FIFTH DIVISION
June 23, 2017

No. 1-16-0103

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

VESNA MACKIC,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	No. 14 L 8677
	)	
WAL-MART STORES, INC.,	)	
	)	Honorable
Defendant-Appellee.	)	Sheryl A. Pethers,
	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Gordon and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court of Cook County did not err in granting summary judgment to defendant where plaintiff failed to present an adequate factual basis to support her negligence claim and did not issue an improper *ex parte* order arising from *ex parte* communications.

¶ 2 Plaintiff Vesna Mackic appeals an order of the circuit court of Cook County granting summary judgment in favor of defendant Wal-Mart Stores, Inc., in a negligence action arising from a slip and fall in a store owned by defendant. On appeal, plaintiff argues the trial court

erred in granting summary judgment because (1) a genuine issue of fact exists as to whether a greasy substance on the floor caused her to fall and (2) "the evidence presented justified the use at trial of [Illinois Pattern Jury Instruction, Civil, No. 5.01 (3d ed. 1995) (IPI 5.01)]." Plaintiff also contends that a discovery closure order entered on July 16, 2015, constituted an improper *ex parte* order because it was issued in the absence of plaintiff's counsel during a status call. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The following facts are adduced from the record on appeal. On October 28, 2012, plaintiff was shopping and slipped and fell inside defendant's discount retail store (the store) located at the Mount Prospect Plaza in Mount Prospect, Illinois. On November 29, 2012, plaintiff's counsel forwarded to defendant's claim handler, Claims Management, Inc., a notice of representation and attorney's lien. Approximately a year and a half later, on May 16, 2014, plaintiff sent a letter to defendant's claim handler, requesting that "all information and materials related to [plaintiff]" including "all electronically-stored information" such as "video recording[s]" be retained.

¶ 5 Thereafter, on August 19, 2014, plaintiff filed a one-count complaint against defendant in the law division of the circuit court of Cook County. In her complaint, plaintiff sought monetary damages exceeding $50,000 for injuries incurred as a result of slipping and falling at the store. Plaintiff alleged defendant owed her a duty to maintain the premises in a reasonably safe condition and to not create or allow any dangerous conditions to exist on the premises. Plaintiff claimed defendant breached that duty by allowing a "slippery substance" to be present on the floor of the store, when it knew or should have known the "slippery substance" created an unreasonable risk of harm to customers, and by failing to warn plaintiff of the dangerous

condition. According to plaintiff, she slipped, fell, and suffered injuries as a direct and proximate result of defendant's negligence. In its answer, defendant denied plaintiff was injured as a result of its wrongdoing. Defendant also raised as an affirmative defense that, if plaintiff was in fact injured, the alleged injuries were sustained as a direct and proximate result of her breach of duty to exercise ordinary care for her own safety.

¶ 6 A. Discovery

¶ 7 The parties then proceeded to discovery. Beginning in October 2014 through May 2015, seven case management conferences were conducted and deadlines were set for the completion of Rule 213(f)(1) fact witness depositions. Ill. S. Ct. R. 213 (eff. Jan. 1, 2007). During that time period, the trial judge allowed two or more extensions of time and the parties were to complete their depositions by May 26, 2015. On December 3, 2014, defendant responded to plaintiff's production requests and disclosed that it possessed a surveillance video depicting plaintiff's fall. Thereafter, on March 24, 2015, plaintiff's counsel forwarded a letter to defendant's counsel which stated, "this correspondence serves as our official request for production of the video surveillance material depicting [plaintiff's] accident, together with the footage of the accident area from 00:05 am to 12:55 pm of the day of the loss, October 28, 2012."[1]

¶ 8 In her discovery deposition, plaintiff testified that on the day of the incident, she was shopping at the store. After paying for her items at a cash register, she turned left toward the exit. She then slipped and fell on the floor. When asked what caused her to fall, she answered,

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[1] The production requests that plaintiff sent to defendant prior to December 3, 2014, and defendant's response on December 3, 2014, are not included in the record on appeal. However, the letter dated March 24, 2015, indicates that on December 3, 2014, defendant responded to plaintiff's production requests and further communicated it was in possession of video surveillance footage covering the incident. Further, neither party disputes the existence of these requests and response. Accordingly, we accept that plaintiff made the requests and defendant responded on December 3, 2014, as indicated in the letter dated March 24, 2015.

