2017 IL App (1st) 152343-U

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THIRD DIVISION
March 8, 2017

No. 1-15-2343

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

SANDRA DAHN, as the Independent Executor of the Estate of Catherine M. Collins, Deceased, Plaintiff-Appellant, v. REGAL CHATEAUX CONDOMINIUM ASSOCIATION; EPI MANAGEMENT COMPANY, LLC; TOTAL MAINTENANCE AND CLEANING SERVICES, INC., Defendants-Appellants.	)	Appeal from the Circuit Court of Cook County No. 13L13635 The Honorable Kathy M. Flanagan, Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court. Justices Pucinski and Cobbs concurred in the judgment.

ORDER

Held: Summary judgment affirmed where, based on the lack of evidence that defendants had actual or constructive notice of a dangerous condition, plaintiff was unable to demonstrate that defendants were negligent. Affirmed.

¶ 1 Plaintiff-appellant Sandra Dahn, Independent Executor of the Estate of Catherine M. Collins (plaintiff or the Estate), Deceased, appeals from the trial court's grant of summary judgment in favor of defendants-appellants Regal Chateaux Condominium Association (Regal), EPI Management Company, LLC (EPI), and Total Maintenance and Cleaning Services, Inc. (Total Management), and against the Estate in its lawsuit seeking damages sustained upon Collins' fatal fall that took place as she was entering her residential building at Regal. The Estate appeals, contending that summary judgment was improper because genuine issues of material fact exist. The Estate asks that we reverse the trial court's entry of summary judgment with respect to each defendant, reverse the portion of the court's August 13, 2015 order striking paragraph seven of the expert's affidavit, and remand to the circuit court for further discovery and trial. For the following reasons, we affirm.

¶ 2 I. BACKGROUND

¶ 3 This case arises out of a November 20, 2013 incident, in which plaintiff's decedent, Catherine Collins, a 74-year-old resident of the Regal Chateaux Condominium complex suffered a subarachnoid hemorrhage and ultimately died[1] after falling down a small flight of exterior stairs at the condominium building, allegedly as a result of the doorknob[2] of the main exterior entrance door breaking off when she attempted to pull the door open. Nobody witnessed the fall. Collins was found lying on the ground at the foot of the stairs with the broken door handle from the door at the top of the stairs in or near her hand. Her estate filed a lawsuit[3] alleging premises liability and negligence claims against: (1) Regal; and (2) the property management company

[1] The fall occurred on November 20, 2013. Decedent was hospitalized that day and never regained consciousness to the extent she could communicate about the fall. She died on January 12, 2014.

[2] The record and parties in this appeal use the terms "doorknob, door handle, and door lock interchangeably." On appeal, we do the same.

[3] Plaintiff filed an amended complaint, which the court below considered. For ease of discussion, we refer to this amended complaint simply as "the complaint."

EPI. It also filed negligence claims against maintenance company Total Maintenance. Additionally, the Estate filed a spoliation claim against Total Maintenance because its maintenance man, Dave Busch, threw the doorknob away the next morning.

¶ 4 More specifically, the complaint against defendants sought damages for injuries Collins sustained when she fell down the exterior stairs to her condominium building when the doorknob of the main exterior entrance broke off when she attempted to pull it open. Counts I through IV are directed at Regal and sound in negligence and premises liability brought under the Wrongful Death and the Survival Act. Similar claims are brought against EPI in counts V through VIII. The remaining counts are directed at Total Maintenance, and sound in negligence under the Wrongful Death Act and the Survival Act, as well as spoliation.

¶ 5 By Count I, plaintiff alleged that Regal was guilty of negligence—wrongful death because it owned, operated, maintained and controlled the property, including door handles in the common areas, and owed Collins a duty of reasonable care in the ownership, operation, maintenance, control, upkeep, replacement, improvement and care of the premises including the doorknob. Notwithstanding this duty, it alleges, Regal failed to fix the faulty door handle, to inspect the property, maintained the property in a dangerous condition, carelessly and negligently maintained the faulty door handle, and did so despite knowing that the door handle was faulty and posed a danger to invitees including Collins. Count II is a negligence—survival action, also against Regal; Count III is a premises liability/wrongful death claim against Regal for the same acts; and Count IV is a premises liability-survival claim against Regal. Count IV is a negligence—wrongful death claim against EPI, by which the Estate claims EPI owned, operated, maintained and controlled the property, including door handles in common areas, at the condominium complex where Collins lived and that, at the time the door handle broke off in

Collins' hand, EPI "Owned and maintained the subject door handle in the common area" and had a "duty of reasonable care in the ownership, operation, maintenance, control, upkeep, replacement, improvement and care of the premises, including but not limited to the entry doors and door handles and other common elements within the condominium complex. Notwithstanding, alleges the Estate, EPI by and through its agents, servants, and employees, caused the faulty door handle to be present, failed to fix the faulty door handle, failed to inspect the property and maintained the property in a dangerous condition, carelessly and negligently maintained the faulty door handle, or carelessly and negligently maintained the faulty door handle despite knowledge that it was faulty and posed a danger to invitees. The Estate alleges that Collins death was a direct and proximate result of one or more of the foregoing reasons. Count VI is a negligence—survival action against EPI management; Count VII[4]is a premises liability—wrongful death claim against EPI; and Count VIII is a premises liability—survival action against EPI. Count IX is a negligence—wrongful death claim against Total Maintenance. By this claim, the Estate alleged that Total Maintenance contracted with EPI to "perform necessary care, upkeep, maintenance, replacement, and improvement of the properties, condominiums, units, common areas, and/or townhomes" in question. At the time of Collins' fall, Total Maintenance was "responsible for completing work orders issued by Defendant, EPI, for the care, upkeep, maintenance, replacement, and improvement of the properties *** and was "authorized to conduct any necessary upkeep, maintenance, and repairs to the properties ***." The Estate alleged Total Maintenance failed in its duty of reasonable care in the maintenance, upkeep, replacement, improvement, and care of the premises, including but not limited to the entry doors and door handles and other common elements within the condominium complex."

[4] This count is misnumbered in the claim. We renumber the counts appropriately herein.

Count X is a negligence—survival action against Total Maintenance; and Count XI is a spoliation claim against Total Maintenance, alleging that, the day after Collins fell, Total Maintenance should have known not to destroy the door handle, but instead "directed and caused the door handle to be destroyed." It alleges that "[a]s a proximate result of the destruction of the door handle, Plaintiff's ability to prove her case against the Defendants * * * and any potential case against the unknown manufacture[r] of the door handle has been prejudiced."

¶ 6 Decedent Catherine Collins had lived at Regal's 12-building complex of condominium units since 1994. She lived in building number 300. All Regal buildings have a front and back entrance. The entrance at issue here is the front entrance to building 300. This entrance consists of an exterior door with no lock, which opens into a small vestibule. The vestibule contains an interior door that is locked and opens by key or by a buzzer activated by the interior units. Leading up to the door is a series of four steps plus a small landing. The exterior door opens out, toward the landing. Regal has a condominium association board (the Board). According to Regal's written answers to interrogatories, the subject door and door frame were installed at the time the building was erected [in the 1970s], but the date of installation of the specific door handle is unknown.

