2014 IL App (1st) 13-0677-U

FOURTH DIVISION
May 29, 2014

No. 1-13-0677

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

EILEEN PARKER, Plaintiff-Appellant, v. CBM DESIGN, INC., Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County, Illinois, County Department, Law Division. No. 10 L 13402 The Honorable Eileen Mary Brewer, Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Howse and Justice Epstein concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court erred in granting summary judgment in favor of the defendant, where the record revealed that there remained genuine issues of material fact as to whether the defendant caused the unreasonably dangerous condition of the floor that proximately caused the plaintiff to slip and injure herself.

¶ 2 This cause arises from a negligence action filed by the plaintiff, Eileen Parker, a bake shop

employee at Jewel Food Stores, Inc. (hereinafter the Jewel store), who sustained injuries when she entered the store's walk-in freezer while on the job, slipped and fell. The plaintiff filed her complaint against the defendant, CBM Design, Inc. (hereinafter CBM Design), the company that Jewel hired to install the floor surface in its walk-in-freezer, a few weeks before the plaintiff's slip and fall. The circuit court granted the defendant's motion for summary judgment (735 ILCS 5/2-1009 (West 2010)). The plaintiff now appeals, contending that summary judgment was improper where there remained genuine issues of material fact as to whether: (1) the conduct of the defendant caused the floor to be in an unreasonably dangerous condition; and (2) the plaintiff's fall was proximately caused by the condition of the floor. For the reasons that follow, we reverse and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 The facts and procedural history of this cause reveal the following. The plaintiff filed her complaint against the defendant on November 23, 2010, alleging that she sustained injuries when on or about December 26, 2008, she slipped on the floor of the bake shop freezer while working as a bakery employee at the Jewel store located at 8801 South Ridgeland, Oak Lawn, Illinois. In her complaint, the plaintiff alleged that shortly before her slip and fall on December 26, 2008, the defendant negligently repaired and resurfaced the floor of the bake shop freezer where she fell. According to the plaintiff, the defendant was negligent in its installation because it failed to apply a coating that had anti-slip protection adequate for use on freezer floors. The plaintiff further alleged that the defendant's negligence proximately caused her to fall, thereby sustaining a serious and permanent back injury, requiring back surgery.

¶ 5 On December 27, 2010, the defendant filed its answer and affirmative defenses. It admitted

that it had resurfaced the subject floor, but denied having done so negligently. In addition, the defendant alleged that the plaintiff was contributorily negligent in walking in an area which she knew, or, in the very least, should have known "presented some danger" of slipping and falling.

¶ 6 The parties next proceeded to discovery, and several individuals were deposed, including, *inter alia*, relevant for this appeal: (1) the plaintiff; (2) Brian R. Maxwell, the owner of the defendant corporation; (3) John E. Adams, a foremen and employee of the defendant; and (4) Brian A. Johnson, a floor installer and employee of the defendant.

¶ 7 A. The Plaintiff

¶ 8 During her discovery deposition, the plaintiff, testified that on the date of the incident, she was working as a bakery employee at the Jewel store in the early morning hours of December 26, 2008, "pulling" stale bake products from the bake shop shelves. The plaintiff was wearing her uniform and Safetrax brand safety shoes, as prescribed by Jewel. After discarding the stale baked products, the plaintiff proceeded to the walk-in freezer to get fresh bake products to restock the bake shop floor with. She opened the freezer door, and immediately upon entering, for the first time that morning, she slipped and fell.

¶ 9 The plaintiff testified that she had never slipped or fallen on the freezer floor before, and that she was unaware of anyone else having slipped on the floor prior to her accident. The plaintiff averred that she had never even partially lost her balance in the freezer. She stated that she did not think that freezer floors are typically slippery, and testified that the subject freezer floor was not slippery on the date of the occurrence. When asked what caused her to fall on the date of the incident, the plaintiff blamed the floor, stating: "Well, I don’t know. I walked in and I slipped on the floor. *** It had to be the floor. I don't know. There was nothing. I don't know." The plaintiff explained that after her fall she looked at the floor and observed nothing on it, such as

debris, liquid, oil, grease, garbage or moisture that could have caused her to fall. The plaintiff also stated that after she fell she checked her clothing and shoes and found nothing about them that would have caused her fall.