"[n]ot sure." When asked whether there was any liquid on the floor, she answered, "I'm not sure." She testified that the store was "well lit" and there was nothing distracting her at the time of her fall. She also acknowledged that she did not observe anything on the ground, which caused her to fall.

¶ 9 Plaintiff further testified that after her fall, she felt a "greasy substance" on her hands. She did not recall whether there were any "spots" on her clothing after she fell. She did not know what the substance was. She was "not sure" whether the substance was water, or whether it was clear or had a color. She did not recall the texture of the substance. She did not know how long the substance was on the floor prior to her fall. She did not know whether defendant's store employees were aware of the substance on the floor. She was "not sure" whether she heard any other customers speaking about the alleged substance on the floor prior to the incident. She was also "not sure" whether she heard any intercom announcements in the store about a greasy substance being on the floor. While she was "not sure" where the alleged greasy substance had come from or whether there was anything nearby that may have caused the substance to be on the floor, she testified it had "[p]robably" come from the floor.

¶ 10 Plaintiff acknowledged that, after her fall, she had completed and signed a customer statement, which was admitted into evidence. In her handwritten customer statement, she stated, "my right leg just slip and I fall on the floor. I think I twisted my ankle." She agreed that the written statement did not indicate what had caused her to fall. She claimed she did not mention the greasy substance in her customer statement because she was in so much pain. She also could not recall whether she informed any store employees about "how [she] fell."

¶ 11 Daniel Caruso (Caruso) testified during his deposition that, on the day of the incident in question, he was employed by defendant as an assistant manager of the store. That day, he

received a call that there had been an accident. When he approached plaintiff, she informed him the cashier had not handed her the receipt properly and she dropped it and then fell on the receipt. Plaintiff did not mention a greasy substance on the floor. Caruso also did not notice any stains or spots on the plaintiff's person. After plaintiff left the store, Caruso examined the floor where plaintiff fell but "didn't notice anything" including the receipt she allegedly fell on. Caruso further testified that, prior to plaintiff's fall, no customer had informed him of any foreign substance on the floor near the cash register where the incident occurred. On the same day, Caruso completed a report which indicates that plaintiff "said she slipped and hurt her ankle." The report was admitted into evidence. The report does not mention that plaintiff fell as a result of a foreign substance on the floor. Caruso noted his signature appears on the report, which confirms that he reviewed the report with the customer, *i.e.*, plaintiff.

¶ 12 Bertha Camerena (Camerena) testified at a deposition that she was employed by defendant as an asset protection manager. She confirmed that a camera is positioned over each cash register at the store and approximately four cameras are positioned to capture a wide corridor toward the store's exit.

¶ 13 The surveillance video recording viewed by the trial court depicts an overhead view of the cash register and surrounding area where plaintiff made her purchase. The surface of the white floor as reflected in the video contains no visible spots, spills, or foreign substances on it. The run time of the video commences at 3:07 p.m., approximately an hour before the incident and concludes at 5:07 p.m., nearly an hour after plaintiff's fall. In the video, at 4:11 p.m., plaintiff approaches the cash register and pays for her items. At 4:12 p.m., the cashier hands plaintiff her change and receipt. Plaintiff then proceeds to turn left and move away from the register. Seconds later, plaintiff is seen falling to the ground and only her legs and feet are

depicted in the video as she is falling. It should be noted that, in the video, no subsequent remedial measures are taken by defendant nor is there evidence that anyone else slipped or fell before or after plaintiff's incident on the day in question.