¶ 7 On the afternoon of November 20, 2013, Collins' neighbor, James Haniacek, saw her return home from grocery shopping and walk up the exterior stairs to the front door of her building. She came back down the stairs, possibly to retrieve more grocery bags from her car. Shortly thereafter, Haniacek heard a noise and found Collins lying at the bottom of the stairs. According to Haniacek, her head and back were on the sidewalk, her legs were on the stairs, and the doorknob was in her hand. Collins was taken to the hospital and was essentially unable to communicate before her death nearly two months later.

¶ 8 The record on appeal includes a handwritten statement from James Haniacek, Jr., dated December 3, 2013. In it, Haniacek states, in part:

> "I went to renew the plates on my wife's car. When I came home I noticed Ms. Collins walking into her building with some groceries. I took the plate off my wife's car, brought it in the house, cleaned it, put the sticker on it and brought it back outside. I didn't see Ms. Collins come back out for a second trip. I put the plate back on my wife's car & started to walk back on the opposite side of the pond. When I heard a noise, I looked over and saw Ms. Collins laying on the ground. Her head & back were on the sidewalk with her legs on the stairs. She was face up with her right arm extended holding the door knob. I checked to make sure she was breathing, with a clear airway & checked her pulse. She was unconscious. I didn't have my phone so I banged on the 1st fl door west of the stairs to call 911 & went back to Ms. Collins. She started to come back but was still slipping in & out of consciousness. I was holding her hand telling her to stay with me, help was on the way & to stay still until the ambulance came. The doorknob was in her hand until she started to gain consciousness."

Haniacek submitted an affidavit to the same effect.

¶ 9 Regal was formed in 1973, and its bylaws are included in the record on appeal. The current president of the Regal Chateaux Condominium Association Board is Karen French. She has held that position since 2008. She testified in deposition that the Association contracted with EPI to provide property management services and with Total Maintenance to provide maintenance services. EPI has been property manager for Regal for 13 years. If there is a maintenance problem at Regal, she or a unit owner is to call EPI not Total Management to get a work order created. EPI, through Terry Bond and Stephen Elmore, takes care of financial aspects

at Regal and "do the regular inspections on the property itself." French did not know of any doorknobs that were replaced for being loose and is not aware of anybody complaining of a loose doorknob. She testified that no doorknob had ever come off in her hand at Regal and she had never noticed that a doorknob was looser than it should have been. According to French, as a "general maintenance measure," Regal had been replacing two doors per year for the "last several years" because of issues with the doors themselves such as degrading wood. Elmore, Busch, and the Board determined together which two doors should be replaced each year. To French's knowledge, no doors had ever been replaced at Regal due to a loose doorknob. She did not talk with Busch before he replaced the door handle in November 2013.

¶ 10 There is no evidence in the record that Regal or any of its Board members were aware of any prior accidents of a doorknob coming off of any of the doors to the condominium buildings and causing injury. There is also no evidence in the record that any prior complaints had been made to Regal relating to the door or doorknob on Collins' building, building 300.

¶ 11 At the time of Collin's injury, Regal had contracted with EPI to provide property management services, the nature of which are defined by the management contract and include: EPI is the "exclusive Managing Agent of the common area and facilities of [Regal]" and:

> "(3) Under the supervision of one of its principal officers, [EPI] shall render services and perform duties as follows:
>
> * * *
>
> (c) [EPI] shall cause the common area and facilities of [Regal] to be maintained according to standards reasonably acceptable to [Regal]. [EPI] is authorized, in the name of and at the expense of [Regal], to make or cause to be necessary, and to purchase such supplies as may be necessary. ***

* * *

(e) [EPI] is authorized, with the approval of [Regal], in the name of and at the expense of [Regal], to make contracts for *** maintenance *** and other services or such of them as [Regal] shall deem advisable. ***

* * *

(i) It shall be the duty of [EPI] at all times during the term of this Agreement to operate and maintain the Development according to the highest standards achievable consistent with the overall plan of [Regal] provided, however, that [Regal] shall not assert any claims against [EPI] on account of any alleged errors or judgment made in good faith by [EPI] in the management or operation of [Regal]. ***"

¶ 12 At the time of Collins' injury, Regal had also contracted with Total Maintenance to provide maintenance and cleaning services on Regal's property, the nature of which are defined by the maintenance contract and include:

"[Total Maintenance] shall perform the following duties, which include but are not limited to the following:

[Total Maintenance] (Dave Busch) shall personally be on the property a minimum of 20 hours per week which is defined as 5 days out of the normal 7 day week.

[Busch] shall perform the following work functions as a part of his 20 hour work week:

1. General Electrical repairs.

2. General Carpentry repairs.

3. General Plumbing repairs.

4. General Drywall and Tile repairs.

* * *

10. Repair and Painting of the Hallways of the Buildings.

* * *

To complete such other work orders that may be issued from time to time. NOTE: [Total Maintenance] must have a work order for all work done on the property and said work order must be returned to the Association denoting the time and materials used for each job."

¶ 13 EPI customer service representative Terry Bond testified she had worked at EPI for 10 years. She explained that Dave Busch worked as the on-site maintenance man for Regal Monday through Friday, where he performs general maintenance. She is able to create work orders for Busch when something comes to her attention that needs to be fixed. Sometimes she telephones Busch with a work order and sometimes Busch collects the written work orders at EPI. At other times, Busch will fix something he notices is broken, then notify her, and she will create a work order for the completed work.

¶ 14 Regarding Collins' fall, Bond testified that she received a telephone call from an unknown caller "sometime later in the afternoon" on November 20, 2013, that "said that a lady had fallen and the ambulance was there." She said the caller was not sure who had fallen. She said, "[The caller] said that [the person] had fallen, I believe, at the front stoop; that the door - - door handle or knob had come off from the front door." Busch, who generally works from 7:00 a.m. to 1:00 p.m., had already left for the day, so Bond "made a note to call him first thing in the

morning." The next morning, Bond telephoned Busch at approximately 8:45 or 9:00 a.m. to tell him about the doorknob. She testified:

> "[TERRY BOND:] I told [Busch] that I had gotten a call, you know, that someone had fallen and that the doorknob needed to be repaired. And he had already known about it, probably from a resident because they all know [Busch]; he's been there for some many years. So he had already said he knew and he had fixed the door already.
>
> * * *
>
> [ATTORNEY MR. NICHOLS:] Did [Busch] tell you when exactly he replaced the knob?
>
> A. It was that morning prior to when I had called."

Bond explained that Busch keeps petty cash to pay for expenses, and Busch paid for the new doorknob with the petty cash.

¶ 15 Bond testified she did not "take any further action" regarding the doorknob. She did not ask Busch what he did with the broken doorknob. She was not aware of any damage to the front door of Collins' building, nor of any defects or damage to the doorknob of that front door. She also was not aware of any prior complaints regarding the doorknob being loose or dysfunctional at the 300 building. She testified that she would have expected Busch to throw a broken doorknob away when he replaced it with a new one.

¶ 16 EPI director of management Stephen Elmore testified that he performs monthly on-site inspections of the Regal property. His most recent inspection of the property prior to Collins' fall was on November 3, 2013, just 16 days before the injury. When he inspects the property, he starts at one end and walks the entire property looking for defects within the property. He also "follows up on any Work Orders with outside contractors to make sure that they were done" satisfactorily. Although he does not specifically recall inspecting the door handle in question, he

testified it is his "custom and practice" to inspect every door and door handle system within the Regal property. He testified:

> "[STEPHEN ELMORE:] I inspect all the door handles because I have to get into the buildings. So I have to use the door handle to get into the buildings."

