2014 IL App (3d) 120653-U

Order filed March 27, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

JUDY A. LOVELL,	)	Appeal from the Circuit Court
	)	of the Tenth Judicial Circuit,
Plaintiff-Appellant,	)	Tazewell County, Illinois,
	)	
v.	)	
	)	
CITY OF WASHINGTON,	)	
	)	Appeal No. 3-12-0653
Defendant-Appellee/	)	Circuit No. 08-L-91
Third Party Plaintiff,	)	
and	)	
	)	
4A DELI, LLC,	)	Honorable
	)	Paul Gilfillan,
Third Party Defendant.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Carter and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* In negligence case brought by plaintiff who fell and was injured while walking across parking lot controlled by defendant, the trial court's decision to exclude photographs of defects in parking lot taken after the City had repaired the defects under the rule barring admission of evidence of post-accident remedial measures was not an abuse of discretion where: (1) plaintiff forfeited the argument that the photographs were admissible to show the City had constructive notice of the defects because she raised that argument for the first time in her posttrial motion and failed to raise it in her motion *in limine*; (2) the photographs at issue were cumulative

of other evidence presented at trial, prejudicial, and of limited probative value; (3) the photographs were not admissible as impeachment evidence; and (4) plaintiff was not prejudiced by the exclusion of the photographs.

¶ 2 On July 13, 2007, the plaintiff, Judy A. Lovell (Lovell), was walking in a parking lot controlled by the defendant, the City of Washington (the City), when she stepped into a hole and fell, fracturing both of her ankles. She sued the City seeking damages for the City's alleged negligent failure to maintain the parking lot in a safe condition. The case was tried before a jury which returned a verdict in favor of the City. The trial court entered judgment on the verdict and subsequently denied Lovell's motion for a new trial. This appeal followed.

¶ 3 **FACTS**

¶ 4 The incident which gave rise to Lovell's complaint occurred in a parking lot at the corner of Peoria and Main streets in the City of Washington. The parking lot serviced several commercial establishments, including the 4A Deli, LLC (4A Deli). During all times relevant to Lovell's Complaint, the City controlled the parking lot pursuant to a lease agreement. It is undisputed that the City was responsible for maintaining the parking lot, including locating and repairing potholes and other defects in the lot.

¶ 5 Lovell was a part time employee of 4A Deli, a business owned and operated by her daughter. On July 13, 2007, a day during which Lovell was not scheduled to work, Lovell's daughter contacted Lovell and asked her to pick up some deli meat from a butcher and deliver the meat to the 4A Deli. Lovell picked up the deli meat, drove back to the 4A Deli, and parked in the parking lot several spaces away from the entrance to the store. At approximately 10 a.m., Lovell exited her vehicle and began walking toward the entrance to the 4A Deli while carrying a box of deli meat, which she was holding against her stomach with both hands. As she was walking through one of the non-occupied parking spaces just outside the entrance to the 4A Deli,

she accidentally stepped into a defect in the surface of the parking lot and fell, fracturing both of her ankles.

¶ 6 Shortly after Lovell's accident, a police officer with the Washington Police Department arrived on the scene and photographed the hole which allegedly caused Lovell's injuries as well as a separate depression located nearby on the parking stripe between two adjoining parking spaces. Before emergency personnel removed Lovell from the scene, representatives of the City's street department arrived and patched both defects.

¶ 7 Lovell filed suit against the City seeking damages for her injuries. In her complaint, Lovell alleged that the City's negligent failure to maintain the parking lot in a safe condition proximately caused her injuries. Lovell maintained that the City created an unreasonably dangerous condition in the parking lot and negligently failed to warn her about that condition. The City denied all material allegations in Lovell's Complaint, including that Lovell was injured as a direct and proximate result of any wrongful acts or omissions on its part. The City also alleged an affirmative defense pursuant to section 3-102 of the Local Governmental and Governmental Employee Tort Immunity Act (745 ILCS 10/3-102) (West 2006) (the Act)), arguing that that it was immune from liability under the Act due because it did not receive actual or constructive notice of the defect prior to Lovell's accident.[1] The City also filed a third-party complaint for contribution against 4A Deli, alleging that 4A Deli negligently failed to warn Lovell about the hole in the parking lot despite its knowledge of the hole's existence.

