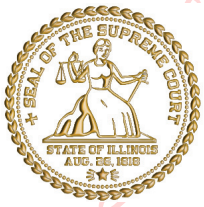
Illinois Official Reports

Appellate Court



***Hollenbeck v. City of Tuscola*, 2017 IL App (4th) 160266**

Appellate Court Caption	LAURIE ANN HOLLENBECK, Plaintiff-Appellant, v. THE CITY OF TUSCOLA and LEON KINNEY, Defendants-Appellees.
District & No.	Fourth District Docket No. 4-16-0266
Rule 23 order filed	February 2, 2017
Rule 23 order withdrawn	March 13, 2017
Opinion filed	March 13, 2017
Decision Under Review	Appeal from the Circuit Court of Douglas County, No. 13-L-2; the Hon. Karle E. Koritz, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	Jeffrey J. Cocagne (argued) and Jeffrey D. Frederick, of Frederick & Hagle, of Urbana, for appellant. Jennifer L. Turiello (argued), of Peterson, Johnson & Murray–Chicago, LLC, of Chicago, for appellee City of Tuscola. Michael A. Walsh (argued), of Erickson, Davis, Murphy, Johnson & Walsh, Ltd., of Decatur, for appellee Leon Kinney.

Panel PRESIDING JUSTICE TURNER delivered the judgment of the court, with opinion.
Justices Holder White and Steigmann concurred in the judgment and opinion.

OPINION

¶ 1 In July 2015, plaintiff, Laurie Ann Hollenbeck, filed a second amended complaint against defendants, the City of Tuscola (Tuscola or City) and Leon Kinney, to recover for injuries suffered in a fall on City property. In December 2015 and January 2016, the trial court granted summary judgment in favor of Tuscola and Kinney, respectively.

¶ 2 On appeal, plaintiff argues the trial court erred in granting summary judgment in favor of defendants. We affirm.

¶ 3 I. BACKGROUND

¶ 4 This appeal arises from an occurrence on November 1, 2012, at 408 East Barker Street in Tuscola, Illinois. Plaintiff had lived in a rental home at 406 East Barker Street since the middle of August 2012. Kinney owned the home next door at 408 East Barker Street. On the date in question, plaintiff stepped into a deep hole located on land adjacent to 408 East Barker Street, causing her to fall and suffer injuries.

¶ 5 In July 2015, plaintiff filed a second amended complaint against defendants. In count I (Tuscola), plaintiff alleged Tuscola owned the parkway located adjacent to 408 East Barker and had a duty to maintain it in a reasonably safe condition and exercise ordinary care to see the property was reasonably safe for lawful users. Plaintiff alleged Tuscola breached that duty by allowing a metal catch basin lid to become "significantly depressed and lower than the turf and ground located in its immediate vicinity, causing a depression to form." Plaintiff alleged Tuscola (1) negligently failed to have any inspection plan to inspect the catch basin; (2) knew or should have known there was an unreasonably dangerous depression; (3) failed to level out the depression; (4) failed to warn of its existence by placing appropriate warning signs in the area of the lid; (5) failed to keep the catch basin free from debris, including lawn clippings, leaves, and trash; and (6) failed to clean the catch basin lid of any debris so it would be visible to pedestrians walking across the right-of-way. Plaintiff alleged that, as a direct and proximate result of Tuscola's negligence, she "stepped in a large depression that was covered with grass, leaves and debris that covered a storm drain or a catch basin cover, causing her to fall and seriously injure herself." Plaintiff claimed she endured medical and hospital expenses, physical and emotional pain and suffering, loss of enjoyment of life, caretaking expenses, and disfigurement.