¶ 10 The plaintiff averred that she was aware that the freezer floor had been resurfaced within a year before her fall, but that no one at Jewel told her or warned her that the floor resurfacing created a dangerous condition. The plaintiff testified that the original floor looked like cement and appeared to be of a rougher surface. The new and resurfaced floor was colored, but did not feel different to walk on. The plaintiff testified, however, that after the accident she felt the resurfaced freezer floor with her hand and noticed that it was "smoother" than the original floor and that it felt "slick." When asked whether "there was any doubt in [her] mind that anything other than the surface of the floor caused her to slip" the plaintiff responded with "No."

¶ 11 The plaintiff also testified that after she fell she got up and left the freezer. The plaintiff told a coworker about what happened and the coworker summoned the store manager. When the store manager arrived he called a nurse and then sent the plaintiff to urgent care for treatment. The plaintiff was diagnosed with a lumbar strain and herniated disc and had to undergo surgery.

¶ 12 The plaintiff also testified that she is aware of two other persons slipping and falling on the bakery freezer floor after her fall: (1) Arlene, another bake shop employee, and (2) an electrician who came to install new lights in the freezer.

¶ 13 B. Brian R. Maxwell

¶ 14 In his deposition, Brian R. Maxwell testified that he is the owner of the defendant corporation, CBM Designs. He started CBM Design in the early 1980s with his brother and sister with the intention of providing interior design services mainly to commercial clients. At

present, the company's niche is flooring and wall installation and repairs. Maxwell's main clients include Jewel and Ace Hardware Stores.

¶ 15 Maxwell admitted that he resurfaced the Jewel bakery store freezer in December 2008, a few weeks before the plaintiff's fall. Maxwell acknowledged that this 7 foot by 30 foot freezer floor was resurfaced with epoxy. He stated that in choosing which brand of epoxy to use when resurfacing floors, he generally discusses the application with a representative of his distributor and receives an appropriate recommendation. With respect to resurfacing the subject Jewel bakery freezer floor, Maxwell personally selected Sikagard 62 upon his distributor's recommendation.

¶ 16 Maxwell identified photographs of the freezer floor and explained that the dots on the surface of the floor were grains of sand used in resurfacing the floor with epoxy. When asked whether a resurfaced floor should have been slippery, Maxwell replied in the negative and stated that it should have "more grit." Referring to the grains on the surface of the floor in the photograph, Maxwell further explained: "[It] would be like walking on a piece of coarse sand paper." Maxwell denied receiving any complaints from Jewel about the floor being slippery or requesting any repairs after the resurfacing. In fact, Maxwell was completely unaware of the allegation that the floor was slippery until he was served with the complaint in the present case.

¶ 17 C. John E. Adams

¶ 18 In his deposition, John E. Adams (hereinafter Adams) testified that since 2005 he has been a foreman and a tile setter for the defendant corporation, CBM Design. He admitted that he was in charge of installing the epoxy floor in the subject Jewel store, and stated that he and Brian Johnson (hereinafter Johnson), another CBM Design employee were the only ones responsible

for installing that floor. Prior to completing this project in December 2008, Adams had done at least 40 similar freezer floor installations.

¶ 19 Adams testified that the subject floor was made out of concrete, which is considered porous and that it was his job to resurface it with epoxy. He stated that at the time of the installation the temperature of the floor was about 50 degrees Fahrenheit because the freezer had been turned off by Jewel at CBM Design's instruction. Adams explained that the temperature of the freezer needed to be at least 40 degrees Fahrenheit because otherwise the epoxy cannot settle, and that generally he prefers that the freezer be turned off by the customer at least one day before the installation. Adams did not know exactly when Jewel turned off the freezer, but testified that he checked the thermostat when he entered the freezer to make sure it was warm enough to proceed with the installation.

¶ 20 Adams next explained that when mixing epoxy he always uses two materials: (1) the epoxy and (2) a hardener. He usually brings the materials unopened from CBM Design's storage facility and then obtains buckets from the customer, in which he mixes each of the materials. Adams labels the buckets (Bucket A and Bucket B) and marks them by inches from top to bottom by using a measuring tape. Adams then uses those marks to "eyeball" the amount of each material that needs to be combined to create the floor coating. Adams testified that this is how he prepped the epoxy coating for the December 2008 Jewel job.

¶ 21 According to Adams, the Jewel project took two days. Adams stated that when he and Johnson first arrived at the site, he noticed that the concrete floor in the bakery freezer had not been well maintained and appeared to be greasy. Adams and Johnson therefore spent the first day "scarifying" the floor, washing and drying it in order to prepare it for the epoxy coat.