¶ 8 Before trial, the City filed a motion *in limine* seeking to exclude all testimony or other evidence relating to the fact that the City had filled in the hole which caused the claimant's

[1] As an additional affirmative defense, the City also asserted that Lovell's own negligence was the proximate cause of her accident and her injuries.

injury as well as a separate, nearby depression immediately after Lovell's accident, including photographs that Lovell possessed depicting the two defects after they were repaired by the City. The City argued that this evidence was inadmissible because it depicted post-accident remedial measures taken by the City, the admission of which would cause the jury to infer that the defects in question presented an unreasonably dangerous condition or that the City was at fault for Lovell's injuries.

¶ 9 Lovell filed a motion *in limine* seeking to use the photographs depicting the two defects after the City had repaired them. Although Lovell acknowledged that evidence of post-accident remedial conduct is generally inadmissible, she contended that the photographs at issue constituted the best available evidence of the entirely of the accident scene. In particular, Lovell argued that, unlike other photos taken before the City had repaired the defects, the post-repair photographs showed the location of the defects relative to the 4A Deli and the spot where Lovell had parked her car immediately before the accident.

¶ 10 The trial court granted the City's motion *in limine* and denied Lovell's motion *in limine*. Thereafter, the case proceeded to trial.

¶ 11 At trial, Lovell testified that the hole which caused her fall resembled a bowling ball-sized crater and that most of her foot fit inside it. She also testified that there were no other vehicles parked in the area where she fell and that she had never noticed the defect prior to her fall.

¶ 12 Carrie Peters, Lovell's daughter and boss, testified on Lovell's behalf. Peters was not an eyewitness to the accident as she was inside the 4A Deli at the time. However, a passerby alerted Peters to the accident promptly after it occurred. When Peters went out into the parking

lot, she saw Lovell lying face down on the pavement. According to Peters, Lovell's feet were still in the hole and remained there until an ambulance arrived.

¶ 13 Peters identified the hole that Lovell stepped in as that depicted in Lovell's Exhibit 8 (the police photograph of the hole taken shortly after the accident, prior to the City's repairs). However, Peters testified that one could not appreciate the size of the hole from the photograph. According to Peters, the hole was large in circumference, very visible, and approximately the size of a bowling ball. She drew what she claimed was the true circumference of the hole on Lovell's Exhibit 8. Peters also stated that the hole was caked with cigarette butts, twigs, coins, and dirt and appeared to have existed for some time. She confirmed that the hole was located within a parking space and would have been concealed by a car parked in that space.

¶ 14 Peters also testified about a second, nearby depression in the parking lot that was not located within a parking space. She identified this second depression as that depicted in Lovell's Exhibits 9 and 10, which were also police photographs taken shortly after the accident prior to the repairs.[2]

¶ 15 Peters testified that she had seen the first hole (the injury-causing defect) before Lovell's accident but did not contact the City or warn Lovell about it. Peters stated that she first became aware of the second, non-injury-causing depression immediately after Lovell's accident while waiting for an ambulance to arrive. She claimed that she embarked on a search for other hazards in the lot at that time so that the City could repair such defects in addition to the hole that caused Lovell's fall.

¶ 16 Craig Cohen, the superintendent of the City's street department, testified as an adverse witness during Lovell's case in chief. Cohen described the inspection system the City had been

[2] Exhibit 10 was a wider-angle photograph of the same depression depicted in Exhibit 9.

implementing since the 1990s to discover and repair potholes or similar defects in roads and in other properties the City owned or maintained. According to Cohen, two street department employees under his supervision drive around and survey the streets, alleys, and parking lots for which the City has maintenance responsibilities in search of holes, ruts, and other defects requiring repair. Cohen estimated that the inspection process encompasses some 70 miles of travel. Cohen testified that the inspections occur every 14 to 21 days on weekdays from approximately 7 a.m. until 3:30 p.m. Defects in need of repair are filled in with a "cold patch" gravel compound that quickly hardens when tamped down with a shovel or other hand tool.