When inspecting the door and door handle, he "pull[s] on the door handle and normally [tries] and go[es] back and forth to see if it wobbles or not[.]"

¶ 17 He considers his inspections "very thorough" and is confident that, had a door handle been loose during his November 3 inspection, he would have noticed it. Elmore testified that Busch followed the proper procedure when he replaced the door handle immediately after finding it defective, rather than waiting to make a work order. The process is that Elmore makes monthly inspections of the property and reports any defects or problems to EPI. The EPI service department generates work orders, which are EPI's responsibility under its contract with Regal.

¶ 18 Dave Busch, owner of Total Maintenance, testified he provides general maintenance and cleaning services for Regal. Busch performs daily "rounds" of the property during which he collects garbage and looks out for defective conditions on the property. He does not inspect doorknobs at Regal. He had never seen a door handle fail and had never been asked to replace one at Regal prior to this incident. He had never heard of a door handle falling off at the Regal property. He acknowledged that there had been a work order to replace the rear door of building 300, but explained that, in reality, only the electronic door release needed to be fixed. Another time, pursuant to a work order, Busch had tightened a screw on a loose doorknob in the 600 building.

¶ 19 Regarding Collins' fall, Busch explained that he never saw Collins on the ground. He testified that, on November 21, 2013, he found a portion of the door handle on the ground before

he heard from anyone, including residents and representatives from Regal or EPI. He said he found the door handle and "basically a trim ring" on the top of the landing to the left of the doorway. He described that, when he saw the door handle, he thought, "somebody was moving in and moving out and broke it again, you know, because a lot of times they prop the doors open and stuff like that; but I just saw it laying there, saw it couldn't be repaired, so went and got another one." Upon further questioning, he explained that, by "broken again," he did not mean the unlocking-type of door handle involved here, but that the locking mechanism on security doors would sometimes break when "somebody tries to force it open." He could not recollect precisely, but he thinks Terry from EPI may have called later that morning to notify him of the broken door handle and he told her he had already fixed it. To repair the door, he "just went to Menards, picked up a new lock, and replaced it in the early morning." He did not take any pictures of the broken door handle because he "just looked at it as like a normal day. If something was broken, I'll fix it, throw it out, go on with my day."

¶ 20 Busch described the process he goes through when he discovers something needs to be repaired at Regal. Depending on the size of the problem, he either repairs it on his own or requests a work order from EPI. He also sometimes receives work orders generated by EPI. He explained that, in the five years prior to Collins' fall, he never replaced any door handles on any interior or external doors at Regal. He testified he uses that particular exterior door handle to building 300 approximately one time per week and agreed that "[t]his door handle that's the subject of [the lawsuit] is a door handle that [I] had never observed, felt, or known of having any problems with respect to being loose or otherwise dysfunctional[.]"

¶ 21 Sheryl Busch testified at deposition that she and her assistants provide the cleaning services for Total Maintenance. The cleanings at Regal had been done on Wednesdays for the

past 20 years. These cleanings included vacuuming and dusting the common areas of each building, and inspecting interior and exterior light fixtures. When cleaning each building, Sheryl and her assistants enter and/or exit each door of the building they clean, including building 300. If they had ever noticed a problem with a door handle, they would have immediately notified EPI. Sheryl and her cleaning crew cleaned the buildings at Regal—including building 300—the morning of Collins' fall and did not notice any problems with the door handle. She agreed that "[w]ith respect to this particular doorknob, it functioned appropriately and as [I] would have expected every time [I] used it coming from the outside in for the 22 years that [I've] been doing this up to and including the morning of November 20th of 2013[.]"

¶ 22 Total Maintenance cleaner Leslie Van Ginder testified she cleaned the common areas of the Regal buildings, including building 300. She had cleaned building 300 for eight years and knows which door handle is at issue here. On Wednesdays when she cleaned, she would go in or out of that door one or more times and she never had any problem with the door handle.

¶ 23 Two of Collins' neighbors also testified in deposition. Neighbor Todd Shaer testified he had lived in the 300 building for most of the past 19 years. During all the years he has used the exterior door in question, he never noticed any problems with the door handle. Shaer testified that he used the door in the morning before Collins fell and had no trouble with the door. If he had noticed the door handle being loose or problematic, he would have called EPI or Dave Busch, but he did not notice anything wrong with the door handle. He used the door again approximately 15 minutes before Collins fell and did not notice any issues with the door handle. According to Shaer, November 20 was a dry, cloudy day with no snow or rain. He described that the front door to building 300 has a handle that a person must pull toward him in order to enter the building. In his opinion as a resident, it is a "safe entrance and exit." He had never heard of

anyone having "any problems going up or coming down those stairs" or "any problems in opening the door, getting in and out of the door, because of the configuration of the stairs."

¶ 24 Shaer testified that, about 15 to 20 minutes after he arrived home that afternoon, his neighbor Jimmy pounded on his door, telling him to call 911. He did so, and went outside to see what had happened. He saw Collins lying on the ground with one leg on the first stair step. He did not see the door handle. As far as Shaer knows, nobody saw Collins fall. He could see bags of groceries strewn around the area where Collins lay.

¶ 25 Neighbor James Crater testified that he had lived at Regal for many years and had never noticed an issue with the door handle to the main entrance. He described "tension" on the door where, after opening the door with no trouble using the door handle, there would be a bit more tension than expected in order to fully open the door. He never reported this extra tension to the property management company. He clarified that the tension he mentioned was "nothing with the doorknob [but] tension on the door[.]" He was always able to open and close the door. He had never heard of any issues with any other doors or door handles on any other buildings at Regal. He had never personally had any "issues relating to any doorknobs either at the exterior doors" of building 300 or any other buildings at Regal.

¶ 26 Crater used the door handle at issue the day before Collins' fall and did not notice any problems with it. On the day of injury, Crater was inside building 300 looking out the window when he saw paramedics assisting Collins. He remained at the window, watching, until Collins was taken away by ambulance. He exited through the front entrance after the ambulance left. He could see blood on the sidewalk, but did not notice a door handle in the area. Over the years, Crater saw Collins from time to time carrying things through the exterior front door and never

saw her having any difficulty with it. Although they spoke regularly, Collins never complained to Crater about anything having to do with the functioning of the doorknob on the exterior door.

¶ 27 Collins' son-in-law, Michael Dahn, who was listed as a plaintiff's witness, also testified at deposition. Dahn testified that he manages and supervises maintenance on a 200 million square foot manufacturing facility. He opined he is an expert in building maintenance because he "run[s]" the large facility with maintenance crew. In his opinion, "the door handle either broke, wasn't installed properly, but that door handle shouldn't have broke [when pulled on by a 95-pound woman like Collins.]" He is familiar with the type of non-locking, pass-through door handle such as the one in question. There are pass-through doors at the facility he manages. He acknowledged that, in his opinion, if a door handle such as the one in question was checked to see that it was not loose and it latched properly, that would be an adequate inspection and there would be no "obligation or reason" for a maintenance person to do anything further. Dahn specifically stated, "If it passed inspection, fair enough. If it is not broke, it is not broke."

