-appears, smiling and seemingly

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<sup>1</sup>In a first amended complaint, plaintiff also sued Three Fires Council Inc., Boy Scouts of America, but later dismissed her complaint against it. In a second amended complaint, plaintiff sued the Church of the Good Shepherd, but it appears from the record that plaintiff and the Church settled their dispute.

gesturing in the direction from which she came. The employee walks through the doors and into the store.

¶ 6 At 12:15:57 and again at 12:16:45, a Boy Scout adult representative is seen in the top left corner of the screen directing the Boy Scouts to stand at a specific area of the sidewalk. Thereafter, the Boy Scouts are seen primarily in the top left corner of the video; they are near the parking lot and behind a line in the sidewalk that runs from the brick corner of the building to the parking lot. Indeed, at times, the viewer can see cars pulling up to the curb directly behind where the Boy Scouts are standing. Photographs in the record taken from the opposite vantage point reflect that, if one is looking at the doors, to the right of the doors is the corner with the garbage can and around that corner is a section of the building that appears to be longer in length than the height of the adults present in the photographs. The Boy Scouts' fundraising table was located farther to the right of that section of the building.

¶ 7 As the video progresses, numerous persons enter and exit the Wal-Mart doors, with the Boy Scouts remaining in the section of pavement to the left of the doors (from the video viewpoint) near the parking lot. Specifically, by this court's count, in the approximately 15 minutes that elapse between the time the Wal-Mart employee enters the store and plaintiff's fall, 89 people either enter or leave through the doors below the video camera. As noted by plaintiff, some of those individuals (by her count, 39) cross or come within a few feet of the area where the Boy Scouts are located prior to entering the store. At 12:30:48, plaintiff appears in the top left portion of the screen, approaching the store from the parking lot. At the same time, a Boy Scout, previously out of view, is seen in the top left portion of the screen, walking toward the portion of the sidewalk dividing the walkway from the parking lot. The scout steps to his left and he and plaintiff bump into each other, on her right side. Plaintiff falls to the ground, landing on her left side.

¶ 8 Plaintiff sued Wal-Mart, alleging in her second amended complaint that it was negligent in that it: (1) failed to supervise or control the Boy Scouts located at its entrance and exit; (2) failed to provide a safe means of ingress and egress for patrons invited to the store; (3) authorized unsupervised fundraising activities in front of the doors; (4) allowed, encouraged, and authorized children to run up to customers entering and exiting the store; (5) failed to properly “maintain” children who were authorized by Wal-Mart to approach patrons while they entered and exited the store; (6) failed to provide adequate space, a reasonable distance from the doors, so as not to block or impede patrons using the doors; and (7) failed to adequately investigate the manner in which sponsors of the authorized fundraising activities would safely approach patrons and they used the doors. Plaintiff alleged that, as a proximate cause of Wal-Mart’s negligence, she suffered injuries.

¶ 9 On February 1, 2013, Wal-Mart moved for summary judgment. 735 ILCS 5/2-1005 (West 2012). It argued that, to the extent it owed plaintiff a duty, it met its obligations of reasonable care and was not the proximate cause of plaintiff’s accident. In addition to the video, Wal-Mart attached to its motion portions of five depositions. First, it attached portions of plaintiff’s deposition testimony, wherein she testified that, on September 26, 2009, she parked her car and approached the store, noticing that some type of fundraising activity appeared to be taking place. Plaintiff testified that, as she approached the store, a Boy Scout approached her and asked if she would buy something. She replied that she would buy something on the way out. The Boy Scout was polite, and he walked up to her; he did not run. According to plaintiff, she then took two steps toward the door when the Boy Scout walked toward her and she felt a “push” on her right side that caused her to fall. When she fell, the Boy Scout was located on the sidewalk and she was located and landed in the skid-resistant area that separated the sidewalk from the street. Plaintiff denied that there was any debris, objects, cracks, or holes on the

sidewalk which caused her to fall, and she denied that Wal-Mart employees in any way caused her to fall. Plaintiff testified that the only thing that caused her to fall was the “push” from the Boy Scout.