¶ 17 When asked about Lovell's Exhibit 8, Cohen testified that the depression depicted in that photograph was a defect he would want the inspection crew to discover and repair. He stated that he was confident his crew would have repaired that defect had it been discovered. However, Cohen noted that the parking lot outside of the 4A Deli was generally quite busy and that it would be impractical for his crew to look under parked vehicles in search of potholes, depressions, or cracks.

¶ 18 During cross-examination by the City's attorney, Cohen was shown Lovell's Exhibit 10, which depicted the second, non-injury causing depression from the vantage point similar to what an inspection crew would have seen while driving through the parking lot. When the City's attorney asked Cohen whether he could see a depression in Lovell's Exhibit 10, Cohen responded, "[n]o, I do not. In this photograph, I do not." Similarly, when viewing a photograph of the non-injury-causing depression at another point during his deposition, Cohen testified that what was depicted in the photograph did not look like a hole and stated, "[i]n this picture, it just looks like there's sand or something on the parking lot across the yellow line."[3] On re-direct,

[3] It is not entirely clear what photograph Cohen was describing when he made these statements.

Lovell's counsel asked Cohen whether Lovell's Exhibit 9 showed a defect in the parking lot, Cohen responded, "[t]here's something there, yes." Turning back to Exhibit 10, Lovell's counsel asked Cohen whether he could see that the yellow painted line of a parking space depicted in that photograph was "broken." Cohen replied that he "could kind of see a shadow" or a "darker spot" "towards the front."

¶ 19 After Cohen testified, Lovell's attorney asked the trial court to reconsider its *in limine* ruling barring the admission of the photographs depicting the two defects after the City had repaired them. Lovell's counsel argued that Cohen's responses to the City's questions on cross-examination had opened the door to the admission of the photographs. Specifically, Lovell's attorney argued that, because Cohen had denied the existence of the second, non-injury-causing defect altogether or otherwise denied its conspicuous or hazardous nature, Lovell should be allowed to impeach this testimony with evidence that the City repaired the second depression.

¶ 20 The City disagreed, noting that Cohen had not denied the existence of the second depression but merely testified that he could not make out a depression in Lovell's Exhibit 10. The City also argued that the admission of the photographs at issue was unnecessary because other witnesses, including Peters, had both confirmed the existence of the second depression and identified its location on Lovell's Exhibit 10. Further, the City reiterated that the admission of photographs depicting its post-accident remedial measures would greatly prejudice its case.

The City asserts that he was describing Lovell's Exhibit 10, but that is not clear from the record. The parties agree that Cohen was describing a photograph of the non-injury-causing defect, which means that Cohen must have been describing either Lovell's Exhibit 9 or Lovell's Exhibit 10.

¶ 21 The trial court denied Lovell's counsel's request and maintained its prior rulings excluding the post-repair photographs in effect throughout the remainder of the trial. The trial court found that, during cross-examination, the City's counsel had merely asked Cohen to describe what he saw in the photograph(s), and that Cohen's answers did not "open the door" enough to justify the admission of the post-accident photographs. The court also noted that Cohen's testimony did not hurt Lovell's case unduly because there had been other, "more descriptive" testimony presented at trial regarding the hole in question. Further, the court found that allowing the post-repair photographs would be "so prejudicial [to the City] to continue to merit its exclusion."