¶ 6 In count II (Kinney), plaintiff alleged that Kinney had a duty to exercise ordinary care when he undertook mowing and yard maintenance of the right-of-way at 408 East Barker Street. Plaintiff alleged he breached that duty when he (1) negligently failed to notify Tuscola to have the depression leveled out so the catch basin was flush with the surrounding lawn; (2) failed to fill in and warn of the depression; (3) violated Tuscola ordinance by allowing grass he maintained to be in excess of eight inches; (4) caused large clumps of grass to be cut, which

covered the catch basin cover and "camouflaged or covered it with excessive thick coverings of dead and mowed grass, rendering the existence of the cover to be invisible to the naked eye; and (5) failed to warn of the existence of the depression by placing warning signs or covering the hole.

¶ 7 In July 2015, Kinney filed his answer to the second amended complaint. In August 2015, Tuscola filed its answer and affirmative defenses. In its first affirmative defense, Tuscola stated that plaintiff had a duty to exercise ordinary care for her own safety but negligently failed to keep a proper lookout where she was walking, walked in an area not intended for pedestrian use, and failed to observe an open and obvious condition. In its second affirmative defense, Tuscola stated plaintiff's claims are barred by the provisions of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/1-101 *et seq.* (West 2014)).

¶ 8 Multiple discovery depositions were taken in this case. The evidence indicated that the area where plaintiff fell was a grassy strip of land owned by Tuscola and referred to either as a parkway or a right-of-way. Further, she stepped on what has been called a catch basin lid or cover.

¶ 9 Plaintiff testified that she has lived at 406 East Barker Street since August 2012. At approximately 4:30 p.m. on November 1, 2012, plaintiff attempted to catch up with her husband, who was taking a walk. She took a step into some leaves, "heard a crunch of my ankle and hit my palms on the ground." She was not aware of the presence of a catch basin cover at the time she stepped on it, and she stated the cover was not loose when she stepped on it. Plaintiff's ankle began throbbing and it was "very painful." She eventually went to the emergency room because "the pain wouldn't stop and the swelling kept getting bigger." Plaintiff underwent surgery in March 2013 and February 2014. She had not sought medical treatment regarding her ankle since April 2014. She still has problems standing and can no longer play with her children in the yard.

¶ 10 James Hollenbeck testified he was unaware of the storm drain in the parkway in front of Kinney's house before his wife's accident on November 1, 2012. He estimated the top of the storm drain lid sat "probably eight to nine inches" below ground level.

¶ 11 James Hoel, Tuscola's city administrator, testified that the catch basin at 408 East Barker Street is owned and maintained by Tuscola. He stated there are two types of storm drains in Tuscola—those connected to curb inlets on paved streets and those associated with the catch basins on oil-and-chip streets. The road at 408 East Barker Street is an oil-and-chip street, and the "grade of the street and the grade of the adjacent land is such that water flows to these open catch basins." When he examined the catch basin in December 2012, he found it to be "a depression in the ground" in an "obvious drainage area" with a "metal cast iron lid on it." He stated there was no written or verbal policy to inspect and maintain the catch basins in a routine manner. As a matter of practice, homeowners mow the grass around the catch basin.

¶ 12 Dennis Cruzan, Tuscola's city services foreman, testified that the catch basin "catches dirt and holds it to keep it from going in the storm sewer." Prior to November 1, 2012, there was no formal inspection program to inspect the catch basins to ensure the drains were open and clear. The grass surrounding the basin helps act as a filter and "keeps everything from covering the lid, so they usually stay clean most of the time." He has noticed some drain covers sit lower than the grass around them, which creates a depression. He was not aware of any recognized industry standards regarding the proper depth of a catch basin lid relative to the surrounding

turf. Cruzan stated Tuscola has a policy to remove debris from the catch basin covers if they are clogged and not allowing water to drain. He also stated it was not the City's responsibility to maintain the right-of-way or parkway, including mowing the grass or raking leaves, where the catch basin was located.

¶ 13 Jeff Smith, a street department employee, testified that Tuscola has no written policy concerning routine inspections of catch basins. He stated he cleaned leaves off the basin at 408 East Barker Street approximately two months prior to the incident. On December 4, 2012, Smith went to the subject area and observed two inches of leaves and "a little mud" atop the catch basin lid. He also checked for any holes around the lid but found nothing.