¶ 10 Second, Wal-Mart attached deposition testimony from Susan Gonciarz, who has been the Oswego store manager since 2009. Gonciarz testified generally that store guidelines for fundraising events include that no more than 15 people may participate in any such activities and any display tables should be located at least 15 feet from the store’s doors, in order to prevent the fundraising activity from impeding the flow of customer traffic and for safety.<sup>2</sup> According to Gonciarz, the photographs in the record reflect that the Boy Scouts complied with Wal-Mart’s guidelines and the display table was set up more than 15 feet away from the doors. According to Gonciarz, the Boy Scouts walking up to the line in the sidewalk that runs from the building toward the street were not impeding customers’ ability to enter or exit the store. She did not tell the Boy Scouts that they could not cross that line or had to stop at that line, and, as far as she knew, no other store employee would have told the Boy Scouts not to cross that line. It was possible that a Boy Scout supervisor told them not to cross that line. In Gonciarz’s opinion, that the Boy Scouts walked from the fundraising table to the line satisfied Wal-Mart’s guidelines for fundraising because “that is not a main traffic flow in and out of the door in that area right there.” Gonciarz was not aware of any complaints made about the Boy Scouts on the day of the incident.

¶ 11 Third, Wal-Mart attached deposition testimony from Lorraine Washington, one of its department managers and the safety team member who investigated plaintiff’s fall. Washington testified that she was aware that the Boy Scouts were present on the day of the incident because she saw them when she came in that morning. She did not have any discussion with them or

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<sup>2</sup>It is not clear from the record whether these guidelines are written.

direct them in any way. According to Washington, the store's policy for fundraising activities is that the activity cannot impede the flow of customer traffic into the store. Washington testified that there was a greeter located at the door where the Boys Scouts were located, and, to her understanding, the greeter would have been monitoring or watching the Boy Scouts to make sure that they did not impede customers' ability to enter the store. Washington testified that, when groups come to fundraise, Wal-Mart has them sign a sheet of paper informing them how many days and hours they may solicit, and they are informed at that time that they cannot be "in the view of the traffic; otherwise, if we have to come out there and constantly ask them to not be in view of the traffic, we will ask them to leave."

¶ 12 While she was not aware of any required minimum distance from the doors that fundraising activities must maintain, Washington estimated that solicitors should not be any closer than three feet from the doors. If they walk right up to the door entrance, they would block the entrance and customers. After reviewing the photographs and video, Washington testified that the Boy Scouts' table was more than 15 feet away from the doors. Washington was not aware of any complaints about the Boy Scouts prior to the incident, nor did she give any warnings to the boys prior to the incident.

¶ 13 Fourth, Wal-Mart attached deposition testimony from Elizabeth Kammerer, who was present with the Boy Scouts on September 26, 2009. Kammerer coordinated and scheduled the popcorn fundraising activity. Kammerer did not recall with whom at Wal-Mart she arranged the activity, but she spoke with someone on the phone and received general instructions, including that the activity not impede the traffic of customers coming in and out of the store and "a verbal understanding" that they would keep the tables at least 5 to 10 feet from the door. In terms of rules or regulations regarding how, as a supervisor, she was supposed to watch over the Scouts, Kammerer testified that "the only thing I was told was to keep our tables away from blocking the

entrance. We had to keep it—I believe it was 5 to 10 feet away from the doors.” She explained that the rule was “on the permit,” of which she did not have a copy. Kammerer stated that the first shift of Boy Scouts started selling popcorn around 9 a.m. the day of the incident (the incident happened during the “second shift”) and, when the Boy Scouts arrived in the morning they went inside the store to inform a manager of their arrival. They were not, at that time, told to keep the table 5 to 10 feet from the door, but “we just did it. We know you have to keep it within the required amount so you’re not blocking the entrance. That’s all they cared about, that it’s not blocking the entrance.” Later, however, Kammerer testified to a conversation where she asked a male manager if she could set up two tables outside and he told her she could do so, as long as they were not blocking the entrance.