¶ 22 Lovell's counsel then asked the trial court to bar the City from arguing, based on Cohen's testimony, that the non-injury causing defect was not a hole. In response, the trial court initially stated, "[w]ell, I think it's fair to say that [the City] should be barred from arguing that this was not a hole." However, the court immediately went on to clarify that the City could argue that "[Cohen] said he couldn't tell what the photograph showed." The City's counsel asserted that he should be able to argue that Lovell's Exhibit 10 "doesn't show a hole or a depression." The trial court responded, "[y]ou can argue the photograph all you want, but you can't argue that [Cohen] testified that that is not a hole." The City's counsel objected that Cohen "did testify that he didn't see a hole in that photograph." After Lovell's counsel stated that the City "can't have it both ways," the court responded "[y]eah. I'd prefer you to limit it, and I'll hold you to that. [Cohen] could not identify what the photograph showed, not that it was not a hole, but that he could not see a hole." The City's counsel responded, "I can certainly argue from my perspective what I think the evidence showed. I'm not going to point him out and say, you heard Mr. Cohen

say that's not a hole." The court replied, "correct," and Lovell's counsel made no further argument on the issue.

¶ 23 During its closing argument, the City's counsel stated,

> "Now in order to try to muddy the waters here a little bit, [Lovell's] counsel wants to throw up the picture of the depression over here. [Lovell] said it's unreasonable to think that this is not a hole. Ladies and gentlemen, you saw the picture. It's not a hole. It's not a depression. In fact, I think the most apt description that can be given was by Mr. Cohen. It looks like sand on the parking lot, not something that you would go in and cold patch."

¶ 24 The jury returned a verdict in the City's favor. The trial court entered judgment on the verdict. Thereafter, Lovell filed a motion for a new trial, which the trial court denied. This appeal followed.

¶ 25 ANALYSIS

¶ 26 Lovell argues that the trial court erred in excluding photographs of the parking lot defects taken after the City repaired the defects. As an initial matter, the City contends that we must presume that the trial court's judgment was proper because the record on appeal is inadequate to allow us to review the trial court's rulings on the motions *in limine* at issue. We disagree.

¶ 27 As the appellant, Lovell had the burden to present a sufficiently complete record to support its claim of error. *Corral v. Mervis Industries*, Inc., 217 Ill. 2d 114, 156 (2005). In the absence of such a record, it will be presumed that the trial court's order conformed with the law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984). Any doubts arising from the incompleteness of the record will be resolved against the appellant. *Id.*

¶ 28 Contrary to the City's argument, the record in this case is sufficient to permit appellate review. As Lovell notes, the parties' initial motions *in limine* were not decided on the record and the colloquy between the trial court and the attorneys regarding the relevant motions *in limine* is rather sparse. However, the record as a whole adequately reveals the basis for the trial court's decision to exclude the post-repair photographs. The City's motion *in limine* No. 22, which the trial court granted, raised only one argument; namely, that the photographs at issue should be excluded because they depict post-accident remedial measures. During the motion *in limine* conference, while discussing its reasons for granting the City's motion *in limine* No. 22 and for denying Lovell's motion *in limine* No. 2, the court explicitly referenced the rule excluding evidence of subsequent remedial measures. At trial, both the parties and the trial court acknowledged that the photographs were excluded on that basis. After Cohen's trial testimony, Lovell's counsel asked the trial court to reconsider its prior ruling on a motion *in limine* which had "excluded any evidence of repairs of either of the defects in the parking lot *under the *** [r]ule *** that subsequent remedial measures are not admissible*." (Emphasis added.) In response, the City's counsel argued that allowing the jury to see the post-repair photographs would prejudice the City by "draw[ing] undue notice" to the repairs and would "fl[y] in the face of the reason we have bars on subsequent remedial measures." The trial court ruled that the testimony presented by Cohen was not "enough to allow the subsequent remedial measure photographs to come in" and stated that the court "still [fell] back on the standard that allowing this evidence would be so prejudicial as to continue its exclusion." Further, in its response to Lovell's posttrial motion, the City confirmed that the basis for the trial court's rulings on the motions *in limine* at issue was the rule barring the admission of post-accident remedial measures. In sum, the record discloses that the trial court excluded the photographs at issue because they

depicted post-accident remedial measures and that both parties acknowledged that fact during the trial. The record is therefore sufficient to permit appellate review.