¶ 14 In June 2015, the instant case was transferred to the municipal division of the circuit court of Cook County because plaintiff's damages did not appear capable of exceeding the law division jurisdictional amount of $50,000. During a status call on July 9, 2015, the trial court entered an order scheduling a status call on July 16, 2015, to determine the discovery closure date. In that order, which was prepared by plaintiff's counsel, the parties were directed to bring all discovery orders that had previously been entered in the law division. On that same day, plaintiff served its first supplemental request for production on defendant, asking that "*[a]ll* surveillance video footage from *all* surveillance cameras covering the subject occurrence area" "from 09:00 am until 08:00 pm of October 28, 2012" be produced. (Emphases added.)

¶ 15 A week later, on July 16, 2015, seven minutes before the status call, plaintiff's counsel emailed defendant's counsel, requesting a continuance due to an emergency. Defendant's counsel communicated the request to the trial court. The trial judge, however, proceeded to review the prior discovery orders. Then based on her review, the trial judge entered an order setting a discovery closure date of July 16, 2015 (discovery closure order) indicating that all discovery was closed with the exception of Rule 213(f)(2) depositions of expert witnesses. Ill. S. Ct. R. 213 (eff. Jan. 1, 2007). Later, defendant's counsel forwarded a copy of the discovery closure order to plaintiff's counsel.

¶ 16 Thereafter, on August 14, 2015, plaintiff filed a petition to vacate the July 16, 2015, discovery closure order (petition to vacate). In the petition, plaintiff claimed (1) she needed to conduct additional discovery regarding the surveillance video recording maintained by

defendant, and that (2) the July 16, 2015, discovery closure order constituted an improper *ex parte* order because it was issued in plaintiff's counsel's absence. Following a hearing, the trial court denied plaintiff's petition to vacate.

¶ 17 Thereafter, plaintiff filed a timely motion to reconsider. In that motion, plaintiff again asserted the July 16, 2015, discovery closure order constituted an improper *ex parte* order, and should thus be vacated. Plaintiff's request was denied after the trial court conducted a hearing on the motion.

¶ 18 B. Summary Judgment

¶ 19 Then defendant filed a motion for summary judgment and in support of its motion, submitted the depositions of plaintiff and Caruso, plaintiff's customer statement, and the surveillance video recording of the incident.

¶ 20 After the matter was fully briefed and argued, on December 10, 2015, the trial court granted defendant's motion for summary judgment. In granting the motion, the trial court noted plaintiff had testified she did not see any slippery substance on the floor and that she did not know what had caused her to fall. The trial court also added, "there is not one shred of evidence, not one iota of evidence that [defendant] had notice of a slippery substance, assuming there was a slippery substance. None." This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 On appeal, plaintiff argues the trial court erred in granting summary judgment because (1) a genuine issue of fact exists as to whether a greasy substance on the floor caused her to fall and (2) "the evidence presented justified the use at trial of [IPI 5.01]." Plaintiff also contends that a discovery-closure order dated July 16, 2015, constituted an improper *ex parte* order because it was issued in the absence of plaintiff's counsel during a status call.

¶ 23 A. Summary Judgment

¶ 24 We begin our analysis by considering the appropriate standard of review. Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Adames v. Sheahan*, 233 Ill. 2d 276, 295 (2009). In determining whether a genuine issue of material fact exists, the court must view all pleadings, depositions, admissions, exhibits, and affidavits strictly against the movant and in the light most favorable to the nonmoving party. *General Casualty Insurance Co. v. Lacey*, 199 Ill. 2d 281, 284 (2002). A reviewing court will not reverse an order granting summary judgment unless it finds that a material question of fact is present and the defendant is not entitled to judgment as a matter of law. *Chmielewski v. Kahlfeldt*, 237 Ill. App. 3d 129, 137 (1992). While a plaintiff need not prove her entire case to survive a motion for summary judgment, she must present a factual basis to support the elements of her cause of action. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002). We review the trial court's grant of summary judgment *de novo*. *Palm v. 2800 Lake Shore Drive Condo. Ass'n*, 2013 IL 110505, ¶ 28. Under *de novo* review, we perform the same analysis that a trial court would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 25 1. Negligence

¶ 26 Plaintiff argues summary judgment was improper because a genuine issue of fact exists as to whether a greasy substance on the floor caused her to fall. Plaintiff maintains her testimony creates a question of fact for the jury, due to the fact that after she fell she noticed a greasy substance on her hand which had not been present prior to the incident.