¶ 28 Also included in the record is an affidavit from Michael Panish, presented as plaintiff's expert witness in construction. In the affidavit, Panish describes his review of the evidence in this case, his on-site inspection of the premises, and the opinions he formed in this matter. Panish first opines that the term "general carpentry repairs," for which Total Maintenance had contracted to provide Regal, is "generally understood as a broad field that encompasses woodwork, repairs to doors and windows, and installation and maintenance of door locks." According to Panish, the original door locks at Regal, including the subject door lock, were "apparently" 37 years old at the time of the occurrence. These original doorknobs were a "Builder's Standard" grade, or a "Grade 4," which grade no longer exists today. He explains:

"10. *** [I]n 1977, there was a commonly accepted fourth grade that fell beneath the current 'Grade 3' rating, which was known as 'Builder's Standard.' Builder's Standard door locks were low-quality, inferiorly constructed locks that were intended for only a short period of use, up to three years. In 1977, Builder's Standard locks likely cost between $5.00 and $10.00 per lock. In 1977, it was commonly accepted within the construction field that a Builder's Standard lock had a rating of 100,000 duty cycles[5], meaning that they were only expected to endure 100,000 duty cycles before failure."

Panish further opined:

"12. Builder's standard locks in 1977 were expected to last no longer than three years, after which time they should be replaced. The exercise of ordinary care for the safety of the Regal Chateaux's residents required that the Builder's Standard locks were replaced within three years of installation. The failure to replace the Builder's Standard locks within three years was negligence."

¶ 29 Based on the number of building residents, Panish estimated that the subject lock most likely exceeded its expected 100,000 duty cycles by 1982, and this lock was likely used through 630,720 duty cycles in its lifetime. Panish concluded:

"15. The exercise of reasonable care for the safety of the Regal Chateaux residents required that the Builder's Standard locks be replaced before they exceed their duty cycle ratings. Allowing the Builder's Standard locks to remain in use at the Regal Chateaux for over 100,000 duty cycles, and especially in excess of 600,000 duty cycles, was negligent.

[5] Panish previously defined a duty cycle as "the action of turning the door knob to activate the lock function to allow the door to be opened."

16. Under the customs and standards for general carpentry repair and/or building maintenance, the exercise of reasonable care required that a Builder's Standard lock be replaced within its anticipated 100,000 duty cycles, and long before it reached 600,000 duty cycles. The failure to do so was negligence."

¶ 30 Panish also described factors specific to the door in question that may have contributed to the failure of the door handle. For example, James Crater testified that the door took extra force to open the door. This extra force, opined Panish, "further stressed the lock and hastened the lock's failure."

¶ 31 Additionally, Panish opined that the landing on which Collins was standing at the time of the occurrence was more shallow than prescribed by the Cook County Building and Environmental Ordinance (the Code), and that, had the landing been of proper size, Collins may have merely come to rest on the landing itself rather than falling down the stairs.

¶ 32 Defendants filed motions for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2014)). Regal and EPI filed a joint motion for summary judgment, claiming, generally, that there was no notice of a dangerous condition and no foreseeability of injury, and that it lacked actual or constructive notice of the possibility of injury, that is, of a defective doorknob. Total Maintenance alleged that it had no contractual duty to repair the doorknob.

¶ 33 In August 2015, the circuit court granted summary judgment in its entirety against plaintiff and in favor of all defendants. In its memorandum order, the court found that plaintiff failed to establish either notice of foreseeability, through her expert or otherwise, as required to support her claims.

¶ 34 Additionally, with respect to the allegations of building code violations, which issue was raised for the first time in plaintiff's summary judgment response, the court found that the expert's opinions were speculative and without factual basis. The court, therefore, found that summary judgment in favor of Regal and EPI was appropriate.

¶ 35 The court also found that Total Maintenance did not owe a duty to provide preventative maintenance and that it, too, was entitled to summary judgment. In so doing, the court noted that plaintiff's concession that summary judgment in favor of Total Maintenance on the spoliation of the evidence claim was proper.

¶ 36 Plaintiff appeals.

¶ 37 II. ANALYSIS

¶ 38 On appeal, plaintiff contends the trial court's grant of summary judgment as to the premises liability claims was in error because there were genuine issues of material fact as to whether defendants had constructive notice of the hazardous condition.[6] Specifically, plaintiff argues that constructive notice was established where: (1) the subject door lock had exceeded its useable lifespan; and (2) other doors on the premises had begun to fail.

¶ 39 A. The Panish Affidavit

¶ 40 First, defendants assert that plaintiff's expert's affidavit failed to meet the requirements of Illinois Supreme Court Rule (Rule) 191(a) (Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013)). Rule 191(a), which governs the content of affidavits offered in support of summary judgment, states that these affidavits:

[6] Although she regularly refers to the alleged spoliation of evidence, plaintiff on appeal does not challenge the dismissal of the spoliation of evidence claim.

> "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 documents 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." 145 Ill. 2d R. 191(a).

¶ 41 Plaintiff responds that the Panish affidavit was, in fact, appropriate as an expert affidavit under Supreme Court Rule 191, and contends the trial court erred in striking paragraph seven of the affidavit.[7]

¶ 42 The purpose of affidavits submitted in support of summary judgment is to show whether the issues raised are genuine and whether each party has competent evidence to support his position. See *People ex rel. Vuagniaux v. City of Edwardsville*, 284 Ill. App. 3d 407, 412 (1996). After all, it is upon these affidavits that a trial court bases its decision whether to grant summary judgment, and that we, as a reviewing court, are to examine that decision. Accordingly, our courts have repeatedly held, and this proposition remains valid today, that when portions of an affidavit are improper under Rule 191(a), only those improper portions should be stricken or excised in reviewing summary judgment and the entire affidavit is not automatically invalidated. See *Roe v. Jewish Children's Bureau of Chicago*, 339 Ill. App. 3d 119, 128 (2003) (where affidavits contain allegations that did not meet standards of Rule 191(a), only improper portions are to be stricken and remainder may be considered by trial and reviewing courts); accord *Vuagniaux*, 284 Ill. App. 3d at 412 (only "tainted portion [of affidavit] should be excised, as

[7] Plaintiff points out—and we agree—that defendant Total Maintenance appears to state in its appellate brief that the trial court struck the entirety of the Panish affidavit. We are aware that the trial court only struck Paragraph 7 of the Panish affidavit.

opposed to the entire affidavit" under Rule 191(a)); *Nardi, Pain & Podolsky, Inc. v. Vignola Furniture Co.*, 80 Ill. App. 2d 220, 227 (1967) (some inadmissible statements do not render entire affidavit invalid under Rule 191(a)). Rather, the steadfast conclusion is that Rule 191(a) is satisfied 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 as to its contents at trial[.]" ' " *Piser v. State Farm Mutual Automobile Association*, 405 Ill. App. 3d 341, 349 (2010) (quoting *Doria v. Village of Downers Grove*, 397 Ill. App. 3d 752, 756 (2009) (quoting *Kugler v. Southmark Realty Partners III*¸ 309 Ill. App. 3d 790, 795 (1999))); see also *Nardi*, 80 Ill. App. 2d at 227 (test is whether it appears from the whole of the affidavit that affiant would be competent to testify if called upon).

¶ 43 An expert's opinion may be excluded where it offers no aid to the trier of fact in determining questions at issue, and affidavits that provide legal conclusions rather than facts are insufficient to defeat a motion for summary judgment. *Hagy v. McHenry County Conservation District*, 190 Ill. App. 3d 833, 843 (1989); *Alop v. Edgewood Valley Community Association*, 154 Ill. App. 3d 482, 487 (1987).