¶ 29 Turning to the merits, Lovell argues that the trial court abused its discretion in excluding the post-repair photographs under the rule barring admission of evidence of post-accident remedial measures. Evidence of post-accident remedial measures is not admissible to prove prior negligence. *Herzog v. Lexington Township*, 167 Ill. 2d 288, 300 (1995); *Schaffner v. Chicago & North Western Transportation Co.*,129 Ill. 2d 1, (1989). However, such evidence may be admissible for other purposes, such as to prove ownership or control of property (when disputed by the defendant), to establish the feasibility of precautionary measures (when disputed by the defendant), or for impeachment. *Herzog*, 167 Ill. 2d at 300-01. However, even if one of the foregoing exceptions is invoked, if the value of the remedial conduct evidence rests on an inference of negligence, the evidence should be excluded. *Id.* at 300. Our supreme court has identified several reasons justifying the rule excluding evidence of post-accident remedial measures, including: (1) a strong public policy that favors encouraging improvements to enhance public safety; (2) subsequent remedial measures are not considered sufficiently probative of prior negligence, because later carefulness may simply be an attempt to exercise the highest standard of care; and (3) a jury may view such conduct as an admission of negligence. *Herzog*, 167 Ill. 2d at 300.

¶ 30 Decisions to admit or exclude evidence are within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *DiCosolo v. Janssen Pharmaceuticals, Inc.*, 2011 IL App (1st) 93562, ¶ 32. A trial court abuses its discretion when its decision is arbitrary or fanciful, or where no reasonable person would adopt the trial court's position. *Napcor Corp. v. JP Morgan Chase Bank, NA*, 406 Ill. App. 3d 146, 155 (2010). Moreover, "it is

'axiomatic that error in the exclusion or admission of evidence does not require reversal unless one party has been prejudiced or the result of the trial has been materially affected.' " *Spaetzel v. Dillon*, 393 Ill. App. 3d 806, 814 (2009) (quoting *Stricklin v. Chapman*, 197 Ill. App. 3d 385, 388 (1990)). The party seeking reversal bears the burden of establishing substantial prejudice and showing that the trial court's ruling materially affected the outcome of the trial. *DiCosolo*, 2011 IL App (1st) 93562, ¶ 40.

¶ 31 In this case, Lovell argues that trial court abused its discretion in excluding the post-repair photographs because those photographs were the "best evidence of the size and location of the defects within the context of the entirety of the parking lot." As such, Lovell argues, the photographs were admissible to show that the defects were "of a sufficient size and in such a location as to have placed the City on constructive notice of their existence." Lovell maintains that she sought to admit these photographs not to prove the City's negligence but to rebut the City's "lack of notice" defense.[4] Moreover, Lovell contends that, because the defects at issue "clearly required patching" (and the jury would have assumed as much), evidence that they were patched after the accident would not have prejudiced the City.

¶ 32 We disagree. As a threshold matter, in her motion *in limine* No. 2, Lovell did not argue that the post-repair photographs were admissible to show that the City had constructive notice of

[4] Lovell contends that "an integral part of the City's lack of [notice] defense was that the injury causing defect was in the middle of a parking space and *** would routinely be covered by parked automobiles when the City conducted its regular inspections." Lovell argues that the post-repair photographs would have rebutted this defense theory by showing the existence of a second, nearby defect which was not within the parameters of a parking space and would not have been covered by parked cars.

the defects; she merely argued that the photographs should be admitted to establish the configuration of the parking lot. Lovell raised the "constructive notice" argument for the first time in her posttrial motion. Accordingly, she has forfeited that argument on appeal. *Dubey v. Public Storage, Inc.*, 395 Ill. App. 3d 342, 350-51 (2000); see also *Thornton v. Garcini*, 237 Ill. 2d 100, 112 (2010).

¶ 33 However, even if Lovell had properly preserved the "constructive notice" argument for appeal, the argument would fail. First, the probative value of the post-repair photographs as to the issue of notice was, at best, limited. The photographs show the defects as they appeared *after they were repaired*, not before Lovell's accident. Accordingly, the post-repair photographs do not reveal exactly how conspicuous the defects were before the accident, which is the only question relevant to the issue of constructive notice.