¶ 14 Kammerer testified that each Boy Scout was required to have a parent with him at the fundraising event, and both the parents and Scouts were instructed that they: (1) should not block customer traffic; (2) should be polite and courteous; and (3) were not to “horse around” or run in the fundraising area. Kammerer stated that she instructed the Scouts to wait until the customer approached them or stay at the table, she did not observe any horsing around by the boys on the date of the incident, she was not aware of any complaints about the boys prior to plaintiff’s fall, and Wal-Mart did nothing to cause the accident between plaintiff and the Boy Scout.

¶ 15 The final deposition Wal-Mart attached to its motion was from Harold Merriweather, a Wal-Mart employee. He was not involved in the incident, and was notified of it by an employee after it happened. He denied that any reports or complaints were received about the Boy Scouts before the incident occurred. Merriweather testified that he understands Wal-Mart’s policy to be that groups such as the Boy Scouts are supposed to be outside of the store at least 10 to 15 feet from the door. After reviewing the exhibits and photographs, Merriweather testified that it does not appear that the Boy Scouts were impeding the customer traffic flow in front of the entrance.

¶ 16 Based on the foregoing, Wal-Mart argued that summary judgment in its favor was appropriate. It noted that: (1) there was no evidence to suggest that it failed to maintain its premises; (2) there were no complaints about the Boy Scouts prior to the incident; (3) the Boy Scouts were supervised by adult volunteers; and (4) the evidence was clear that the Boy Scouts were instructed both by Wal-Mart and the troop leaders that they were not to impede traffic flow in and out of the store. In addition, Wal-Mart noted that it was serving the public good by supporting local community groups and that to find liability under these facts would have a chilling effect on future events. Finally, Wal-Mart argued that plaintiff was more than 50% contributorily negligent.

¶ 17 In response to Wal-Mart's motion, plaintiff attached no affidavits. Plaintiff referenced the video, Gonciarz's testimony that one of the store guidelines is that the display table be placed 15 feet from the store entrance, and she attached portions of a deposition transcript from Bob Saelens, a parent of one of the Boy Scouts who was present the day of the incident. Plaintiff alleged that, according to Saelens, the Boy Scouts' display table was positioned within four feet of the store's entrance. The transcript, however, reflects that Saelens was asked where the *boys* were located in relation to the fundraising *table*, and his reply was about four feet. He "believed," therefore, that the table was within four feet of the sidewalk line that ran from the building toward the street, which would have been within four feet of the *walkway* to the entrance doors. When Saelens was asked who from the Boy Scouts told the boys to stand in the spot seen on the video, he replied, "Well, we don't specify you got to stand in a specific spot." Saelens could not recall whether he saw any Wal-Mart representatives come out to talk to the group. When asked whether anyone from Wal-Mart told him that the table had to be positioned at least 15 feet from the store entrance, Saelens replied, "no," but he did not know whether any employees told other Boy Scout supervisors that the tables were too close to the door. When

asked “do you know if anybody ever came out from Wal-Mart to make sure that the table was 15 feet from the entrance to the store,” Saelens replied, “no.” Saelens agreed that he saw employees bringing shopping carts into the store and having smoking breaks and they would walk by the tables and could see where the Boy Scouts were standing. None told the Boy Scouts that the table was too close to the entrance or needed to be moved. Plaintiff argued that summary judgment was inappropriate because Wal-Mart owed a duty of reasonable care to plaintiff and the questions of whether that duty was breached or plaintiff was contributorily negligent were questions of fact.

¶ 18 In its reply and again at oral argument on the motion, defense counsel noted that, where the material facts are undisputed, whether a breach occurred may be decided as a matter of law. At oral argument, plaintiff’s counsel disagreed that the facts were undisputed, noting that the video shows that the Boy Scouts’ behavior changed after the Wal-Mart employee “who has never been disclosed to us” appeared around 12:15 p.m. Plaintiff argued that there is a question of fact as to whether the Wal-Mart employee directed the Boy Scouts to stand in the spot where the accident occurred and whether it was reasonable to do so. In reply, defense counsel represented to the court that plaintiff’s “discussion about this employee who’s never been disclosed on the video, that has never even been an issue that’s ever been presented to me until right now. If I had been asked can you name that person in the video, I mean, we had the video at the depositions. That was never asked at a single deposition. It was never requested of counsel to me. \*\*\* The spot on the sidewalk is something that was indicated by a Boy Scout employee, not a Wal-Mart employee in that video.”