¶ 14 Cody Mann, a street department employee, testified that he regularly checks the catch basins on streets with curbs and gutters. However, he does not check catch basins on the oil-and-chip roads "very often."

¶ 15 Craig Hastings, Tuscola's chief of police, testified that the police department is charged with enforcing the city's high-grass ordinance. He stated he was at Kinney's property at 408 East Barker Street on September 24, 2012, and observed tall grass. He could not recall ever seeing the catch basin covered in mud or with leaves.

¶ 16 Leon Kinney testified that he owned the home at 408 East Barker Street, but no one lived there. He stated a neighbor would mow the lawn as needed. Prior to the accident, Kinney stated he last mowed the lawn in the middle of October 2012. He had received a letter from the City in October 2012 instructing him to cut the grass. He never removed any leaves to clear the drain because "it's the city's property, not mine."

¶ 17 George Fidler testified that he offered to mow the grass at 408 East Barker Street in 2010 or 2011. He was aware of the catch basin located in the parkway of Kinney's property.

¶ 18 In August 2015, Tuscola filed a motion for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2014)). Tuscola contended it owed no duty to protect plaintiff from the catch basin setting at a lower grade than the surface from which it was to drain water or from the natural accumulation of grass and leaves on the catch basin cover. Tuscola also asserted that the location and condition of the catch basin and the surrounding area was open and obvious and that plaintiff's own negligence in failing to keep a proper lookout was the sole proximate cause of her fall and resulting injuries.

¶ 19 In October 2015, Kinney filed his motion for summary judgment. Along with filing a response to Tuscola's motion, plaintiff filed an affidavit, whereby she attested that after her fall, she measured the distance between the catch basin lid and the surface area where she walked. She stated "the height differential between the catch basin and the surface area" measured 10.56 inches.

¶ 20 In November 2015, Tuscola filed an objection to plaintiff's affidavit, arguing that the photographs attached by plaintiff lacked a proper foundation. Plaintiff responded with a second affidavit, stating she initially measured the catch basin on December 1, 2012, and then measured it again on October 15, 2015. She stated the height differential between the top of the catch basin and the grass level was 10.56 inches on both occasions.

¶ 21 In November 2015, the trial court held a hearing on the motions. In considering Tuscola's objection to plaintiff's affidavits, the court stated it would not consider the attached photographs, finding the pictures lacked a foundation that they portrayed the catch basin as it existed on the day of the incident. The court did, however, state it would consider plaintiff's

affidavit statement that the catch basin lid was 10.56 inches deep relative to the top of the grass level.

¶ 22 In December 2015, the trial court issued its written order on Tuscola's motion for summary judgment. The court found the area of land surrounding the catch basin was public property, the parkway was intended for plaintiff's use, and she used it in a manner that was reasonably foreseeable. Viewing the evidence in the light most favorable to plaintiff, the court found, in part, as follows:

> "There is no evidence upon which the Court may find that a genuine issue exists as to whether the catch basin was too deep or steep so as to be unreasonably dangerous or not customary. The fact that the accumulation of leaves and mud in the depression 'could cause a hazardous condition' does not make it unreasonably dangerous. That same fact would also be true of all other catch basins in the city. By all accounts, this particular catch basin continued to do what it was designed to do. The lid was secure and in place. The depth of the catch basin together with the accumulation of leaves upon it does not pose a hazard in the nature of a pitfall, trap, snare, or the like. These qualities may have made the catch basin slightly dangerous, but that does not give rise to a duty of reasonable care unless those qualities remove this particular catch basin from the universe of customary parkway conditions. Here, they do not."

The court granted summary judgment in favor of Tuscola.