¶ 22 On the following morning, they brought their materials, mixed the epoxy components and

began coating the floor. When asked about the amounts of materials used, Adams could not recall and had to refer to deposition Exhibit 1, CBM Design's invoice to Jewel for the resurfacing of the bakery freezer floor. That invoice reveals that CBM Design charged Jewel for "½ Part A Epoxy (Tan) and ½ Part B Hardener." Adams testified that the ½ stands for how much of one 4-gallon unit of each material he used. He therefore stated that he "believes he used about 6 gallons of each."

¶ 23 Adams explained that after mixing the materials, he and Johnson first placed a very thin layer of epoxy onto the floor. They then added an additional 50-millimeter coat over the first one, using a rubber trowel. After the second coat of epoxy was in place, using their hands and standing outside of the freezer, Adams and Johnson "broadcast" some non-slip silica sand over the epoxy. When questioned about the amount of sand used, Adams again had to refer to deposition Exhibit 1, CBM Design's invoice to Jewel. He acknowledged that according to that invoice, CBM Design charged Jewel for "¼ non-slip sand." He explained that the ¼ referred to a quarter of the amount of sand he had in stock in his van for this job. Adams admitted that the amount of sand in the van was about 800 pounds.

¶ 24 In his deposition, Adams also testified that to complete their project, he and Johnson permitted the floor to dry for about two hours before removing any excess sand using a broom.

¶ 25 D. Brian Johnson

¶ 26 In his deposition, Brian Johnson, testified consistent with Adams deposition. In addition, Johnson explained that he has worked as a floor installer for CBM Design since August 2008. Johnson acknowledged that before resurfacing the Jewel bakery freezer floor in December 2008, he had never resurfaced a floor with epoxy before. Nevertheless, Johnson explained that when he began working at CBM Design he received training on how to mix and resurface floors with

epoxy. He received the training from Thermal-Chem, the company from which CBM Design purchased the epoxy. According to Johnson, at this training session, he was advised that the epoxy floors have to be "spotless and flat, dry or damp, instead of wet, and dust free." As to mixing the epoxy material, Johnson was instructed to mix equal parts of the epoxy and the hardener. When asked to explain the process of epoxy resurfacing, Johnson testified in detail:

> "[F]irst you have to clean the floor and get it nice, and then *** you have to grind it down, get all of the dust up. You have to mop it, make sure you have all the dust and make sure it's not wet. Damp. Then mix the epoxy, the two parts together.
>
> You take the roller and you spread a thin primer roller over the floor, and then you take the big, the heavy-duty trowel, the notched trowel, and then you spread it ***, get it nice thick even throughout, and then you take the sand, and you broadcast it a pound per square foot.
>
> And then you wait for that to set up nicely. And once it's nice and set up, you sweep all of the excess sand off.
>
> And then once *** you got all of the sand off, you take another application of the epoxy with the roller, thin, just so that it coats the sand and so that the sand doesn't come up.
>
> And then that's the application."

¶ 27 With respect to the Jewel freezer job, Johnson explained that of the two days they spent on the project, the first was spent scarifying the cleaning the floor and the second, among other things, installing the epoxy application. Johnson could not remember whether he or Adams mixed the epoxy coating. He testified that the only "warning" he and Adams gave Jewel upon completion was caution tape, instructing the employees not to walk on the epoxy until it was completely dry and cured.

¶ 28 After the close of discovery, on August 1, 2011, the defendant sought and was granted leave to file a third party complaint for contribution against the plaintiff's employer, Jewel. In its complaint against Jewel, the defendant alleged that Jewel failed to properly train the plaintiff and warn her of the condition of the freezer. Jewel filed its answer on September 9, 2011, denying all of the allegations of wrongdoing directed against it. On August, 31, 2012, Jewel also filed a motion for summary judgment.

¶ 29 On October 24, 2012, the defendant filed its motion for summary judgment against the plaintiff, asserting that the plaintiff had failed to establish that the defendant caused the unreasonably dangerous condition on the floor (*i.e.*, that the floor was more slippery after it had resurfaced that floor than it had been before). According to the defendant, the plaintiff herself admitted that she did not know what caused her to slip and fall. In support of its motion for summary judgment, the defendant attached a copy of the plaintiff's complaint and a transcript of her deposition.

