2016 IL App (2d) 151181-U
No. 2-15-1181
Order filed September 12, 2016

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WILLARD PEARSON,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 14-L-60
	)	
DRH CAMBRIDGE HOMES, INC.,	)	
SYMPHONY MEADOWS HOMEOWNERS	)	
ASSOCIATION, FOSTER/PREMIUM INC.,	)	
and ACRES ENTERPRISES, INC.,	)	
	)	
Defendants	)	
	)	Honorable
(DRH Cambridge Homes, Inc.,	)	Jorge L. Ortiz,
Defendant-Appellee).	)	Judge, Presiding.

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

ORDER

¶ 1 *Held*: (1) The trial court properly granted defendant summary judgment on plaintiff's negligence claim, as plaintiff presented no evidence that the accumulation of ice on which he slipped was made unnatural by a defect in the road that defendant was constructing; (2) the trial court properly struck depositions that plaintiff attempted to submit for purposes of defendant's motion for summary judgment, as plaintiff had not submitted them with his response to defendant's motion, referred to them in his response, or sought leave to file an amended response including them.

¶ 2 Plaintiff, Willard Pearson, sued defendants, DRH Cambridge Homes, Inc. (Cambridge), Symphony Meadows Homeowners Association, Foster/Premium Inc., and Acres Enterprises, Inc. (Acres), for damages sustained when he slipped on a patch of ice located on the road in front of his house. The trial court granted summary judgment in favor of Cambridge. Following the denial of his motion for reconsideration, plaintiff timely appealed. On appeal, plaintiff argues: (1) the trial court erred in granting summary judgment for Cambridge, because there is a genuine issue of fact as to whether plaintiff fell on an unnatural accumulation of ice resulting from Cambridge's business operations; and (2) the trial court erred in striking certain depositions. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On February 5, 2014, plaintiff filed an amended complaint against defendants. Count I, the only count at issue here, was brought against Cambridge, the developer of the Symphony Meadows subdivision in the Village of Volo, where plaintiff lived. Plaintiff alleged that Cambridge "owned, designed, engineered, constructed, maintained and controlled the roads for Symphony Meadows." According to the complaint, at the time of the incident, the asphalt roads servicing the subdivision "remained incomplete and unfinished." The "incomplete and unfinished roads impeded drainage of water from the roadways and caused water to accumulate and pool in front of the residences including Plaintiff's home." Plaintiff alleged that, on January 28, 2012, while retrieving his mail, he was injured when he encountered a patch of ice that had accumulated in front of his home on Purcell Road due to the "inadequate and incomplete drainage of water from the unfinished roadway."

¶ 5 Plaintiff alleged that Cambridge was negligent in the following respects:

> "a. Failed to complete construction of the roadway servicing [plaintiff's property];

b. Allowed a dangerous and defective condition of the roadway servicing [plaintiff's property] to exist when [Cambridge] knew or should have known its residents would routinely and regularly be required to encounter and traverse it;

c. Failed to properly conduct snow removal operations when defendant knew or should have known it's [*sic*] failure to do so was creating dangerous conditions for its residents;

d. Failed to provide for proper drainage of the roadway surface when defendant knew or should have known that its failure to do so was creating dangerous conditions for the residents whom defendant intended to use the roadway[.]"

¶ 6 Cambridge filed a motion for summary judgment. In its motion, Cambridge argued that plaintiff failed to show that he slipped on an unnatural accumulation of ice, that the construction of the road was negligent or a violation of industry practices, or that the construction of the road caused his injury. Further, Cambridge argued that, to the extent plaintiff raised a premises-liability claim, plaintiff failed to show that Cambridge had notice of the allegedly dangerous condition.