¶ 34 Moreover, even if the post-repair photographs were relevant to show the size, location, and conspicuousness of the defects prior to Lovell's accident, they would be cumulative of other evidence presented on that issue. The jury was shown a photograph of the injury-causing hole which was taken prior to the accident (Lovell's Exhibit 8). Although various witnesses testified that this photograph did not accurately convey the hole's size and appearance, Peters drew on the photograph what she claimed were the actual dimensions of the hole. In addition, Lovell described the hole as a "bowling ball sized crater," and Peters testified that the hole was large in circumference, very visible, and approximately the size of a bowling ball. Peters claimed that she had seen the hole prior to the accident and that it was caked with cigarette butts, twigs, coins, and dirt, suggesting that it had existed for some time prior to the accident. Peters also testified that, immediately after Lovell's accident, she discovered a second, nearby depression in the parking lot that was not located within a parking space. She identified this second depression as

that depicted in Lovell's Exhibits 9 and 10, which were shown to the jury. Although Cohen initially testified that he could not see a depression in these photographs, he later admitted that Lovell's Exhibit 9 showed some kind of defect and that he "could kind of see a shadow" or a "darker spot" on the yellow parking line depicted in Ex. 10.

¶ 35 In sum, Lovell introduced ample evidence regarding the size and conspicuousness of the injury-causing hole (as well as the existence and character of the non-injury-causing depression) prior to the accident, and the admission of the post-repair photographs would merely have duplicated this evidence. The admission of such duplicative evidence would be unnecessary and would contravene the policies barring the admission of post-accident remedial measures. See, e.g., *Simich v. Edgewater Beach Apartments Corp.*, 368 Ill. App. 3d 394 (1st Dist. 2006) (holding that evidence which revealed post-accident remedial measures was not admissible to show the magnitude of the original hazard because that fact was clearly established by other evidence and post-accident evidence was therefore "duplicative for that purpose"); *Schuman v. Bader & Co.*, 227 Ill. App. 28, 30 (1922) (holding that the trial court erred in admitting evidence that a spout which caused the plaintiff's accident had been "cut off some two feet" several months after the accident, even though the plaintiff claimed that the evidence was offered only to show the condition of the spout at the time of the accident, where the plaintiff had "introduced other witnesses who testified to measurements made before the change"). In any event, Lovell cannot show that she was prejudiced by the exclusion of such cumulative evidence. See, *e.g.*, *Chuhak v. Chicago Transit Authority*, 152 Ill. App. 3d 480, 486 (1987) (ruling that "[t]he exclusion of evidence is harmless" where the evidence excluded is "fully established by other evidence" and "merely cumulative").

¶ 36 Further, the admission of the post-repair photographs would have likely caused at least some unfair prejudice to the City. Admittedly, the City did not dispute that Lovell was injured by a hole in the parking lot which Cohen testified was the type of defect that his crew would have repaired had they noticed it before the accident. Thus, evidence that the City repaired the hole after the accident might not be as prejudicial here as it would be in other cases in which the existence of an unsafe condition or injury-causing defect is disputed. Nevertheless, as the City notes, allowing the jury to see photographs of the repairs would have highlighted the repair work done and would have made it more likely that the jury would infer that the City was negligent in failing to repair the hole prior to the accident. See *Herzog*, 167 Ill. 2d at 300. Thus, the policies animating the rule barring evidence of post-accident remedial measures apply in this case.

¶ 37 In sum, because the photographs at issue were duplicative, prejudicial, and of limited probative value, and because Lovell cannot demonstrate that she was prejudiced by their exclusion, the trial court's decision not to admit the photographs was not an abuse of discretion. Under the circumstances presented in this case, Lovell cannot show that the trial court's decision to bar the photographs was "arbitrary or fanciful" or that "no reasonable person would adopt the trial court's position." *Napcor Corp.*, 406 Ill. App. 3d at 155.