¶ 23 In January 2016, the trial court issued its written order on Kinney's motion for summary judgment. The court found, in part, as follows:

> "There is no evidence that Kinney assumed any portion of the parkway for his own purposes as a means of ingress or egress. There is no evidence that Kinney prevented the general public from using the parkway in any way. There is no evidence that Kinney obstructed the parkway, parked on the parkway, or conducted business thereon. Indeed, Kinney had not even put a driveway on his property. Kinney did not appropriate the parkway merely by mowing it or having another individual mow it on his behalf."

The court, in considering the evidence in the light most favorable to plaintiff, found "no evidence to support a finding that there were large clumps of grass atop of—or obstructing the view of—the catch basin." The court also found Tuscola's grass ordinance did not impose a duty on Kinney. Thus, the court granted summary judgment in his favor.

¶ 24 Plaintiff filed a motion to reconsider the grant of summary judgment in favor of Tuscola, arguing that the trial court made improper credibility determinations regarding the measurements supported by affidavit and deposition testimony and also improperly afforded greater weight to Cruzan's testimony. In March 2016, the court heard arguments on the motion. While the court admitted using "inartful language," it stated it did not make any findings that one witness was "less credible" than another and "was most certainly guided in its inquiry by the rule that the evidence should be viewed in the light most favorable to the Plaintiff." The court denied plaintiff's motion. This appeal followed.

¶ 25 II. ANALYSIS

¶ 26 A. Plaintiff's Affidavits

¶ 27 Plaintiff argues the trial court should have admitted her affidavits in their entirety. Illinois Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2016) provides that an appellant's brief shall contain "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." "Bare contentions in the absence of argument or citation of authority do not merit consideration on appeal and are deemed waived." *Obert v. Saville*, 253 Ill. App. 3d 677, 682, 624 N.E.2d 928, 931 (1993); see also *People ex rel. Illinois Department of Labor v. E.R.H. Enterprises, Inc.*, 2013 IL 115106, ¶ 56, 4 N.E.3d 1 (stating the "[f]ailure to comply with the rule's requirements results in forfeiture").

¶ 28 In the case *sub judice*, other than citing Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013), plaintiff cites no authority in support of her argument. Moreover, her undeveloped argument offers little more than a conclusory statement that she met the standards for the admission of the affidavits. However, "a reviewing court is not simply a depository into which a party may dump the burden of argument and research." *E.R.H. Enterprises*, 2013 IL 115106, ¶ 56, 4 N.E.3d 1. We find this issue forfeited.

¶ 29 B. Standard of Review on Summary Judgment

¶ 30 "Summary judgment is appropriate where 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Ioerger v. Halverson Construction Co.*, 232 Ill. 2d 196, 201, 902 N.E.2d 645, 648 (2008) (quoting 735 ILCS 5/2-1005(c) (West 2000)). "Summary judgment is a drastic remedy and should be allowed only when the right of the moving party is clear and free from doubt." *Jones v. Chicago HMO Ltd. of Illinois*, 191 Ill. 2d 278, 291, 730 N.E.2d 1119, 1127 (2000). "Accordingly, where reasonable persons could draw divergent inferences from the undisputed material facts or where there is a dispute as to a material fact, summary judgment should be denied and the issue decided by the trier of fact." *Jackson v. TLC Associates, Inc.*, 185 Ill. 2d 418, 424, 706 N.E.2d 460, 463 (1998). "On appeal from a trial court's decision granting a motion for summary judgment, our review is *de novo*." *Bowles v. Owens-Illinois, Inc.*, 2013 IL App (4th) 121072, ¶ 19, 996 N.E.2d 1267.