¶ 7 In support of its motion, Cambridge attached the discovery depositions of plaintiff and Mark Salvatore, a Cambridge employee. Plaintiff testified in relevant part as follows. Plaintiff testified that he purchased his home in August 2011 and lived there for about five months prior to his fall. The fall occurred when he was walking across the road from his driveway to his mailbox, which was located across the street and about 15 feet to the left. It was about 5:30 or 5:45 p.m. It was dark out, and the street lights were on. It had been snowing the day of his fall, and it was very cold and very windy with blowing snow. There was snow "off to the sides" of the road. It had been cold all day. It did not rain the day before the accident or the day of the accident. He did

not recall there being "freezing and/or thawing" conditions. Plaintiff took the same path to get his mail six days a week since he moved into the property. On the day he fell, he walked down his driveway and took two steps off the driveway, when his feet went out from under him. He never looked down at the road before he fell; he was looking straight ahead as he walked. As he got up, he observed a dusting of snow on the ground. He also saw ice on the street off the driveway; it was underneath him. The ice was covered with snow. He was asked, "Do you know how long the ice was there?" and he responded, "No, I do not." He was asked, "Do you know where the ice came from?" and he responded, "No." He testified that the ice was "[m]aybe a four by four area circle." The only place he saw ice was on the road where he slipped. He had never seen ice there before. Later, he agreed when asked if the ice came from water that had accumulated in front of his house. According to him, "in front of every residence where the driveways meet, that's where the water would accumulate." He noticed the water accumulating in the summer after the accident; he stated that he "never paid that much attention to it until afterwards." He stated, "[Y]ou look down and everybody had [water] on their street."

¶ 8 Salvatore, Cambridge's land development manager and a licensed civil engineer, testified, in relevant part, as follows. Salvatore testified that it is common practice in the construction industry to not apply the final layer of asphalt until the subdivision or the land that is being developed reaches a certain level of completeness, because the road could be damaged by ongoing construction activities. (The parties refer to the surface of the road that is present prior to the application of the final layer as the "binder" layer.) According to Salvatore, Cambridge complied with common construction practices and standards with respect to Purcell Road. Salvatore did not receive any complaints about problems with water drainage on Purcell Road in 2011. Salvatore could not say what the grade of the road was before the final layer was put on.

According to the engineering plans, the proposed drainage plan for Purcell Road provided that the water was to flow west away from plaintiff's house to a catch basin. The following testimony was given regarding placement of the final layer:

> "Q. In your opinion, Mark, does placement of the final layer of asphalt, does that affect the drainage of the water off the roadway?
>
> A. Yes.
>
> Q. How?
>
> A. It does not allow water to get to the curb and therefore get to the inlet.
>
> Q. When it is not there?
>
> A. Correct.
>
> Q. So would you agree with me that before the final layer is installed, the roadway is not flush with the curb?
>
> A. Correct.
>
> Q. And ideally from an engineering standpoint, construction standpoint, that's what you would hope to have?
>
> A. It is standard practice the way we did it."

He explained that, with the final layer, the portion of the roadway adjacent to the curb is typically a quarter-inch higher than the curb.

¶ 9 In his response, plaintiff maintained that he "never criticized or alleged negligence in the design and/or construction of Purcell Road." He argued that he, instead, alleged that Cambridge "was negligent in the conduct of its business operations; it knowingly, consciously and intentionally decided not to complete Purcell [R]oad." He maintained that Cambridge made this decision "knowing that without the final lift water would not properly drain from the roadway, to

the curb and away from [plaintiff's] home to a catch basin." He claimed that, "because of the deviation in height between the curb and [the] roadway surface, water would unnaturally accumulate in front of the residences." According to plaintiff, this claim was supported by the testimony of both Salvatore and plaintiff. He also argued that he did not need to prove that Cambridge had notice of the condition, because Cambridge caused the condition.

¶ 10 In addition, plaintiff argued that there was a genuine issue of fact as to whether he slipped on an unnatural accumulation of ice. He maintained that it was "undisputed that Acres conducted salting operations on the morning of the occurrence and that the weather and pavement conditions on the day of the occurrence indicated that the initial snow accumulation would melt and then refreeze as temperatures decreased later in the day." He attached an activity report from Acres, as well as purported weather reports.