¶ 27 In response, defendant argues summary judgment was properly granted as plaintiff failed to establish that (1) there was a greasy substance on the floor where she fell, (2) defendant

caused the alleged substance to be on the floor, and (3) defendant's employees had actual or constructive notice of the alleged substance prior to the incident.

¶ 28 To prevail on a negligence claim, the plaintiff must establish that the defendant owed her a duty, the duty was breached, and the plaintiff suffered an injury as a proximate result of that breach. *Newsom-Bogan v. Wendy's Old Fashioned Hamburgers of New York, Inc.*, 2011 IL App (1st) 092860, ¶ 14. Summary judgment for the defendant is proper if the plaintiff cannot establish each element of her cause of action. *Wallace v. Alexian Brothers Medical Center*, 389 Ill. App. 3d 1081, 1085 (2009). While proximate cause is generally a question of fact, it becomes a question of law when the alleged facts indicate that the plaintiff would never be entitled to recover. *Keating v. 68th & Paxton, LLC*, 401 Ill. App. 3d 456, 472 (2010). Further, liability cannot be predicated upon mere conjecture or surmise as to the cause of an injury. *Mann v. Producer's Chemical Co.*, 356 Ill. App. 3d 967, 974 (2005). Accordingly, absent affirmative and positive evidence that defendant may have proximately caused plaintiff's injury, plaintiff has failed to establish a genuine issue of material fact exists and that summary judgment was improper. *Chmielewski*, 237 Ill. App. 3d at 137; *Keating*, 401 Ill. App. 3d at 473.

¶ 29 We find *Palumbo v. Frank's Nursery & Crafts, Inc.*, 182 Ill. App. 3d 283 (1989), to be instructive. There, a customer claimed she slipped and fell on water which had dripped from nearby poinsettias when she was in defendant's store. *Id.* at 288. The customer's husband had noticed that her coat, which she had been wearing when she fell, was wet after the incident. *Id.* at 284. There was, however, no evidence as to when the poinsettias were last watered prior to the customer's fall. *Id.* Further, the customer and her only eyewitness testified they did not notice any water on the floor when she fell. *Id.* In addition, two of defendant's employees testified they had examined the scene after the incident but did not find any liquid or debris on

the floor. *Id*. In its determination, the *Palumbo* court noted the customer "only speculates that the poinsettias dripped, but there is sworn testimony that the floor was dry." *Id*. at 288. The *Palumbo* court further found there was no evidence to establish what caused her to fall, and concluded that summary judgment in favor of defendant was properly granted. *Id*.

¶ 30 Similarly, the evidence plaintiff relies on here to support her argument that she slipped on a greasy substance on the floor, is entirely speculative and does not create a genuine issue of material fact. Plaintiff claims she noticed a greasy substance on her hand that was not present prior to her fall. She testified the alleged substance was "probably" from the floor and claims it caused her to fall. Based on our review of the record, however, plaintiff testified she did not observe the alleged substance on the floor either before or after the incident. She further testified she was "[n]ot sure" what had caused her to fall. After the incident, plaintiff completed a customer statement about the incident but did not indicate what had caused her to fall. She also testified she did not recall whether she had notified any of defendant's employees about the alleged substance on the floor. Additionally, no other witness observed any foreign substance on the floor where plaintiff slipped. On the contrary, the video evidence which displays the area in question for approximately over an hour prior to the incident and nearly an hour following the incident, does not evince any visible condition on the floor that may have caused plaintiff to fall. Caruso also testified that after plaintiff left the store, he checked the area where plaintiff fell and did not find any foreign substance or liquid on the floor. As aforementioned, liability cannot be predicated "upon surmise or conjecture as to the cause of the injury." *Kimbrough v. Jewel Companies, Inc.*, 92 Ill. App. 3d 813, 817 (1981). Like the customer in *Palumbo*, plaintiff only speculates that the alleged greasy substance originated from the floor where she fell, but there is sworn testimony here that there was no foreign substance or liquid the floor. See *Palumbo*, 182