¶ 31 C. Negligence and Summary Judgment

¶ 32 "To state a cause of action for negligence, a plaintiff must establish that the defendant owed a duty to the plaintiff, that the defendant breached that duty, and that the plaintiff incurred injuries proximately caused by the breach." *Chandler v. Illinois Central R.R. Co.*, 207 Ill. 2d 331, 340, 798 N.E.2d 724, 728 (2003). "A legal duty refers to a relationship between the defendant and the plaintiff such that the law imposes on the defendant an obligation of reasonable conduct for the benefit of the plaintiff." *Choate v. Indiana Harbor Belt R.R. Co.*, 2012 IL 112948, ¶ 22, 980 N.E.2d 58. In the absence of a duty on the part of a defendant, the plaintiff cannot recover. *Choate*, 2012 IL 112948, ¶ 22, 980 N.E.2d 58. Whether the defendant owes a duty to the plaintiff is a question of law for the court to decide. *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 114, 649 N.E.2d 1323, 1326 (1995). However, "[t]he issues of breach and proximate cause are factual matters for a jury to decide, provided there is a

genuine issue of material fact regarding those issues." *Espinoza*, 165 Ill. 2d at 114, 649 N.E.2d at 1326.

¶ 33 1. *Credibility Findings*

¶ 34 Plaintiff argues that the trial court erred in granting Tuscola's motion for summary judgment, claiming it improperly weighed testimony and made improper determinations of witness credibility. She argues that the "court clearly overstepped its bounds by analyzing the testimony of the Plaintiff and improperly weighing Plaintiff's testimony against the testimony of the other witnesses." Plaintiff correctly points out that a trial court does not make credibility determinations or weigh evidence when ruling on a motion for summary judgment. *Coole v. Central Area Recycling*, 384 Ill. App. 3d 390, 396, 893 N.E.2d 303, 309 (2008). However, as stated, our review on the grant of a motion for summary judgment is *de novo*, and "thus we are examining the depositions and pleadings anew to determine whether a material question of fact exists." *Coole*, 384 Ill. App. 3d at 396, 893 N.E.2d at 309. As no deference is given to the trial court's ruling, and as we are analyzing the court's rulings on summary judgment anew, we need not address the merits of this particular issue. See *Coole*, 384 Ill. App. 3d at 396, 893 N.E.2d at 309.

¶ 35 2. *Tuscola*

¶ 36 Plaintiff claims that the trial court erred in granting summary judgment in favor of Tuscola, arguing the City owed her a duty to maintain its property against unreasonably dangerous conditions. We disagree.

¶ 37 The Tort Immunity Act protects "local public entities and public employees from liability arising from the operation of government." 745 ILCS 10/1-101.1 (West 2014). In regard to the care and maintenance of government property, section 3-102(a) of the Tort Immunity Act (745 ILCS 10/3-102(a) (West 2014)) states, in part, as follows:

> "Except as otherwise provided in this Article, a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used, and shall 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."

¶ 38 Our supreme court has found a municipality has a duty to exercise ordinary care in maintaining parkways in a reasonably safe condition. *Marshall v. City of Centralia*, 143 Ill. 2d 1, 9, 570 N.E.2d 315, 319 (1991).

> "However, the duty of care with regard to parkways is not identical to the duty of care with regard to sidewalks. Pedestrians who leave the sidewalk cannot assume that parkways are free of defects or undulations as they otherwise could when traveling on the sidewalk. Sidewalks are generally made of cement, while parkways are composed of sod and earth and are therefore more susceptible to weather damage caused by rain and snow. [Citation.] Municipalities cannot be held liable for parkway conditions which are customary, even though such conditions may be slightly dangerous.

> [Citation.] 'However a city has no right to maintain anything in the nature of a pitfall, trap, snare or other like obstruction whereby the traveler, in yielding to the impulse of the average person to cut across a corner in a hurry, may be injured ***.' [Citation.]" *Marshall*, 143 Ill. 2d at 10-11, 570 N.E.2d at 319-20.

See also *Barnhisel v. Village of Oak Park*, 311 Ill. App. 3d 108, 115, 724 N.E.2d 194, 199 (1999) (noting "a municipality's duty of care with respect to parkways is not as stringent as its duty of care with respect to sidewalks"). Thus, "[i]f the area is a parkway, the municipality's duty is limited to maintaining the area free of pitfalls, traps, snares and the like." *Mazin v. Chicago White Sox, Ltd.*, 358 Ill. App. 3d 856, 861, 832 N.E.2d 827, 832 (2005).