¶ 19 After hearing argument, the trial court, on May 1, 2013, granted summary judgment in Wal-Mart's favor. The court noted that it had reviewed all pleadings with exhibits, as well as the surveillance video. It found that Wal-Mart had a duty of reasonable care to maintain its premises

and owed a duty of reasonable care over the actions of the Boy Scouts. However, it found that there was no genuine issue of material fact that Wal-Mart did not breach its duties. This appeal followed.

¶ 20

## II. ANALYSIS

¶ 21 We review *de novo* a trial court's grant of summary judgment. *Ioerger v. Halverson Construction Co.*, 232 Ill. 2d 196, 201 (2009). Summary judgment is appropriate only where the pleadings, depositions, and admissions on file show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010); *Ioerger*, 232 Ill. 2d at 201. Where reasonable minds could draw different inferences from the undisputed material facts, summary judgment is inappropriate. *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 114 (1995).

¶ 22 However, a "genuine" issue is construed to mean that there is evidence to support the position of the nonmoving party. *Ralston v. Casanova*, 129 Ill. App. 3d 1050, 1058 (1984). Although plaintiff need not prove its entire case at summary judgment, it must present admissible *evidence* that would support a finding in its favor. *Nordness v. Mitek Corp. Surgical Products*, 286 Ill. App. 3d 761, 762 (1997). In reviewing a summary judgment disposition, we strictly construe the record against the movant and liberally in favor of the nonmoving party. *Id.*

¶ 23 To state a negligence cause of action, plaintiff must establish that Wal-Mart owed her a duty, it breached its duty, and that its breach proximately caused her injury. *Espinoza*, 165 Ill. 2d at 114. Generally, the existence of a duty is a question of law for a court, and, provided genuine issues of material fact exist, the issues of breach and proximate cause are factual matters for a jury to decide. *Id.*; see also *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 430 (2006) (same). Conversely, therefore, where there are no genuine issues of material fact, the questions of breach and proximate cause may be decided as a matter of law. A business open to the public may bear

responsibility for injury that follows: “ ‘one who invites all may reasonably expect that all might not behave, and bears responsibility for injury that follows the absence of *reasonable precaution* against common expectation.’ ” (Emphasis added.) *Marshall*, 222 Ill. 2d at 439 (quoting *Hills v. Bridgeview Little League Assoc.*, 195 Ill. 2d 210, 245-46 (2000)). A business invitor owes a duty of care to invitees to protect them against the *unreasonable* risk of physical harm, including where the unreasonable risk of harm arises from negligent acts of third parties. *Id.* at 440-41.

¶ 24 The trial court granted summary judgment in Wal-Mart’s favor on the basis that, because no material questions of fact exist on the element of breach of duty, plaintiff’s negligence claim fails as a matter of law. Plaintiff disagrees and argues that there are at least two questions of fact regarding whether Wal-Mart breached its duty to protect her from an unreasonable risk of harm. She argues first that a genuine issue of material fact exists regarding whether Wal-Mart directed the Boy Scouts where to stand, noting that the unidentified Wal-Mart employee is seen in the video walking in the direction of the Boy Scouts’ table, and after her appearance, the Boy Scouts appear to restrict their location to the site of plaintiff’s accident. We reject this argument as pure speculation. Not only has the employee not been identified, there is no evidence in the record through affidavit or otherwise that the Wal-Mart employee in fact spoke to the Boy Scouts, nor reflecting what, if anything, the Wal-Mart employee told them. To the contrary, a Boy Scout supervisor is seen in the video and appears to pointing to a location for the boys to stand. However, whether, in fact, the supervisor was telling them to stay there and whether he did so at the direction of the unidentified employee is also speculative. As noted above, at summary judgment, plaintiff is not required to prove her claim, but she must present some *evidence* that would support a finding in her favor. Here, as plaintiff presents only speculation and no actual evidence on this point, there is no disputed issue of fact.