¶ 38 Lovell argues in the alternative that, even if the trial court's initial decision to exclude the post-repair photographs was proper, the court abused its discretion by refusing to admit the photographs after the City "opened the door" by eliciting testimony from Cohen which "minimized the nature and size of the defects." Lovell maintains that "the clear purpose of this testimony was an attempt to convince the jury that the defects were of insufficient size to either be discoverable or require repair." She contends that the trial court's refusal to allow her to "impeach" and rebut Cohen's testimony with the post-repair photographs was prejudicial error.

¶ 39 We disagree. Evidence of post-accident remedial measures may be admitted for impeachment purposes "[w]here the impeachment value rests on inferences other than prior negligence" and "where its probative value outweighs the prejudice to defendant." *Herzog*, 167 Ill. 2d at 302. For example, Illinois courts have held that evidence of subsequent repairs is admissible to impeach a defendant's exaggerated claims that the condition that caused the injury was the "safest possible," that no greater care was possible, or that it would have not have been feasible to make it safer. See *Herzog*, 167 Ill. 2d at 303; *Lewis v. Cotton Belt Route-St. Louis Southwestern Ry. Co.*, 217 Ill. App. 3d 94 (1991).

¶ 40 Here, Cohen did not make any exaggerated claims regarding the safety of the parking lot or claim that it was not feasible to fix the hole that caused Lovell's injury. To the contrary, he admitted that the hole that caused Lovell's injury was the type of defect that he would expect his crew to repair and that he was confident that they would have repaired it had they discovered it before the accident. Moreover, Cohen did not deny the existence of either the injury-causing hole or the non-injury causing depression. Although he initially testified that he could not see a depression or a hole in Lovell's Exhibit 9 or 10, he later admitted that Lovell's Exhibit 9 showed a defect and that he "could kind of see a shadow" or a "darker spot" on the yellow parking line depicted in Ex. 10. Moreover, even during his initial testimony, Cohen did not deny that the non-injury-causing depression existed prior to Lovell's accident or claim that it was not visible or conspicuous at that time. Rather, he merely stated that he could not see a depression in the photograph he was shown. (As noted, he later changed his testimony and admitted he could see a defect in Lovell's Exhibit 9 and a "shadow" or "darker spot" in Lovell's Exhibit 10.) Accordingly, there was nothing in Cohen's testimony that called for impeachment. Moreover, Lovell was not unfairly prejudiced by Cohen's initial testimony regarding Lovell's Exhibits 9

and 10 because: (1) Peters and other witnesses testified that they could see a depression in those photographs; and (2) Cohen himself later admitted that he could see a defect in Lovell's Exhibit 9 and a "shadow" or "darker spot" in Lovell's Exhibit 10.

¶ 41 Lovell argues that the City "compounded the error" of Cohen's testimony and committed "reversible error" during its closing argument by arguing that the non-injury-causing defect did not constitute a safety hazard that would have put the City on notice of the need to conduct repairs. Lovell maintains that, in making this argument during its closing, the City violated the trial court's order barring the City from arguing that the non-injury-causing defect was "not a hole." However, the City raised no objection to the City's closing argument at trial. Accordingly, the City has forfeited this argument. *Pietrzak v. Rush-Presbyterian-St. Luke's Medical Center*, 284 Ill. App. 3d 244, 253 (1996).[5]

¶ 42 **CONCLUSION**

¶ 43 For the foregoing reasons, we affirm the judgment of the circuit court of Tazewell County.

¶ 44 Affirmed.

---

[5] In any event, although the City's comments during closing argument may have come close to the line, we do not believe that they violated the trial court's order. The trial court merely barred the City from claiming that *Cohen* testified there was "no hole." It did not bar the City from arguing what *the City* believed Lovell's Exhibits 9 and 10 actually showed. In fact, the trial court expressly allowed such argument. The court merely cautioned the City not to mischaracterize Cohen's testimony by arguing that Cohen stated that Lovell's Exhibits 9 and 10 showed no hole. As the trial court told the City's counsel, "[y]ou can argue the photograph all you want, but you can't argue that [Cohen] testified that that is not a hole."