¶ 39 In this case, no one disputes the area of land in question is City property and constitutes a parkway. Moreover, no one disputes plaintiff was an intended user of the parkway. In her second amended complaint, plaintiff alleged Tuscola breached its duty by allowing the catch basin lid "to become significantly depressed and lower than the turf and ground located in its immediate vicinity, causing a depression to form." Plaintiff alleged Tuscola negligently failed to grade the area so the catch basin lid sat flush with the surrounding turf so as not to create a dangerous hole or depression.

¶ 40 The deposition testimony indicated a catch basin, such as the one at issue in this case, is a customary condition. In contrast to curb inlets on paved streets, catch basins are utilized on oil-and-chip streets. Hoel noted the "grade of the street and the grade of the adjacent land is such that water flows to these open catch basins." As Cruzan stated, the basins have to be located below grade to allow the water to drain. Thus, the position of the catch basin is an inherent characteristic necessary for proper performance.

¶ 41 The question becomes whether the position of the catch basin and its cover constituted a pitfall. In *Marshall*, 143 Ill. 2d at 10-11, 570 N.E.2d at 319-20, the supreme court found an open manhole could constitute a pitfall. Here, however, no evidence indicated the lid was missing, broken, or loose. No testimony indicated the hole was too deep or sat at a depth that was unreasonably dangerous. No experts testified to any industry standards regarding the baseline or accepted depth for catch basin lids. No evidence indicated this particular catch basin was deeper than any others in Tuscola.

¶ 42 Plaintiff argues "a depth whereby a passerby stepping onto it, would fracture their ankle, would constitute an impermissible depth." However, such conclusory arguments fail to establish a duty of care on Tuscola's part. To hold otherwise would allow a plaintiff to impose a duty on every fall at any depth so long as an injury occurred.

¶ 43 We also note the presence of leaves or grass in and around the catch basin lid does not make it an unreasonably dangerous condition. The supreme court noted "parkways are composed of sod and earth and are therefore more susceptible to weather damage caused by rain and snow. [Citation.]" *Marshall*, 143 Ill. 2d at 10-11, 570 N.E.2d at 319. The parkway in question here was also susceptible to the accumulation of fallen leaves, a common occurrence during autumn in Illinois.

¶ 44 The evidence indicated that the catch basin in the subject parkway was a customary condition. Although such a condition may be slightly dangerous, it did not amount to a pitfall and did not give rise to a duty of care on the part of Tuscola. Accordingly, we find the trial court did not err in granting summary judgment in favor of Tuscola.

¶ 45 3. *Kinney*

¶ 46 Plaintiff claims the trial court erred in granting summary judgment in favor of Kinney, arguing he breached his duty to exercise ordinary care when he undertook mowing and yard maintenance on city property and, in doing so, rendered the existence of the catch basin cover to be invisible to the naked eye. We disagree.

> "As a general rule, a private landowner owes a duty of care to provide a reasonably safe means of ingress and egress from his property but owes no duty to ensure the safe condition of a public roadway abutting that property. [Citation.] An exception to this rule exists where an abutting landowner has assumed control of the public roadway for his own purposes. [Citation.] 'However, an assumption of control for purposes of determining a duty of care must consist of affirmative conduct which prevents the public from using the property in an ordinary manner such as blocking the land, parking on it, or using it to display goods.' [Citation.]" *Caracci v. Patel*, 2015 IL App (1st) 133897, ¶ 23, 31 N.E.3d 460.