¶ 30 The plaintiff filed her response on December 14, 2012, arguing that summary judgment was improper because there was evidence in the record that the condition of the floor (which was caused by improper installation) was the cause of the plaintiff's slip and fall. In support, the plaintiff attached several documents, including: (1) her own deposition; (2) the deposition of the defendant's owner, Maxwell; (3) depositions of Adams and Johnson, the defendant's two employees responsible for resurfacing the Jewel freezer floor; and (4) an affidavit by Scott Leopold, the plaintiff's retained expert in structural engineering, who opined that the condition of the freezer floor at the time of the incident was unreasonably dangerous because it was not sufficiently slip-resistant and constituted a fall hazard.

¶ 31 In his affidavit, structural engineer, Scott Leopold, explained that CBM Design improperly

installed the epoxy overlay on the freezer floor by failing to apply a sufficient amount of sand to the epoxy binder coat. According to Leopold, the walk-in freezer did not have sufficient slip resistance due to an insufficient amount of abrasive particles (sand) in the binder coat of the epoxy. Leopold opined that "[t]he floor surface was smooth with widely spaced grains of sand, and therefore did not contain enough voids to provide for safe traction in the presence of moisture."

¶ 32 Leopold further opined that the epoxy manufacturer's specifications for the epoxy required: (1) that sand be applied at a rate of about 2 pounds per square foot; and (2) that the rate of coverage should be a continuous layer of sand (and a rough surface) at all points on the freezer floor. According to Leopold, contrary to the manufacturer's specifications, CBM Design provided widely scattered grains (instead of a continuous layer). Leopold further opined that contrary to the epoxy manufacturer's specification, that the sand be dropped vertically into the epoxy binder, to maximizing the amount of sand penetrating the binder coat, CBM Design dropped the sand horizontally, from the entrance to the freezer.

¶ 33 Leopold explained in his affidavit that in coming to the aforementioned conclusions, he performed an inspection of the freezer floor and reviewed several documents including: (1) the parties' pleadings in this cause of action; (2) the depositions of the plaintiff, Adams, Johnson and Maxwell; and (3); photographs of the slip and fall scene.

¶ 34 After hearing arguments by the parties, on February 27, 2013, the circuit court entered an order granting the defendant's motion for summary judgment. In addition, as part of its order, the court dismissed the third-party complaint against Jewel, finding it moot apropos the grant of summary judgment in favor of the defendant. The plaintiff now appeals.

¶ 35 II. ANALYSIS

¶ 36 On appeal, the plaintiff contends that the circuit court erred when it granted summary judgment in favor of the defendant because there remained issues of genuine material fact as to whether: (1) the defendant breached its duty toward the plaintiff; and (2) the defendant's actions proximately caused the plaintiff's injury. For the reasons that follow, we agree.

¶ 37 While use of summary judgment is to be encouraged as an aid in the expeditious disposition of a lawsuit, it is a " ' a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt. ' " *Carlson v. Chicago Transit Authority*, 2014 IL App (1st) 122463, ¶ 22 (citing *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005 (West 2010); see also, *Carlson*, 2014 IL App (1st) 122463, ¶ 21; *Fidelity National Title Insurance Company of New York v. West Haven Properties Partnership*, 386 Ill. App. 3d 201, 212 (2007) (citing *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004)); *Virginia Surety Co. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550, 556 (2007). In determining whether the moving party is entitled to summary judgment, the court must construe the pleadings and evidentiary material in the record in the light most favorable to the nonmoving party and strictly against the moving party. *Happel v. Wal-Mart Stores, Inc.*, 199 Ill. 2d 179, 186 (2002); see also *Pearson v. DaimlerChrysler Corp.*, 349 Ill.App.3d 688, 697 (2004).

¶ 38 The moving party "bears the initial burden of proof" and satisfies it either by: (1) affirmatively showing that some element of the case must be resolved in his or her favor; or (2) by establishing " 'that there is an absence of evidence to support the nonmoving party's case.' " *Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 624 (2007) (quoting *Celotex Corp. v. Catrett*, 477 U.S.