¶ 44 We first address paragraph 7 of the Panish affidavit. Paragraph 7 states:

> "A. Total Maintenance's Contract for Maintenance Required the Performance of 'General Carpentry Repairs,' which Includes Maintenance, Repair, and Replacement of Door Locks.
>
> 7. The contract between the Regal Chateaux Condominium Association and Total Maintenance and cleaning Services, Inc. calls for Total Maintenance and Cleaning Services, Inc. to perform 'general carpentry repairs.' In the maintenance context, carpentry is generally understood as a broad field that encompasses woodwork, repairs to

> doors and windows, and installation and maintenance of door locks. In the fields of construction and building maintenance, the ordinary understanding of the term 'general carpentry repairs' would include the installation, maintenance, repair, and replacement of door locks. The common understanding of the term 'general carpentry repairs' includes maintenance, repair, and replacement of door locks."

The trial court struck this paragraph, determining:

> "[T]he affidavit of Plaintiff's expert, Michael Panish, inappropriately tries to interpret the contract between Regal and Total Maintenance. Furthermore, it is conclusory with regard to Total Maintenance and fails to establish any duty on the part of Total Maintenance outside of the clear and unambiguous terms of its contract. Thus, paragraph 7 of Panish's affidavit as to Total Maintenance is stricken."

¶ 45 The trial court did not err in striking paragraph 7. Where Panish inappropriately interpreted the contract between Regal and Total Maintenance. See Supreme Court Rule 191 (affidavits offered in support of summary judgment "shall not consist of conclusions but of facts admissible in evidence")." Additionally, it is appropriate to exclude this paragraph because it "provide[s] legal conclusions rather than facts," which conclusions are "insufficient to defeat a motion for summary judgment." See *Hagy*, 190 Ill. App. 3d at 843.

¶ 46 Next, all three defendants urge us to strike paragraphs 7-19 and 25-27 of the Panish affidavit as conclusory and noncompliant with Rule 191, as providing inappropriate legal conclusions, and, in general, "provid[ing] no factual or legal basis for a court to conclude that the defendants knew or should have known that the door knob on Building 300 was on the brink of failure," and failing to establish that the defendants otherwise acted negligently.

¶ 47 We provide here a summary of the Panish affidavit. In paragraphs 1 through 6, Panish establishes that he has education, training, and experience that qualify him to provide an expert opinion regarding doorknobs. He explains he is an "expert in the field of construction, with specialized knowledge in the fields of General Contracting; Electrical Contracting; Doors, Locks & Security Equipment Contracting; Cabinet & Millwork Contracting; and Painting & Finish Specialties Contracting." He provides a description of the materials he reviewed in reaching his opinions in this matter, including ten depositions, two affidavits, many discovery documents, and his personal inspection of the property and other original door locks of apparently similar ages. He attached the materials on which he relied to his affidavit, which materials are part of the record on appeal.

¶ 48 In paragraph 7, which we have quoted above, Panish provides his opinion regarding the definition of "general carpentry repairs" and what the parties intended by that term in the contracts. As noted, the trial court struck paragraph 7, and we have affirmed this decision.

¶ 49 Then, Panish describes the different standards and grades of locks. He begins with the premise that, while present-day standards define three grades of door locks and knobs, no such standards existed in 1977 when Regal was built. Despite the absence of these standards, however, Panish says a "fourth grade" of door lock existed at that time, known as a "Builder's Standard." He opines that doorknobs of this standard were "low-quality, inferiorly constructed locks that were intended for only a short period of use, up to three years." He also states that in 1977 "it was commonly accepted within the construction field that a Builder's Standard lock had a rating of 100,000 duty cycles, meaning that they were only expected to endure 100,000 duty cycles before failure." He provides no evidence to support these statements.

¶ 50 He then proceeds to describe the "Builder's Standard" locks he inspected from Regal, making the assumption that these three locks were "just like the subject lock on Collins's unit." Based on his earlier, unsupported duty cycle figures, he calculates how long a lock should last before failing and opines that it was negligence for Regal not to have changed out these locks:

> "12. Builder's standard locks in 1977 were expected to last no longer than three years, after which time they should be replaced. The exercise of ordinary care for the safety of the Regal Chateaux's residents required that the Builder's Standard locks were replaced within three years of installation. The failure to replace the Builder's Standard locks within three years was negligence."

¶ 51 Panish provides more calculations, in which he determines that the Builder's Standard doorknob in question exceeded its duty cycles in 1982 and, since it was kept in service until Collins' fall in 2013, it "likely endured six times as many duty cycles as it had been rated for." Panish then provides the following legal conclusions:

> "15. The exercise of reasonable care for the safety of the Regal Chateaux residents required that the Builder's Standard locks be replaced before they exceed their duty cycle ratings. Allowing the Builder's Standard locks to remain in use at the Regal Chateaux for over 100,000 duty cycles, and especially in excess of 600,000 duty cycles, was negligence.
>
> 16. Under the customs and standards for general carpentry repair and/or building maintenance, the exercise of reasonable care required that a Builder's Standard lock be replaced within its anticipated 100,000 duty cycles, and long before it reached 600,000 duty cycles. The failure to do so was negligence."

¶ 52 The affidavit continues, citing testimony from Regal resident James Crater that the front door of Building 300 required 'extra tension' to open. Panish opined that "[t]his lock had already long exceeded its useful life, and the additional forces required to open the door further stressed the lock and hastened the lock's failure."

¶ 53 Panish also opines that, while he was unable to inspect the subject doorknob, the exemplar doorknobs he examined contained significant corrosion "which would be expected over time in a light-duty lock that was installed on the exterior of a building." He said:

> "This type of corrosion could have resulted in failure of the spring which holds the retention plate in place; the pin which is held in place by the spring could have sheered off; the stem that operates and is an integral part of the lock body could have broken off; or the knob itself could have failed due to corrosion and/or metal fatigue."

¶ 54 The affidavit also includes opinions regarding defendants' maintenance procedures. Panish opines that the "accepted industry standard for maintenance for common-area locks in a multi-unit dwelling" such as Regal "requires that the [doorknob be] disassembled, lubricated, cleaned, and inspected at least twice per year." According to Panish, the inspection process here, in which Busch inspected the doorknob by turning it to see if it was loose or wobbly, was insufficient. He says:

> "This method of inspection is inadequate and fails to meet the acceptable standards for maintenance and inspection and is significantly below the industry standard of care. Total Maintenance did not inspect the locks, maintain them in any fashion, or check them for wear. Through these actions, the Regal Chateaux, EPI, and Total Maintenance fell beneath the industry standard of acceptable maintenance for such door locks, and they were negligent."

He provides no documentation or other evidence to support the existence of this industry standard.

¶ 55 Additionally, Panish opines that the landing itself was smaller than required by the building code. He says he measured it himself and noted that it was of insufficient size, concluding:

> "Were the landing to have been deeper, Collins may have tumbled backward onto the landing and come to rest without ever reaching the stairs, thereby reducing the possibility for injury."