¶ 11 In reply, Cambridge argued that Salvatore's uncontroverted testimony established that Cambridge complied with standard construction and engineering practices with respect to Purcell Road and that plaintiff failed to present expert testimony in either construction or engineering to dispute that testimony. Further, Cambridge argued that there was no evidence that the binder layer prohibited proper drainage. In addition, Cambridge argued that plaintiff had no knowledge of where the ice came from on the day of his fall or how long it was there.

¶ 12 Following a hearing, the trial court granted the motion for summary judgment. (There is no transcript of the hearing; however, there is a transcript of the court's subsequent ruling.) The court found that the allegations of the complaint were grounded in part on the theory of negligent construction of the road, specifically a failure to provide proper drainage. The court found that there were also allegations in the complaint regarding the creation of a dangerous condition as a result of the alleged negligent construction of the road.

¶ 13 The court found that the issues raised involved engineering and construction principles that are beyond the ken of the average juror and thus required expert testimony. The court found that Salvatore's testimony that it was standard engineering practice to have only the binder layer on the road at the time of plaintiff's fall was unrebutted, undisputed, and uncontroverted, as was his testimony that Cambridge complied with standard construction and engineering practices concerning construction of the road. The court further found that there was no expert testimony in support of plaintiff's allegations that the binder layer prohibited proper drainage on Purcell Road at or near his home.

¶ 14 The court also found that plaintiff's argument that Cambridge was negligent in its business decision as to when the final layer would be placed was a red herring and never pled. The court noted that plaintiff had no testimony that the presence of only the binder layer was a construction defect.

¶ 15 The court further found that there was no evidence of an unnatural accumulation. The court noted that plaintiff testified that, on the day of his fall, it had not been raining. He stated that it was cold. He did not know where the ice had come from or how long it was there. The court also noted that plaintiff could not state if there was any freezing or thawing that day. The court found that the documents, attached by plaintiff to his response, "which purport[ed] to establish that salting operations took place in Volo do not establish any such thing. There is nothing in those reports establishing what happened in Volo. There is nothing about the weather conditions in Volo, and the records which purport to be weather reports are not self authenticating documents." The court stated: "There is no proper foundation for them. And even if there was, they don't establish weather conditions on the date and time and location in question."

¶ 16 Following the denial of plaintiff's motion for reconsideration, plaintiff timely appealed.

¶ 17 II. ANALYSIS

¶ 18 A. Summary Judgment

¶ 19 Plaintiff contends that the trial court erred in granting summary judgment for Cambridge. The purpose of a motion for summary judgment is to determine whether a genuine issue of triable fact exists (*Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986)), and such a motion should be granted only when "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(c) (West 2014)). "An order granting summary judgment should be reversed if the evidence shows that a genuine issue of material fact exists or if the judgment was incorrect as a matter of law." *Clausen v. Carroll*, 291 Ill. App. 3d 530, 536 (1997). The existence of a duty is a question of law properly decided on a motion for summary judgment because, absent a legal duty, there can be no recovery in negligence. *Hodges v. St. Clair County*, 263 Ill. App. 3d 490, 492 (1994). Our review is *de novo*. *Auto-Owners Insurance Co. v. Konow*, 2016 IL App (2d) 150823, ¶ 8.

¶ 20 The common-law duties of a landowner with respect to accumulated snow or ice was stated in *Webb v. Morgan*, 176 Ill. App. 3d 378, 382-83 (1988), as follows:

> "The general rule in Illinois is that a property owner owes no common law duty to remove natural accumulations of ice and snow from common areas which remain under his control and thus cannot be found liable for injuries resulting from a natural accumulation of ice and snow. [Citation.] However, when the property owner chooses to remove ice and snow, he is charged with the duty of exercising ordinary care in the accomplishment of that task. [Citation.] The property owner, then, has no duty to remedy a natural accumulation of ice and snow. His duty is to prevent an unnatural accumulation on his property,

> whether that accumulation is the direct result of the owner's clearing of the ice and snow, or is caused by design deficiencies that promote unnatural accumulations of ice and snow. [Citation.] The plaintiff has the burden of affirmatively proving that the ice and snow on which she fell was an unnatural accumulation caused by the defendant. [Citation.]"