Courts have found acts of maintenance are insufficient to show appropriation of property. See *Caracci*, 2015 IL App (1st) 133897, ¶ 26, 31 N.E.3d 460 (agreeing with other cases which found "acts of maintenance are insufficient to show appropriation"); *Gilmore v. Powers*, 403 Ill. App. 3d 930, 935, 934 N.E.2d 564, 569 (2010) (finding no appropriation where the defendants cut the grass and raked leaves off the parkway); *Evans v. Koshgarian*, 234 Ill. App. 3d 922, 926, 602 N.E.2d 27, 30 (1992) (finding no appropriation where the defendants mowed the parkway grass); *Burke v. Grillo*, 227 Ill. App. 3d 9, 15, 590 N.E.2d 964, 968 (1992) (finding no appropriation where the defendants simply mowed the grass and shoveled the snow).

¶ 47 In this case, no evidence indicated Kinney assumed any portion of the parkway for his own purposes as a means of ingress or egress. Further, nothing indicated Kinney prevented the general public from using the parkway in any fashion. No evidence indicated Kinney obstructed the parkway, parked on it, or conducted business thereon. Although Kinney mowed the parkway and allowed Fidler to mow it on his behalf, these acts of maintenance fail to establish a duty on Kinney's part.

¶ 48 In her reply brief, plaintiff relies on this court's decision in *Smith v. Rengel*, 97 Ill. App. 3d 204, 422 N.E.2d 1146 (1981), where summary judgment was found to be improper. We find that case distinguishable. The question in *Smith* centered on "whether a landlord owes any duty of care to an invitee or social guest of his tenant who is injured in an area adjacent to, but not upon, the landlord's premises." *Smith*, 97 Ill. App. 3d at 205, 422 N.E.2d at 1147. Here, however, plaintiff was not a tenant or an invitee of Kinney and was not using the parkway as a means of ingress to or egress from Kinney's property.

¶ 49 Plaintiff agrees Kinney had no duty to mow the parkway. However, she contends that once he decided to do so, he had a duty to exercise ordinary care respecting her safety and well-being. In her second amended complaint, plaintiff also alleged Kinney breached his duty to exercise ordinary care when he "negligently caused large clumps of grass to be cut which covered the catch basin cover and camouflaged or covered it with excessive thick coverings of dead and mowed grass, which rendered the existence of the catch basin cover to be invisible to the naked eye."

¶ 50 Here, a review of plaintiff's deposition testimony fails to show the presence of "large clumps of grass" on the catch basin cover. Plaintiff testified she stepped on leaves and what she

"assumed was grass because the grass was high." The photographic evidence confirmed the presence of leaves, but nothing indicates the catch basin lid was covered with dead and mowed grass. On appeal, plaintiff attempts to rely on her affidavits, wherein she stated she observed "cut grass layers covering the actual catch basin to where it was not visible." However, the trial court struck this assertion for lack of foundation, and we have found plaintiff forfeited her arguments regarding the affidavits. Even if we were to consider her affidavits, we note a party's testimony at a discovery deposition may amount to a judicial admission, and "the party making the admission is bound by that admission and cannot contradict it." *Eidson v. Audrey's CTL, Inc.*, 251 Ill. App. 3d 193, 195-96, 621 N.E.2d 921, 923 (1993); see also *Hansen v. Ruby Construction Co.*, 155 Ill. App. 3d 475, 480, 508 N.E.2d 301, 303-04 (1987) (stating "a party cannot create a factual dispute by contradicting a previously made judicial admission"). The evidence fails to show the existence of "large clumps of grass" on the catch basin cover, and plaintiff's attempt to create a genuine issue of material fact is nothing more than speculation. See *Valfer v. Evanston Northwestern Healthcare*, 2016 IL 119220, ¶ 20, 52 N.E.3d 319 (stating "unsupported conclusions, opinions, or speculation are insufficient to raise a genuine issue of material fact"). Thus, we find the trial court did not err in granting summary judgment in favor of Kinney.

¶ 51 III. CONCLUSION

¶ 52 For the reasons stated, we affirm the trial court's judgment granting summary judgment in favor of Tuscola and Kinney.

¶ 53 Affirmed.