He also alleges a code violation regarding some of the hardware used on the door. The trial court addressed these claims of alleged violations at summary judgment, noting:

> "The Plaintiff attempts to raise another basis of liability for the first time in the response, that the landing size was in violation of the building code and caused the Decedent's fall. While this basis of liability was not alleged in the pleading, even if it had been, the Plaintiff fails to provide an evidentiary basis to support it. Moreover, Mr. Panish's opinions on this are speculative and without factual basis, and do not show that any ordinance violation proximately caused the complained injuries. Accordingly, summary judgment in favor of Defendants Regal and EPI is appropriate."

We agree with the trial court that these alleged building code violations cannot be used as a basis to defeat summary judgment here, where no such violations were plead in plaintiff's complaint. Plaintiff waived this argument and we will not consider it here, as plaintiff may not introduce a new theory of liability in response to a summary judgment motion.

> "The purpose of a complaint is to crystallize the issues in controversy, so that a defendant will know what claims it has to meet. [Citation.] When ruling on a motion for

> summary judgment, the trial court looks to the pleadings to determine the issues in controversy. [Citations.] If a plaintiff desires to place issues in controversy that were not named in the complaint, the proper course of action is to move to amend the complaint. [Citations.] If the plaintiff does not seek to amend, then it cannot move for summary judgment on those issues. *Gold Realty [Group Corp. v. Kismet Café, Inc.*, 358 Ill. App. 3d 675, 679 (2005)] quoting *Pagano [v. Occidental Chemical Corp.*, 257 Ill. App. 3d 905, 911 (1994)]; *Steadfast Insurance Co. v. Caremark Rx, Inc.*, 373 Ill. App. 3d 895, 900 *** (2007) ('A party cannot seek summary judgment on a theory that was never pled in the complaint.')." *Filliung v. Adams*, 387 Ill. App. 3d 40, 51 (2008).

¶ 56 Plaintiff here did not seek to amend her complaint, but instead relied on a new claim at summary judgment, that is, that building code violations existed affecting the safety of the entryway. Plaintiff cannot rely on new theories without first pleading them, and we will not consider the new, unpled claims based on alleged building code violations here.

¶ 57 Panish's affidavit was insufficient under Rule 191(a), which requires in relevant part that affidavits submitted in summary judgment proceedings "shall not consist of conclusions but of facts admissible in evidence." Ill. S.Ct. R. 191(a). First, Panish failed to provide evidence regarding the "fourth grade" standard he references, nor reference literature, a professional association, manufacturer, or building code that recognized or made use of his classification, whether in 1977 or anytime thereafter. He, in fact, provides no supportive documentation as to this theory which makes up the base of his opinions. Nor does Panish articulate how any differences in quality between the alleged Builder's Standard lock are relevant to whether the door knob could pull off of a door in such a manner as to cause injury such as in the case at bar. Although Panish opines that Builder's Standard locks are "inferiorly constructed," he does not

provide statistics or any other factual basis to illuminate whether this inferior construction might cause the doorknob to actually detach from the door itself. Nor does he provide any information other than his personal opinion to support that "it was commonly accepted" that the Builder's Standard locks were "expected to last" for only a few years or for 100,000 duty cycles.

¶ 58 For that matter, Panish does not tell us whether the standards he refers to have ever been applied in Illinois or Cook County.[8]

¶ 59 Panish also fails to establish why he believes the lock was installed in the 1970s. He relies on statements made to him by maintenance man Dave Busch and by EPI representative Stephen Elmore. However, Busch had only been working at Regal for five years, and EPI had only been involved with Regal for about 8 years. No further information was provided regarding dating the doorknobs here.

¶ 60 Panish's opinions on lock maintenance suffer from the same conclusory deficiencies as mentioned above. He claims that the "accepted industry standard" to maintain the lock is to disassemble, lubricate, clean, and inspect it at least two times per year. However, he does not support this statement in any manner, *e.g.*, by even, at minimum, naming an industry organization that recognizes this standard. Nor does Panish opine whether this maintenance plan would have prevented this accident. He only speculates that corrosion "could have" resulted in failure, or the stem "could have" broken off, or the "knob itself could have failed due to corrosion and/or metal fatigue."

¶ 61 In our opinion, Panish's legal conclusions regarding negligence and contract interpretations, as well has his broad opinions offered without support do not give the court facts to assist in deciding this case. See *People ex rel. Vuagniaux*, 284 Ill. App. 3d at 412 (The

[8] From his affidavit and resume, we can see that Mr. Panish is licensed in the State of California.

purpose of affidavits submitted in support of summary judgment is to show whether the issues raised are genuine and whether each party has competent evidence to support his position). After all, it is upon these affidavits that a trial court bases its decision whether to grant summary judgment, and that we, as a reviewing court, are to examine that decision. Regardless, we are cognizant that the entire affidavit is not automatically invalidated. See *Roe,* 339 Ill. App. 3d at 128 (where affidavits contain allegations that did not meet standards of Rule 191(a), only improper portions are to be stricken and remainder may be considered by trial and reviewing courts); accord *Vuagniaux*, 284 Ill. App. 3d at 412 (only "tainted portion [of affidavit] should be excised, as opposed to the entire affidavit" under Rule 191(a)).

¶ 62 Here, then, we strike those portions of the Panish affidavit offering legal conclusions as to negligence. "It is well-settled that an expert witness may not testify with respect to legal conclusions" and such conclusions "cannot raise a genuine issue of material fact" for purposes of summary judgment. *Caracci v. Patel*, 2015 IL App (1st) 133897, ¶ 28 (citing *Todd W. Musburger, Ltd. v. Meier*, 394 Ill. App. 3d 781, 800 (2009)). We strike paragraph 8, which concludes that the doorknob in question was approximately 37 years old, as conclusory; and we strike paragraph 10, which introduces the Builder's Standard inferior-quality argument with no evidentiary support, as conclusory. These opinions are conjecture, which will not support a claim for negligence. See *e.g., McCormick by McCormick v. Maplehurst Winter Sports, Ltd.*, 166 Ill. App. 3d 93, 100 (1988) ("[S]urmise is not an adequate basis for establishing liability for negligence. Nor can an inference of negligence be established on inferences which are themselves speculative in nature."). Because Panish failed to support his Builder's Standard theory with any evidentiary support, we also strike all further reference to the Builder's Standard and the 100,000 duty cycles theory from this affidavit. Additionally, we strike paragraph 26, in

which Panish provides the "industry standard for maintenance," but does not provide evidentiary support for the standard, as conclusory. See, *e.g., Hagy*, 190 Ill. App. 3d at 843 (An expert's opinion may be excluded where it offers no aid to the trier of fact in determining questions at issue, and affidavits that provide legal conclusions rather than facts are insufficient to defeat a motion for summary judgment). Accordingly, we will not consider the excluded portions of the affidavit in our further consideration here.

¶ 63 B. Notice and Foreseeability

¶ 64 We now turn to the question of summary judgment as to notice and foreseeability. In contending that the trial court improperly granted summary judgment in defendants' favor, plaintiff asserts that a genuine issue of material fact existed as to whether defendants had constructive notice of a dangerous condition, but did not fix it, resulting in the fall that caused Collins' death. Defendants respond that they did not have notice of any kind and that the injury was entirely unforeseeable.