Thus, under common law, only unnatural accumulations of snow or ice, *i.e.*, accumulations caused by the property owner or his agents, can be a ground for liability.

¶ 21 Plaintiff argues that the record creates a question of fact as to whether plaintiff fell on an unnatural accumulation of ice resulting from Cambridge's business operations. According to plaintiff, his testimony established that water accumulated in front of his driveway when it rained, and Salvatore's testimony confirmed that "because the construction of Purcell [R]oad was not complete, drainage of water from the road to the curb and away from plaintiff's home was impaired and as a result, water would accumulate and puddle in the roadway." Plaintiff argues that "a jury could reasonably conclude that the patch of ice that caused [him] to fall was the direct result of [Cambridge's] decision not to install the final layer of asphalt on Purcell [R]oad."

¶ 22 Plaintiff asserts that defendant was negligent for not applying (in a timely fashion) the top layer of road. Plaintiff has failed to raise a genuine issue of fact as to the issue of a negligent business decision on the part of Cambridge. Salvatore testified that it was standard engineering practice to not apply the final layer of asphalt until a certain percentage of homes were finished and that Cambridge complied with standard construction and engineering practices with respect to Purcell Road. Plaintiff has not presented any evidence to rebut this testimony.

¶ 23 In any event, plaintiff's assertion that defendant was negligent for not applying the top layer of road, the purpose of which is to drain accumulations of water to the inlet, does not defeat the fact that the accumulations not drained were otherwise natural. Despite the allegation,

plaintiff did not present evidence, other than mere speculation, that the binder layer itself was negligently constructed so as to prohibit proper drainage and allow unnatural accumulations. Plaintiff claims that he need not present evidence of negligent construction because "[t]his is not and has never been a construction negligence case." However, unless the binder course itself caused an unnatural accumulation of ice, his claim fails.

¶ 24 We agree with the trial court that plaintiff has failed to present evidence sufficient to raise a genuine issue of fact as to whether the ice he slipped on was an unnatural accumulation caused by Cambridge. Plaintiff testified that, prior to the incident, he had never seen ice present in the area of his fall. He stated that he did not know how the ice got there or how long it had been there. Although he later agreed when counsel asked if the ice came from water that had accumulated in front of his house, he also testified that it was not until the summer after his accident that he first noticed water accumulating in the area of his fall. Moreover, the only testimony as to the weather conditions in Volo on the day of the incident was provided by plaintiff, who testified only that it was very cold and very windy with blowing snow. He stated that it did not rain the day before or the day of the incident and that he did not recall freezing and thawing conditions. Although plaintiff claims that "it is undisputed that Acres conducted salting operations on the morning of the occurrence and that the weather and pavement conditions existing on the day of the occurrence indicated that the snow accumulation would melt and then refreeze as temperatures decreased later in the day," this assertion is unsupported. The court properly refused to consider the documents attached to plaintiff's response for lack of foundation. See *Landeros v. Equity Property & Development*, 321 Ill. App. 3d 57, 62 (2001) (document attached to a response to a motion for summary judgment was inadmissible due to lack of authentication).

¶ 25 The cases plaintiff relies on are distinguishable. Indeed, *Lapidus v. Hahn*, 115 Ill. App. 3d 795 (1983), highlights the deficiencies in plaintiff's case. In *Lapidus*, the plaintiff was injured when she slipped on ice while leaving her apartment building, and she brought suit against her landlord. *Id*. at 796. The plaintiff testified that she and her husband had lived in the apartment for 2½ years. Several witnesses testified that, whenever it rained or snowed, water dripped from the roof onto the platform in front of the plaintiff's door and formed a puddle. *Id.* at 796-99. The plaintiff's husband testified that, on the day before the accident, he observed water pouring off the roof and onto the landing area. There was a puddle in front of the door, at least the width of the door. *Id*. at 798. He further testified that, on the day of the accident itself, he observed a half-inch to one-inch accumulation of ice in that same area. *Id.* The jury found in favor of the plaintiff and the defendant appealed. On appeal, the *Lapidus* court found that the jury could reasonably have concluded that the ice was caused by the defective nature of the roof and was not a natural accumulation. *Id.* at 800-01. *Lapidus* is distinguishable, because there the plaintiff presented evidence clearly establishing the weather conditions on the day of the incident and the condition of the roof directing the water to the exact location of the plaintiff's fall. Here, plaintiff has presented nothing more than speculation as to the cause of the ice.