317, 325 (1986)). The burden then shifts to the nonmoving party to present a *bona fide* factual issue and not merely general conclusions of law. *Caponi v. Larry's 66*, 236 Ill. App. 3d 660, 670 (1992). A genuine issue of material fact exists where the facts are in dispute or where reasonable minds could draw different inferences from the undisputed facts. *Morrissey v. Arlington Park Racecourse, LLC*, 404 Ill. App. 3d 711, 724 (2010); see also *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 114 (1995); see also *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill.App.3d 313, 328 (1999) ("Mere speculation, conjecture, or guess is insufficient to withstand summary judgment."). We review a trial court's entry of summary judgment *de novo*. *Ragan v. Columbia Mutual Insurance Co.*, 183 Ill. 2d 342, 349 (1998).

¶ 39 In order to prevail on a claim of negligence, the plaintiff must prove: (1) that the defendant owed her a duty of care; (2) that the defendant breached that duty of care; and (3) that the breach of that duty proximately caused the plaintiff's injury. *Bajwa v. Metropolitan Life Insurance Co.*, 208 Ill. 2d 414, 421 (2004); *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 225 (2010). "Whether a duty is owed presents a question of law for the court to decide, while breach of duty and proximate cause present questions of fact for the jury to decide." *Thompson v. Gordon*, 241 Ill. 2d 428, 438-39 (2011) (citing *Iseberg v. Gross*, 227 Ill. 2d 78, 86-87 (2007)); see also *Hooper v. County of Cook*, 366 Ill.App.3d 1, 6 (2006) (breach of duty and causation are questions of fact); *Pantlen v. Gottschalk*, 21 Ill. App. 2d 163, 172 (1959) (contributory negligence is a question of fact).

¶ 40 In the present case, the parties agree that the defendant owed the plaintiff a duty of care. The plaintiff concedes that because the defendant does not own or manage the Jewel store where the plaintiff fell, the defendant owed only a general duty of care to her, namely the duty "not to

create [a]n unreasonably dangerous condition." *Kotarba v. Jamrozik*, 283 Ill. App. 3d 595, 598 (1996).

¶ 41 The parties disagree, however, as to whether the defendant breached its duty when it resurfaced the bakery freezer floor, thereby creating an unreasonably dangerous condition, and whether, in turn, this breach of duty proximately resulted in the plaintiff's fall and injury. We will address each of these contentions in turn.

¶ 42 We begin with breach of duty. The plaintiff asserts that there remains a genuine issue of material fact as to whether the defendant breached its duty not to create an unreasonably dangerous condition when it resurfaced the bakery floor. In support of its position, the plaintiff relies on her own testimony regarding the defendant's recent repair and resurfacing of the freezer floor, and on her experts' s affidavit that the floor created an "unreasonably dangerous" condition because it was not properly installed and not "sufficiently slip-resistant" to provide for "safe traction in the presence of moisture." The defendant, on the other hand, asserts that the plaintiff cannot rely on her expert's testimony to create an issue of fact as to breach of duty, since that affidavit is directly contradicted by the plaintiff's own deposition testimony that there was no moisture in the freezer at the time of the accident. For the reasons that follow, we disagree with the defendant.

¶ 43 The record uncontrovertibly establishes that the defendant resurfaced the freezer floor on December 3, and December 4, 2008, about two weeks prior to the plaintiff's fall. The plaintiff testified that she had never fallen on the freezer floor prior to its resurfacing, and that she was not aware of anyone else falling on that floor prior to the resurfacing. The plaintiff testified, however, that she was aware of two other individuals slipping on the floor subsequent to her own slip and fall. The plaintiff also testified that on the day of her fall, there was nothing on the

freezer floor, aside from the floor itself, that could have caused her to slip. She was certain that there was no debris, liquid, oil, grease, or garbage on the floor. She also stated that there was nothing on her clothes that could have caused her to slip and that she was neither inattentive nor carrying a load that might have caused her to take a misstep. In addition, the plaintiff averred that she was wearing safety non-slip shoes.

¶ 44 As to the installation of the freezer floor, the record is clear that the defendant's two employees, Adams and Johnson applied a new epoxy surface to that floor. Both Adams and Johnson admitted that in resurfacing a floor with epoxy, they use non-slip sand. Although neither directly testified as to the amount of epoxy used on the project, Adams stated that he and Johnson used only ¼ of the 800 pounds of sand on their truck for the freezer floor. Adams also explained that they used their hands to broadcast the sand while standing outside of the freezer. In addition, Johnson testified that they generally broadcast the sand into the epoxy at "a pound per square foot."