Ill. App. 3d at 288. There is also no evidence to demonstrate what caused plaintiff to fall, and therefore summary judgment in favor of defendant was appropriate. *Id.*

¶ 31 In addition, even if plaintiff presented evidence that she slipped and fell on a foreign substance, there is no evidence to connect defendant to the presence of the alleged substance. To establish negligence on the part of the defendants, plaintiff need only present facts that her fall was caused by a condition on the floor attributable to defendant. *Ishoo v. General Growth Properties, Inc.*, 2012 IL App (1st) 110919, ¶ 21. When a business invitee is injured by slipping on the premises, liability on the part of the defendant may arise if (1) the substance was placed there by the negligence of the proprietor or his servants or (2) the proprietor or his servants knew of its presence or the substance was there a sufficient length of time so that, in the exercise of ordinary care, its presence should have been discovered, *i.e.*, the proprietor had constructive notice of the substance. *Thompson v. Economy Super Marts, Inc.*, 221 Ill. App. 3d 263, 265 (1991). Thus, if the substance was on the premises through the acts of third persons or by an unknown cause, the time element to establish knowledge or notice to the proprietor is a material factor. *Id.*

¶ 32 Here, plaintiff fails to present evidence to support either of these theories of recovery. Plaintiff testified she did not know how the substance came to be on the floor and that she did not notice anything nearby that may have caused a foreign substance to be on the floor. Thus, there is no direct evidence that one of defendant's employees caused the alleged substance to be there. Further, plaintiff testified she had no knowledge of whether any of defendant's employees knew of the alleged greasy substance on the floor prior to her fall. She also testified that she did not hear any intercom announcements or customers speaking about a greasy substance on the floor prior to her fall. There was no evidence of any accidents giving rise to notice of a

dangerous condition prior to her fall. In addition, plaintiff testified she did not know how long the alleged substance had been on the floor before the incident. In the absence of any evidence tending to show how long the alleged substance was on the floor before plaintiff fell, there is no basis for a jury to conclude the substance had been there long enough that defendant's employees had constructive notice. Accordingly, there is no genuine issue of material fact for a jury to decide and defendant is entitled to summary judgment. *Keating*, 401 Ill. App. 3d at 474 (summary judgment for the defendant was proper when the plaintiff did not sustain the burden of making a *prima facie* case).

¶ 33 2. 5.01 Jury Instruction

¶ 34 Plaintiff further contends summary judgment was improper because "the evidence justified the use at trial of [IPI 5.01]." IPI 5.01 instructs the jury that if a party fails to produce evidence within the party's control, it may infer that the evidence was adverse to the party. *Koonce ex rel. Koonce v. Pacilio*, 307 Ill. App. 3d 449, 461 (1999). Plaintiff appears to argue that based on defendant's failure to produce video footage from all surveillance video cameras in the store, she was entitled to a similar inference at the summary judgment stage. According to plaintiff, such an inference should have precluded summary judgment in favor of defendant.

¶ 35 Generally, IPI 5.01 is warranted when (1) certain evidence was under the control of the party and could have been produced with the exercise of due diligence, (2) the evidence was not available to the adverse party, (3) a reasonably prudent person under the same or similar circumstances would have produced the evidence if he believed it would have been favorable to him, and (4) there was no reasonable excuse for the failure to produce the evidence. *Id.* This instruction, however, is not warranted if the evidence that has not been produced is merely cumulative of facts already established. *Chiricosta v. Winthrop-Breon*, 263 Ill. App. 3d 132, 157

(1994). The decision to tender IPI 5.01 is in the sound discretion of the circuit court, and is subject to reversal only where there is a clear abuse of discretion. *Id.*