¶ 26 Plaintiff also relies on *Stroyeck v. A.E. Staley Manufacturing Co.*¸ 26 Ill. App. 2d 76 (1960). In *Stroyeck*, the plaintiff was injured when she slipped and fell on ice that had accumulated on a sidewalk leading to the defendant's manufacturing plant. The plaintiff claimed that the defendant maintained the sidewalk in an unsafe condition and failed to provide adequate lighting for plaintiff to be able to see ice on the sidewalk. The plaintiff presented expert testimony that the grade of the sidewalk, although within acceptable limits, presented a hazardous condition in the presence of snow, ice, and mud. At trial, the plaintiff was awarded a judgment against the

defendant, and the defendant filed a posttrial motion for judgment notwithstanding the verdict (JNOV), which was denied. In affirming the denial of the motion for JNOV, the court stated:

> "[O]n the negligence question we have a situation where the defendant has constructed and is maintaining a sidewalk being used by some 1700 employees daily. Since it maintains an engineering department in connection with its plant operation it is chargeable with knowledge that a 13.6% grade in a sidewalk, while within the maximum limits of a safety grade, presents a hazardous condition during seasonal changes which occur in this climate. It is a fair inference from this record that a lesser grade was practical and had been considered by defendant prior to the occurrence in question. To these factors there must be added the factor of lighting. It is undisputed that it was dark when plaintiff fell, and that there was no lighting at all in the immediate area. It is a fair inference that the darkness was so pronounced that plaintiff could not discern the icy condition of the walk until she felt it with her hands after falling. Consequently, the question of whether the construction and maintenance of the walk under the circumstances thus shown was negligence, and the question of whether, knowing of the hazard that might well be created by seasonal conditions, it was negligence to fail to provide lighting facilities by which seasonal conditions creating the extra hazard might be readily observed, were fact questions for the jury." *Id.* at 82-83.

¶ 27 Here, unlike in *Stoyeck*, plaintiff did not present expert evidence concerning whether the condition of the road without the final layer of asphalt posed a hazardous condition in winter conditions. Further, there was no issue raised in the present case as to any failure to provide appropriate lighting conditions.

¶ 28 Accordingly, based on the foregoing we find that the summary judgment was properly granted.

¶ 29 B. Trial Court's Ruling on Motion to Strike Certain Depositions

¶ 30 Plaintiff argues that the trial court erred in striking the depositions of Todd Terrill, Andrew Schmidt, Adan Arteaga, and Tobias Arteaga. The following facts are relevant to the court's ruling.

¶ 31 Cambridge filed its motion for summary judgment on June 25, 2015. On that day, the trial court set a briefing schedule giving plaintiff until July 16, 2015, to file his response and giving Cambridge until July 30, 2015, to file its reply. The hearing on the motion for summary judgment was set for August 13, 2015.

¶ 32 Plaintiff did not file his response by the date set by the trial court. Instead, on August 4, 2015, 19 days after his response was due, plaintiff e-mailed his response to Cambridge. In addition, on that same day, plaintiff filed his response without leave of court.

¶ 33 Three days later, on August 7, 2015, plaintiff filed notice of his motion seeking leave to file his response and to continue the hearing, noting that his counsel had been unable to provide defense counsel with a response until August 4, 2015. Plaintiff indicated that the motion for leave to file would be heard on August 12.