¶ 45 The record further reveals that the plaintiff's expert structural engineer, Scott Leopold, averred that the defendant's employees improperly installed the epoxy overlay by failing to appropriately apply a sufficient amount of sand to the epoxy binder coat. The expert explained that according to the epoxy manufacturer's specifications, the sand had to be applied at a rate of about 2 pounds per square foot, with the sand dropped vertically into the epoxy binder to maximize the amount of grains penetrating the coat. The plaintiff's expert opined that contrary to the manufacturer's specifications the defendant's employees dropped the sand horizontally from the entrance to the freezer, and scattered the grains, instead of continuously layering them onto the epoxy. As a result, the expert concluded:

"a. The condition of the freezer floor at the time of the occurrence was unreasonably dangerous, because it was not sufficiently slip-resistant constituted a fall hazard. By improperly installing the epoxy overlay on the freezer floor, which CBM intended and expected for use by bake shop employees, *** CBM increased the likelihood of injury to [the] bake shop employees, including [the plaintiff.]

b. The floor of the walk-in freezer did not have sufficient slip resistance under foreseeable conditions due to an insufficient amount of abrasive particles (sand) in the binder coat of epoxy. The floor surface was smooth with widely spaced grains of sand, and therefore did not contain enough voids to provide for safe traction in the presence of moisture."

¶ 46 The defendant offered no expert of its own to oppose this affidavit. Rather, the defendant solely relied, and continues to rely on appeal, on the plaintiff's deposition, asserting that it directly contradicts the expert witness's conclusions regarding the danger of the resurfaced floor. The defendant argues that contrary to the expert's opinion, which is premised on an assumption that there was moisture inside the freezer, the plaintiff testified in her deposition that there was no moisture in the freezer. We disagree. Contrary to the defendant's argument, the record reveals that the plaintiff nowhere testified that there was no moisture inside the freezer. Rather, in response to defense counsel's repeated questions, she merely testified that when she looked at the floor where she fell, she did not see any liquid or moisture on the floor that could have caused her to slip and fall. We find nothing inconsistent in the expert's opinion and this testimony offered by the plaintiff.[1]

[1] We note that the defendant also attempts to circumvent the plaintiff's expert's opinion by arguing that the expert's affidavit does not meet the requirements of Illinois Supreme Court Rule

¶ 47 Accordingly, under the aforementioned record, and based upon the plaintiff's expert's affidavit, the testimonies of the defendants' employees, as well as the plaintiff's deposition testimony regarding her own fall, and the subsequent falls of two additional employees, we

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191. The defendant, however, nowhere sought to strike the plaintiff's expert's affidavit nor challenged the basis or validity of that affidavit before the circuit court; rather he attempts to do so for the first time on appeal. *Cambridge Engineering, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437, 453 (2007) ("It is well settled that issues not raised in the trial court are deemed waived and may not be raised for the first time on appeal.") (*Haudrich v. Howmedica, Inc.*, 169 Ill.2d 525, 536 (1996)). What is more, contrary to the defendant's assertions, the expert's affidavit explicitly explains the basis for the expert's conclusions, namely his own inspection of the bakery floor and the numerous documents (including the parties' depositions) that the expert reviewed. See Ill. S. Ct. R. 191(a) (eff. July 1, 2002) ("Affidavits in support of and in opposition to a motion for summary judgment under section 2-1005 of the Code of Civil Procedure * * * shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto."); see also *Kugler v. Southmark Realty Partners III*, 309 Ill.App.3d 790, 795 (1999) ("If, from the document as a whole, it appears that the affidavit is based upon the personal knowledge of the affiant and there is a reasonable inference that the affiant could competently testify to its contents at trial, Rule 191 is satisfied.").

conclude that there remains a genuine issue of material fact as to whether the defendant breached its duty of care when it resurfaced the floor. *Kugler v. Southmark Realty Partners III*, 309 Ill.App.3d 790, 795 (1999) ("[C]ourts must accept an affidavit as true if it is uncontradicted by counteraffidavit or other evidentiary materials ."); see also *Purtill v. Hess*, 111 Ill.2d 229, 240 (1986) ("In determining the existence of a genuine issue of material fact, courts must consider the pleadings, depositions, admissions, exhibits, and affidavits on file in the case and must construe them strictly against the movant and liberally in favor of the opponent." (citing *Kolakowski v. Voris*, 83 Ill.2d 388, 398 (1980)).