¶ 25 Plaintiff argues next that a genuine issue of material fact exists regarding whether Wal-Mart breached its duty of reasonable care by failing to discover where the Boy Scouts were standing and to remove them from the “direct path” of patrons entering and exiting the store. She asserts that, even if the Wal-Mart did not direct the Boy Scouts where to stand, it had 15 minutes to intervene and remove the Boy Scouts from the spot that impeded the flow of patrons. We disagree.

¶ 26 The question is whether plaintiff presented evidence from which a trier of fact could find that Wal-Mart failed to protect her from a foreseeable and *unreasonable* risk of harm from third parties. See *e.g.*, Restatement (Second) of Torts § 314A cmts. e, f (1965) (the duty is only to exercise care that is reasonable under the circumstances, and the defendant is not required to act unless it knows or has reason to know that plaintiff is endangered); see also Restatement (Second) of Torts § 344 cmt. d (1965) (possessor of land who holds it open for business purposes is not insurer of safety to visitors, but must act to provide reasonable protection). The evidence simply does not create genuine material questions of fact on this issue. Plaintiff concedes that the evidence is undisputed that Wal-Mart directed the Boy Scouts not to impede the flow of customer traffic. The evidence reflects that Wal-Mart has guidelines requiring that fundraising groups not block the store’s entrance, and that the Boy Scouts did not do so. Indeed, there is no genuine issue of fact as to whether the Boy Scouts met those guidelines, as the depositions from Gonciarz, Washington, and Merriweather all reflected that the Boy Scouts were not impeding customer flow or blocking the entrance, numerous patrons freely entered and exited the store while the Boy Scouts were present, and plaintiff did not present any testimony to the contrary. In fact, critically, plaintiff did not even testify or present an affidavit stating that the Boy Scouts blocked her path or the doors (she simply testified that the Scout took a step and she felt a push on her right side), nor did she present evidence as to how many feet from the doors the Boy

Scouts were standing. We note that plaintiff's reliance on Saelens' testimony is misplaced, as he did not testify that the table was four feet from the entrance but, rather, that the *Boy Scouts* were approximately four feet from *the table*, which does not speak to how far the Boy Scouts were standing from the doors.

¶ 27 Further, plaintiff's argument is premised on her assertion that the site where the Boy Scouts were standing was in the "direct path" of customers, and she notes that 39 patrons walked over or near the spot of her accident in the 15 minutes preceding her injury. However, in addition to the aforementioned testimony, the video shows that neither the Boy Scouts nor their table were *directly* in front of or *blocking* the doors. Further, Wal-Mart had no reason to suspect that customer flow was allegedly being impeded, for approximately 89 people walked in or out of the doors, apparently unimpeded, in the 15 minutes preceding plaintiff's accident, all while the Boy Scouts were in the top left corner of the screen or out of view. The evidence is also undisputed that there were no complaints about the Boy Scouts blocking the doors or impeding traffic prior to plaintiff's fall, such that Wal-Mart might be on notice that an unreasonable risk of harm might have arisen.

¶ 28 It is true that, depending on the path the customer chose for approaching the store or upon leaving it, the Boy Scouts were in *a* path to the double sliding doors, but there are countless possibilities of such paths. Further, and as seen on the video, we note that plaintiff's accident actually occurred when the Boy Scout, who was out of view of the camera, steps into view at the same time as plaintiff, seconds before the two collide. Plaintiff's argument essentially suggests that any injurious contact between a fundraiser and a customer that occurs within any path of access to the store equates to liability, such that there could never be a "fluke" accident between a fundraiser and a customer near the store entrance. However, this action involves negligence, not strict liability. It is unreasonable to expect Wal-Mart, as part of its duty of reasonable care,

to anticipate or control the movements of individuals in every conceivable path near its entrance *at all times*.

¶ 29 In sum, there are no material questions of fact on the issue of breach of duty and, therefore, plaintiff's negligence claim fails as a matter of law. The trial court did not err in granting summary judgment in Wal-Mart's favor.

¶ 30

### III. CONCLUSION

¶ 31 For the reasons stated, we affirm the judgment of the circuit court of Kendall County.

¶ 32 Affirmed.