¶ 36 In the case at bar, we initially note plaintiff failed to cite any relevant authority justifying the application of IPI 5.01 in a trial court's decision to grant summary judgment. In this vein, we find plaintiff's reliance on *Braverman v. Kucharik Bicycle Clothing Co.*, 287 Ill. App. 3d 150 (1997), to be misplaced. There, a cyclist was injured while participating in a race and brought an action against the manufacturer of his safety helmet, claiming that it was defectively designed. *Id.* at 152. During discovery, however, the cyclist was not able to produce the helmet involved in the accident and the trial court granted summary judgment in favor of the manufacturer. *Id.* In reversing the trial court's decision, the *Braverman* court noted there was evidence that the manufacturer's products were defective and was a proximate cause of the cyclist's injury, and concluded the cyclist raised genuine issues of material fact to preclude summary judgment. *Id.* at 157-58. In *Braverman*, unlike plaintiff's claim, the court referenced IPI 5.01 only to explain that the manufacturer would not be unduly prejudiced at trial, as the instruction would allow the jury to consider the cyclist's failure to produce the helmet. *Id.* at 158-59. Thus, contrary to plaintiff's contention, *Braverman* does not stand for the proposition that "the destroyed evidence and [IPI 5.01] create[s] a *prima facie* case that defeat[s] summary judgment." See *id.*

¶ 37 Further, even if we were to employ the presumption contained in IPI 5.01 at the summary judgment stage, plaintiff fails to establish that defendant did not have a reasonable excuse for its failure to produce the additional footage. Plaintiff claims defendant "knew within days of her injury that [plaintiff] had retained a lawyer, and later, *** received a formal request to retain video." The record before us, however, suggests otherwise. On October 28, 2012, plaintiff fell at defendant's store. Thereafter, on November 29, 2012, plaintiff's counsel forwarded a notice

of representation and attorney's lien to defendant's claim handler. Plaintiff subsequently forwarded production requests to defendant and on December 3, 2014, defendant responded to the requests. As previously noted, however, these requests and the response are not included in the record on appeal. In the absence of a complete record, any doubts arising from an incomplete record are resolved against the plaintiff, as the appellant. *Foutch v. O'Bryant*, 99 Ill.2d 389, 392 (1984). Thus, based on the limited record before us, it was not until May 16, 2014, that plaintiff's counsel sent defendant's counsel a letter, requesting that defendant "retain *** all information and materials related to [plaintiff]," including "all electronically-stored information" such as "video recording[s]." Even this letter, however, did not specifically request that video footage from *all* surveillance cameras in the area of the incident be preserved.

¶ 38 Thereafter, a year later on March 24, 2015, plaintiff's counsel sent defendant's counsel a letter which stated, "this correspondence serves as our official request for production of the video surveillance material depicting [plaintiff's] accident, together with the footage of the accident area from 00:05 am to 12:55 pm of the day of the loss, October 28, 2012." Again, plaintiff did not specifically request that video footage from *all* surveillance cameras be produced. In fact, it was not until approximately three years after the incident, on July 9, 2015, that plaintiff sent its first supplemental request for production to defendant, indicating that, "[a]ll surveillance video footage from *all* surveillance cameras covering the subject occurrence area" "from 09:00 am until 08:00 pm of October 28, 2012" be produced. (Emphasis added.) By this time, however, videos from the other surveillance cameras were no longer preserved. We thus find defendant had a reasonable excuse for not producing footage from the other surveillance cameras. See *Skelton v. Chicago Transit Authority*, 214 Ill. App. 3d 554, 586 (1991) (trial court did not abuse discretion in refusing to issue IPI 5.01 for transit authority's failure to produce train schedules, in

light of transit authority's consistent and vigorous argument that train schedules were not specifically requested by passenger until well after the schedules had been destroyed). Accordingly, even if we were to employ the presumption contained in IPI 5.01, the record presents no genuine issue of material fact, and thus, defendant was entitled to summary judgment. *Chmielewski*, 237 Ill. App. 3d at 137.