¶ 34 Also on August 7, 2015, plaintiff filed the four depositions at issue. These depositions were not attached to or referenced in plaintiff's response to Cambridge's motion for summary judgment.

¶ 35 On August 12, 2015, the parties were in court on plaintiff's motion for leave to file his response. (The record does not contain a transcript of the hearing.) Cambridge filed a motion to strike the depositions filed by plaintiff, arguing that plaintiff did not obtain leave of court to file

any documents in response to Cambridge's motion for summary judgment. The trial court entered two orders: in one order the trial court granted Cambridge's motion and ordered that the depositions be stricken and impounded; in a second order the trial court granted plaintiff's motion, allowing him leave to file his response *instanter*. After allowing plaintiff leave to file his response, the trial court granted Cambridge until August 18, 2015, to file its reply and continued the hearing on the motion for summary judgment until August 20, 2015.

¶ 36 On September 21, 2015, after summary judgment was granted for Cambridge, plaintiff filed a motion for reconsideration of the trial court's order of August 12, 2015, which granted Cambridge's motion to strike the four depositions filed by plaintiff, and of the trial court's order of August 20, 2015, granting summary judgment. Plaintiff's argument for reconsideration of the entry of summary judgment was based solely on testimony from the stricken depositions.

¶ 37 Plaintiff argues that the trial court erred in "finding [that Illinois] Supreme Court Rule 207 [(eff. Jan. 1, 1967)] does not contemplate the filing of discovery depositions prior to, in conjunction with, or at the time of hearing on a party's motion for summary judgment." However, the trial court did not base its decision on Rule 207. As noted, there is no transcript of the hearing at which the trial court granted Cambridge's motion to strike the depositions; however, the basis for the court's ruling can be gleaned from its comments at the hearing on the motion for reconsideration. At the hearing, the court noted that plaintiff had never submitted the depositions with his response, never referred to the depositions in his response, never requested leave to file an amended response, and "simply filed [them] over the counter downstairs in the Circuit Clerk's Office." The court stated: "How am I supposed to consider something that is not brought properly to the Court's attention and something that the Movant could even reply to?" The court then ruled as follows:

> "Okay. Well, frankly I don't see any basis to reconsider the order of August 12th. I'm going to deny the motion. The cases you cited with respect to Supreme Court Rule 207 are in apposite [*sic*] here. There is no reference to the deposition testimony in any response, nor did you seek to file an amended response so as to be allowed to incorporate any of this deposition testimony.
>
> So, I'm going to deny that motion to reconsider. There is no basis to simply file over the counter these deposition transcripts and then to expect the Court is somehow going to be able to consider them or to expect that the Movant would somehow have an opportunity to reply to something contained—well, it's not even contained.
>
> There was no written argument. So it would be patently unfair to allow you to argue at the hearing on a motion for summary judgment the testimony contained in deposition transcripts that were never appropriately presented."

¶ 38 We find no error. Regardless of the court's decision to "strike" the depositions, the court made clear that it would not consider the depositions because plaintiff did not rely on them in support of his response to Cambridge's motion for summary judgment. It is disingenuous for plaintiff to suggest that the depositions were not referred to in his response only because he filed his response after the court granted Cambridge's motion to strike and after the depositions were impounded. Plaintiff's response was due on July 16, 2015. He provided defense counsel with a copy of his response on August 4, 2015, and he filed a copy of his response without leave of court on that same day. The deposition testimony is not referred to in that response. The depositions were filed on August 7, 2015. When the parties appeared in court on August 12, 2015, where plaintiff sought leave to file his response (at which time the depositions were stricken), plaintiff filed the identical response that he had provided to counsel and filed on August 4, 2015. There is

no indication in the record that plaintiff had prepared a response including the depositions or that he sought to rely on these depositions in any way.

¶ 39 III. CONCLUSION

¶ 40 Based on the foregoing, we affirm the judgment of the circuit court of Lake County granting summary judgment for Cambridge.

¶ 41 Affirmed.