¶ 65 Summary judgment is proper when the pleadings, affidavits, depositions and admissions of record, construed strictly against the moving party, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Morris v. Margulis*, 197 Ill. 2d 28, 35 (201); 735 ILCS 5/2-1005 (West 2014). This relief is an appropriate tool to employ in the expeditious disposition of a lawsuit in which " 'the right of the moving party is clear and free from doubt.' " *Morris*, 197 Ill. 2d at 35 (quoting *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986)). In ruling on a motion for summary judgment, the circuit court is to determine whether a genuine issue of material fact exists, not try a question of fact. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). Although the burden is on the moving party to establish that summary judgment is appropriate, the nonmoving party must 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 party opposing a motion for summary judgment "must present a factual basis which would arguable entitle him to a judgment." *Allegro Services Ltd. v. Metropolitan Pier & Exposition Authority*, 172 Ill. 2d 243, 256 (1996). While he need not prove his case at this preliminary stage, the nonmoving party must, nevertheless, present some factual basis to support his claim and he is not simply entitled to rely on the allegations in his pleading in order to raise a genuine issue of material fact. See *Rucker v. Rucker*, 2014 IL App (1st) 132834, ¶ 49, and *CitiMortgage, Inc. v. Bukowski*, 2015 IL App (1st) 140780, ¶ 19. This basis must recite facts and not mere conclusions or statements based on information and belief. See *In Interest of E.L.*, 152 Ill. App. 3d 25, 31 (1987); see also *Morrissey v. Arlington Park Racecourse, LLC*, 404 Ill. App. 3d 711, 724 (2010) ("nonmoving party must present a *bona fide* factual issue and not merely general conclusions of law"). And, if his allegations of fact are lacking, any documents provided will be held insufficient to defeat the motion for summary judgment. See *E.L.*, 152 Ill. App. 3d at 31-32. Moreover, while a plaintiff need not prove his entire case during summary judgment, he must present some evidentiary facts to support the elements of his cause of action. See *Bellerive v. Hilton Hotels Corp.*, 245 Ill. App. 3d 933, 936 (1993). If the plaintiff fails to establish even one element of the cause of action, summary judgment in favor of the defendant is wholly proper. See *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 163 (2007).

¶ 66 When determining whether a genuine issue of material fact exists, courts construe the pleadings liberally in favor of the nonmoving party. *Williams*, 228 Ill. 2d at 417. "Summary judgment is to be encouraged in the interest of prompt disposition of lawsuits, but as a drastic measure it should be allowed only when a moving party's right to it is clear and free from doubt." *Pyne v. Witmer*, 129 Ill. 2d 351, 358 (1989). "If the plaintiff fails to establish any element of the

cause of action [asserted,] summary judgment for the defendant is proper." *Governmental Interinsurance Exchange v. Judge,* 221 Ill. 2d 195, 215 (2006). We review summary judgment rulings *de novo* (*Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 113 (1995)) and we will only disturb the decision of the trial court where we find that a genuine issue of material fact exists. *Addison v. Whittenberg,* 124 Ill. 2d 287, 294 (1988). 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 *In re Estate of Ciesiolkiewicz*, 243 Ill. App. 3d 506, 510 (1993). In our review, we may affirm on any basis found in the record regardless of whether the trial court relied on those grounds or whether its reasoning was correct. *Illinois State Bar Ass'n Mutual Insurance Co. v. Coregis Insurance Co.*, 355 Ill. App. 3d 156, 163 (2004); see also *Pepper Construction Co. v. Transcontinental Insurance Co.*, 285 Ill. App. 3d 573, 576 (1996).

¶ 67 A possessor of land owes its invitees a common law duty of reasonable care to maintain its premises in a reasonably safe condition (*Deibert v. Bauer Brothers Construction Co.*, 141 Ill. 2d 430, 437-440 (1990)), but no legal duty arises unless the harm is reasonably foreseeable (*Renslow v. Mennonite Hospital,* 67 Ill. 2d 348, 354055 (1977)); *VanGelderen v. Hokin,* 2011 IL App (1st) 093152, ¶ 15 (citing Restatement (Second) of Torts § 343 (1965)) (A possessor of land may be subject to liability for physical harm caused to his invitees by a condition on the land if he has actual or constructive knowledge of the defective condition); *Simich v. Edgewater Beach Apartments Corp.*, 368 Ill. App. 3d 394, 408 (2006) (Under the theory of premises liability, a landowner may be liable for injuries caused to people coming onto the land even where the condition was not caused by the landowner, but only where the landowner had notice of the condition causing the injury). This court has explained:

"The existence of a duty is a question of law turning on whether, based on the parties' relationship to one another, public policy should impose a duty on the defendant to act with reasonable care toward the plaintiff. *LaFever [v. Kemlite Co.*, 185 Ill. 2d 380, 388-89 (1998)]. Factors to consider in deciding whether to impose a duty are: (1) the reasonable foreseeability of the injury; (2) the likelihood of the injury; (3) the burden on the defendant to protect against the injury; and (4) the consequences of placing that burden on the defendant. *LaFever*, 185 Ill. 2d at 388-89 ***. 'When, as here, plaintiff alleges he was injured by a condition on defendant's property * * *, we decide the foreseeability prong of the duty test by reference to section 343 of the Restatement (Second) of Torts.' *LaFever*, 185 Ill. 2d at 389 ***.

Section 343 of the Restatement reads:

'A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.' Restatement (Second) of Torts § 343 (1965)." *VanGelderen*, 2011 IL App (1st) 093152, ¶ 16.

Accordingly, under both Illinois Law and the Restatement (Second) of Torts, to sustain a claim for premises liability, the plaintiff must establish that the injury was foreseeable by the defendant

in that the defendant had ether actual notice or knowledge of the injury-causing condition and risk, or would have had notice or knowledge with the exercise of due care.

¶ 68 The relevant inquiry for plaintiff's negligence claims are similar for purposes of this case. To properly state a cause of action for negligence, the plaintiff must show that the defendant owed her a duty, that the defendant breached that duty, and that this breach was the proximate cause of his resulting injuries. See *Heastie v. Roberts*, 226 Ill. 2d 515, 556 (2007); *Bermudez v. Martinez Trucking*, 343 Ill. App. 3d 25, 29 (2003). The "touchstone" of a duty inquiry "involves four factors: (1) the reasonable foreseeability of the injury; (2) the likelihood of the injury; (3) the magnitude of the burden of guarding against the injury; and (4) the consequences of placing the burden on the defendant." *Vancura v. Katris*, 238 Ill. 2d 352, 383 (2010) (citing *Marshall v. Burger King Corp*., 222 Ill. 2d 422, 463037 (2006)). "[I]t is axiomatic that no legal duty arises unless the harm is reasonably foreseeable." *Keating v. 68th and Paxton, LLC*., 401 Ill. App. 3d 456, 471 (2010).

¶ 69 The parties do not dispute that defendants owed invitee plaintiff a duty to exercise ordinary care in maintaining its premises in a reasonably safe condition. See *Ward v. K Mart Corp*., 136 Ill. 2d 132, 141 (1990). Rather, the question in the instant case is whether the plaintiff can establish that the defendants breached this duty. We turn, then, to the questions of notice and foreseeability, as Illinois law is clear that, in the absence of notice or foreseeability, a plaintiff's causes of action for either premises liability or negligence will fail for lack of duty. Of course, as we consider these questions, we do so without evidence concerning the quality of the locks, their expected service life in years or duty cycles, or the adequacy of maintenance as to biannual disassembly and cleaning, all of which were stricken from the Panish affidavit.