¶ 39 Lastly, defendant asserts summary judgment is improper because "it would prevent [plaintiff] from pursuing a spoliation-of-evidence count in the same case as the underlying negligence case." It is well settled that an unsuccessful party may not advance a new theory of recovery for the first time on appeal. *Hudkins v. Egan,* 364 Ill. App. 3d 587, 592 (2006). If the issue was not raised in the trial court, the party has not properly preserved the issue, which " 'results in forfeiture of that issue on appeal.' " *Stuckey v. The Renaissance at Midway,* 2015 IL App (1st) 143111, ¶ 30 (quoting *In re E.F.,* 2014 IL App (3d) 130814, ¶ 42). "The purpose of this court's forfeiture rules is to encourage parties to raise issues in the trial court, thus ensuring both that the trial court is given an opportunity to correct any errors prior to appeal and that a party does not obtain a reversal through his or her own inaction." *1010 Lake Shore Association v. Deutsche Bank National Trust Company*, 2015 IL 118372, ¶ 14. The record before us reveals that defendant did not raise this issue before the trial court. Accordingly, we find this argument to be forfeited. See *Stuckey,* 2015 IL App (1st) 143111, ¶ 30.

¶ 40 B. Discovery Closure Order

¶ 41 Plaintiff further asserts that the discovery closure order dated July 16, 2015, constituted an improper *ex parte* order because it was issued when plaintiff's counsel was absent during a scheduled status call. Specifically, plaintiff argues the discovery closure order violates Canon 3 of the Code of Judicial Conduct which provides, in pertinent part:

> "(5) A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:
>
> > (a) Where circumstances require, *ex parte* communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:
> >
> > > (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and
> > >
> > > (ii) the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond." Ill. S. Ct. R. 63(A)(5) (eff. Apr. 16, 2007).

¶ 42 Here, the record fails to establish the trial court engaged in inappropriate *ex parte* communications with defendant's counsel. During the status call on July 16, 2015, the trial court reviewed discovery orders that had previously been entered in the law division. The orders provided that the parties had been allowed two or more extensions of time to complete fact witness depositions in the law division, the last extension set on May 26, 2015. After having reviewed the discovery orders, the trial court closed discovery, except for the discovery of expert witnesses. Thus, it appears that any communications that occurred between the trial court and defendant's counsel during the status call on July 16, 2015, were limited to scheduling matters regarding discovery. In addition, defendant gained no advantage over plaintiff as the discovery closure order applied to both parties and plaintiff was notified of the communications.

¶ 43 We further find defendant's reliance on *Board of Trustees of Community College District No. 508, County of Cook v. Cook County College Teachers Union Local 1600*, 42 Ill. App. 3d

1056 (1976) and *Ryan v. Monson*, 47 Ill. App. 2d 220 (1964), to be misplaced. In *Board of Trustees*, unlike here, a temporary restraining order was issued without adequate notice to the defendants during the alleged *ex parte* communication between the judge and the plaintiff. *Board of Trustees*, 42 Ill. App. 3d at 1067. Similarly, in *Ryan*, a default judgment was entered during a trial where defendant's counsel was engaged in the trial of another case. *Ryan*, 47 Ill. App. 2d at 220. Here, as aforementioned, any communications between the trial court and defendant's counsel during the status call on July 16, 2015, only involved matters of scheduling.

¶ 44 Finally, regardless of whether the status call constituted an *ex parte* hearing, a reversal is unnecessary because there is no suggestion of bias on the part of the trial judge, and no suggestion that there was any outside influence or that the case was decided on any basis other than the evidence presented in the case. See *Bauer v. Memorial Hospital*, 377 Ill. App. 3d 895, 912 (2007). Accordingly, there was no appearance of impropriety and we conclude that any alleged error committed by the trial court was harmless. *Id.*

¶ 45 III. CONCLUSION

¶ 46 In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 47 Affirmed.