¶ 48 For these same reasons, we find that the record discloses a genuine issue of material fact as to whether the resurfaced floor proximately caused the plaintiff's injury. As already noted above, proximate cause is an essential element of a negligence claim that, if not proved, will prevent the plaintiff from establishing a *prima facie* case. *Bermudez v. Martinez Trucking*, 343 Ill. App. 3d 25, 30 (2003). "The mere occurrence of an accident does not support an inference of negligence, and, absent positive and affirmative proof of causation, the plaintiff cannot sustain the burden of establishing the existence of a genuine issue of material fact." *Vertin v. Mau*, 2014 IL App (3d) 130246. Proximate cause includes two distinct requirements: cause in fact and legal cause. *People v. Johnson*, 392 Ill. App. 3d 127, 131, (2009) (citing *People v. Hudson*, 222 Ill.2d 392, 401 (2006)). Cause in fact exists where there is a reasonable certainty that a defendant's acts caused the injury or damage, whereas legal cause is established if an injury was foreseeable as the type of harm that a reasonable person would expect to see as a likely result of defendant's conduct. *Johnson*, 392 Ill. App. 3d at 131.

¶ 49 In the present case, as already noted above, the plaintiff testified in her deposition that she

fell because she slipped on the floor. The plaintiff averred that there was nothing on the floor (debris, liquid, grease etc.), aside from the floor itself, that could have made her slip. She testified that she did not misstep or lose her balance, and that there was nothing on her clothing that could have made her trip and fall. The plaintiff additionally testified that she is aware of two other individuals slipping on the same resurfaced floor since her injury. Taking, as we must, the plaintiff's testimony in the light most favorable to her, based on the aforementioned statements we conclude that there remains a genuine issue of material fact as to whether there is a reasonable probability that a defendant's acts caused the plaintiff's fall and injure herself. See *Canzoneri v. Village of Franklin Park*, 161 Ill. App. 3d 33, 39

¶ 50 In coming to this conclusion, we have considered the decisions in *Kimbrough v. Jewel Companies, Inc.*, 92 Ill. App. 3d 813 (1981) and *Kellman v. Twin Orchard Country Club*, 202 Ill. App. 3d 968, 974 (1990), cited to by the defendant and find them inapposite. In *Kimbrough*, plaintiff fell on a ramp as she left a Jewel store, and, although there were grease spots on the ramp, she did not know why she had fallen or even if she had slipped on the grease. *Kimbrough*, 92 Ill. App. 3d at 817-18. The court held that because a causal connection had not been established between her fall and any condition under defendant's control, summary judgment in favor of defendant was proper. *Kimbrough*, 92 Ill. App. 3d at 817-18. Similarly, in *Kellman*, the decedent, Kellman, was taking a shower in a country club locker room when he fell and fractured his spine. Kellman's family filed a negligence lawsuit and relied on: (1) an affidavit of his son (who recounted his father's dying communications as to the reason for his fall); and (2) expert testimony to establish the condition of the shower stall and the manner in which Kellman fell. *Kellman*, 202 Ill. App. 3d at 972-73. The court found the son's affidavit was inadmissible hearsay, and granted summary judgment in favor of the country club noting that no testimony

was offered to establish causation, and that the mere possibility that an unreasonably dangerous condition in the shower stall had caused him to fall was insufficient to establish a causal relationship. *Kellman*, 202 Ill. App. 3d at 975. The lack of an identifiable cause was the determinative factor in both cases. Unlike in *Kimbrough and Kellman*, here, the plaintiff specifically pointed to a defect which she claimed had caused her to fall, namely the resurfaced bakery freezer floor. Contrary to the defendant's assertion the plaintiff's deposition testimony as to what caused her to fall was not ambiguous. Although when asked to explain what caused her to fall, at one point in her deposition, the plaintiff stated, "Well, I don't know. I walked in and I slipped on the floor. *** It had to be the floor. I don't know. There was nothing. I don't know," later on, when asked whether "there was any doubt in [her] mind that anything other than the surface of the floor caused her to slip" the plaintiff unequivocally responded with "No." Under this record, we conclude that *Kellman* and *Kimbrough* are inapplicable, and that in the present case, there remains a genuine issue of material fact as to causation.

¶ 51 III. CONCLUSION

¶ 52 For all of the aforementioned reasons, we reverse the judgment of the circuit court and remand for further proceedings.

¶ 53 Reversed and remanded.