¶ 70 Plaintiff's main arguments concerning notice and foreseeability are the same. In the case at bar, there is no evidence that the condominium had actual notice of the hazardous condition, and no argument is made to that effect. Instead, plaintiff contends defendants had constructive notice where the doorknob on building 300 was of low quality, that it was old and past its expected service life, that the door knobs at Regal were generally not properly maintained, and that other door knobs on the premises were beginning to fail.

¶ 71 Where a plaintiff alleges constructive notice, the time element is a material factor, and "[c]onstructive notice can *** be shown where the dangerous condition is shown to exist for a sufficient length of time to impute knowledge of its existence to the defendants. *Ishoo v. General Growth Properties, Inc.*, 2012 IL App (1st) 110919, ¶ 28 (citing *Pavlik v. Wal-Mart Stores, Inc.*, 323 Ill. App. 3d 1060, 1065-66 (2001)); *Buford v. Chicago Housing Authority*, 131 Ill. App. 3d 235, 246 (1985) ("Constructive notice is established where a condition has existed for such a length of time, or was so conspicuous that authorities, by exercising reasonable care and diligence, might have known of it"). "Factors to be considered are the conspicuity of the defect and the length of time it existed." *Palermo v. City of Chicago Heights*, 2 Ill. App. 3d 1004, 473 (1971). Thus, "there is no liability for landowners for dangerous or defective conditions on the premises in the absence of the landowner's actual or constructive knowledge. If the gist of a complaint is that the landowner did not create the condition, the plaintiff must be required to establish that the landowner knew or should have known of the defect." *Tomczak v. Planetsphere, Inc.*, 315 Ill. App. 3d 1033, 1038 (2000). At issue here is whether there is a genuine issue of fact that defendants, by the exercise of reasonable care, should have discovered the dangerous condition of the door handle.

¶ 72 Here, there is no evidence in the record that defendants knew or should have known about any dangerous condition regarding the doorknob in question that would have caused the doorknob to separate from the door, nor any evidence suggesting the alleged dangerous condition had existed for such a long period of time so as to impute knowledge of its existence to the defendants. See *Ishoo*, 2012 IL App (1st) 110919, ¶ 28. Nobody testified that the subject doorknob was loose or wobbly in any way. Nobody testified there was any previous trouble regarding this doorknob. In fact, EPI Director of Management Stephen Elmore testified that he performs regular, monthly, on-site inspections of the property during which it is his "custom and practice" to inspect every door and door handle system within the Regal property. He does so by pulling on the door handle and moving it "back and forth to see if it wobbles or not[.]" His most recent inspection was just 16 days before Collins' fall, and he did not discover any defective door handles during that inspection.

¶ 73 In addition, cleaning personnel were in building 300 on the morning of Collins' fall and did not discover any problems with the door knobs. Sheryl Busch testified that she and her cleaning assistants enter and/or exit every door of the buildings they clean, including building 300. They had been cleaning the buildings at Regal weekly for 20 years and had never noticed a problem with a door handle. She testified that, if they had noticed a problem, they would have immediately notified EPI. She agreed that "[w]ith respect to this particular doorknob, it functioned appropriately and as [I] would have expected every time [I] used it coming from the outside in for the 22 years that [I've] been doing this up to and including the morning of November 20th of 2013[.]" Total Maintenance cleaner Leslie Van Ginder also testified that she had cleaned the common areas of the Regal buildings, including building 300, for the past eight years, and had never had a problem with the door handle in question.

¶ 74 Total Maintenance owner Dave Busch also testified that, in providing general maintenance for Regal, he performs daily "rounds" of the property during which he looks out for defective conditions on the property. Although he does not inspect the door handles, he had never seen a door handle fail at Regal and had never heard of a door handle falling off at the Regal property. He testified that he had tightened a screw on a loose doorknob on a different building. He uses the subject exterior door handle approximately once per week and agreed that it "is a door handle that [I] had never observed, felt, or known of having any problems with respect to being loose or otherwise dysfunctional[.]"

¶ 75 Other Regal residents also testified that they had never experienced any problems with the subject door handle. Todd Shaer testified he had lived in building 300 for most of the past 19 years and had never noticed any problems with the door handle. He had, in fact, used the door handle without incident twice the day of injury, including entering the building via the subject door approximately 15 minutes before Collins fell.

¶ 76 Neighbor James Crater also testified he had lived at Regal for many years and never noticed an issue with the subject door handle. He described "tension" on the door where, after opening the door with no trouble using the door handle, there would be a bit more tension than expected in order to fully open the door. He never reported this extra tension to the property management company. He clarified that the tension he mentioned was "nothing with the doorknob [but] tension on the door[.]" He had never heard of any issues with any other doors or door handles on any other buildings at Regal, and never had any "issues relating to any doorknobs either at the exterior doors" of building 300 or any other buildings at Regal. He used the subject door handle the day before Collins' fall and did not notice any problems with it. He also testified that, over the years, he had seen Collins use the door without trouble, and Collins

had never complained to him about anything having to do with the functioning of the door handle.

¶ 77 The subject door handle continued to work satisfactorily up to the very morning of Collins' accident. No evidence indicated that any individual from Regal, EPI, or Total Maintenance observed any unsafe condition prior to plaintiff's fall. Given the number of years that the door handle was in use without incident and the absence of any evidence that would have alerted defendants to the existence of any potentially dangerous condition, there is no genuine issue of material fact as to whether defendants had constructive notice of the dangerous condition of the door handle. See *Britton v. University of Chicago Hospitals*, 382 Ill. App. 3d 1009, 1012 (2008) ("[W]here a structure not obviously dangerous has been in daily use for an extended period of time and has proven adequate, safe, and convenient for the purposes to which it was being put, it may be further continued in use without the imputation of negligence."). Summary judgment was proper.

¶ 78 Additionally, plaintiff contends that summary judgment was error where there remains a material question of fact as to proximate cause. She argues that Collins presented circumstantial evidence that defendants' failure to properly maintain and replace the subject door handle resulted in the handle failing and subsequent injury to Collins, that the issue of proximate cause should be resolved by the jury, and that the trial court should not have "disregarded Panish's "might or could" opinion testimony. Plaintiff also contends that summary judgment as to Total Maintenance was error where there remains a material question of fact as to the meaning of "general carpentry repairs" in its contract with Regal. Specifically, plaintiff contends that Total Maintenance was obligated to repair the doorknob and failed to do so, resulting in injury to Collins. Plaintiff also contends that Busch of Total Management "should have repaired or

replaced the inferior, overused, and dangerous lock before it injured Collins." However, due to our determinations that: (1) the portions of the Panish affidavit relevant to this argument are stricken; and (2) there was no notice here, we find it unnecessary to address these arguments. See *Bagent,* 224 Ill. 2d at 163 (If the plaintiff fails to establish even one element of the cause of action, summary judgment in favor of the defendant is wholly proper).

¶ 79 Based on the lack of evidence here that defendants had actual or constructive notice of a dangerous condition, plaintiff is unable to demonstrate that defendants were negligent. Accordingly, liability may not be imposed and the defendants were entitled to summary judgment.

¶ 80 III. CONCLUSION

¶ 81 For all of the foregoing reasons, we affirm the court's entry of summary judgment in favor of all defendants.

¶ 82 Affirmed.