2017 IL App (1st) 161299-U

FIRST DIVISION
January 30, 2017

No. 1-16-1299

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JUDITH HIRSCH, Plaintiff-Appellant, v. JOHN H. KELSEY, COROMANDEL TOWNHOME ASSOCIATION, and OPTIMA, INC., an Illinois Corporation, Defendants-Appellees.	))))))))))	Appeal from the Circuit Court of Cook County, No. 05 CH 6841 Honorable Margaret A. Brennan, Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Connors and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The circuit court's order granting summary judgment in favor of defendants is reversed because defendants did not affirmatively establish the absence of evidence to support plaintiff's claims against them; (2) the circuit court's orders denying plaintiff's motions to correct her fourth amended complaint and for leave to file a fifth amended complaint are vacated.

¶ 2 This lengthy legal saga began with a homeowner's claims against the previous owner, the property's townhome association, and the company that constructed the building, for damages resulting from a flooded basement in 2003, which the homeowner alleged was caused by a

defective drain tile system surrounding the property that she purchased in April 2002. The plaintiff homeowner, Judith Hirsch, appeals from the circuit court's grant of summary judgment in favor of defendants John H. Kelsey, Coromandel Townhome Association, and Optima, Inc., and the court's orders denying Ms. Hirsch's motions to correct her fourth amended complaint and for leave to a file a fifth amended complaint. For the reasons that follow, we reverse the judgment of the circuit court and remand for proceedings consistent with this order.

¶ 3 BACKGROUND

¶ 4 The property at issue in this case is located at 415 Milford Road, Deerfield, Illinois (the Property). The Property was built by defendant Optima, Inc. (Optima), which established defendant Coromandel Townhome Association (Coromandel) to exercise control over the common elements of a complex of buildings which includes the Property. Optima originally sold the Property to defendant John H. Kelsey in 1996, who then sold the Property to plaintiff Judith Hirsch in April 2002.

¶ 5 The original complaint in this case was filed in April 2005 before the Honorable Martin S. Agran. Ms. Hirsch subsequently amended her complaint on four separate occasions, most recently on May 14, 2008, when she filed the complaint at issue here.

¶ 6 This is not the first time this case has been before the appellate court—in *Hirsch v. Optima, Inc.*, 397 Ill. App. 3d 102 (2009), the third division of this court considered Ms. Hirsch and Optima's cross-appeals regarding the circuit court's partial granting of Ms. Hirsch's petition for relief from judgment after the circuit court had dismissed Ms. Hirsch's claims against Optima in her second amended complaint. This court affirmed the circuit court's order to the extent that it granted Ms. Hirsch's petition and reversed the court's order to the extent that it denied her petition, thereby restoring all claims against Optima. *Id.* at 121-22.

¶ 7 In her current fourth amended complaint, Ms. Hirsch brought a total of fifteen counts against the three defendants, each count generally premised on the allegation that there were undisclosed defects in the Property that were known to defendants at the time of its sale to Ms. Hirsch. Ms. Hirsch claimed that the "drain tile storm water discharge system," which was designed to prevent the basement of the Property from being flooded with water, did not function properly and required regular maintenance, which defendants knowingly performed while the Property was owned by Mr. Kelsey, but which they ceased doing when the Property was sold to Ms. Hirsch, without informing her of the defect. Ms. Hirsch alleged that, as a result, her basement flooded in June 2003. The relief Ms. Hirsch sought included:

> "a declaration of the responsibilities of the parties for maintaining the drain tile storm water discharge system, rescission of the sale of the [Property], and damages, from Defendants on account of their fraudulent misrepresentations, unfair and deceptive business practices, breach of fiduciary relationship for failure to disclose known material defects in the property, negligent performance of a voluntary undertaking and breaches of contract and warranty."

¶ 8 Mr. Kelsey filed the case's first motion for summary judgment on April 24, 2009, which the other two defendants joined. In that motion, Mr. Kelsey presented "scientific evidence" that there was insufficient rainfall in June 2003 to have caused a flood in the Property's basement, and addressed other possible exterior sources of water and argued that none of them could be the source of the water discovered in the basement. Mr. Kelsey concluded, therefore, that a defective drain tile system could not have contributed to any such flooding, and he suggested that the flood water must have come from an interior source.

¶ 9 On December 3, 2010, before the circuit court issued a ruling on the summary judgment

motion, Ms. Hirsch filed a motion to correct her fourth amended complaint in which she sought an order "deeming all references in the Fourth Amended Complaint to June 2003 to mean July 2003, and striking 'The flood resulted in standing water of three to four feet above the basement floor' from paragraph 19." Judge Agran denied Ms. Hirsch's motion on February 22, 2011, ruling that Ms. Hirsch could not change the date of the flood in her pleadings because, in his view, she had made judicial admissions that the flood occurred in June 2003. Judge Agran also ruled that Ms. Hirsch could not strike the sentence about standing water because the proposed amendment was untimely, she already had "multiple prior opportunities to amend her complaint," and that allowing the proposed amendment would likely prejudice defendants.

¶ 10 With defendants' motion for summary judgment still pending, the case was reassigned to a different judge because Judge Agran was reassigned to a different division. Ms. Hirsch moved for substitution of judge as a matter of right, which the circuit court granted, and the case was transferred to the Honorable Richard J. Billik, Jr. Judge Billik denied defendants' motion for summary judgment without prejudice on June 28, 2012. In his ruling, Judge Billik stated that defendants produced "no opinion testimony or evidence or evidentiary submission in this case" to allow the court to determine whether they were correct in their conclusion that "the undisputed scientific evidence establishe[d] that the drain tile storm water discharge system could not have been the source of Plaintiff's June flood."

¶ 11 On July 10, 2012, Ms. Hirsch filed a motion for leave to file a fifth amended complaint. Similar to her December 2010 motion, Ms. Hirsch sought in this motion to expand the range of time during which the alleged flood occurred to be "June-July 2003" and to remove the reference to "three to four feet of standing water." Ms. Hirsch additionally sought to make eight other changes to her complaint, including adding statements regarding the condition of the Property's

basement and actions taken by the parties before and after Ms. Hirsch discovered the flood water. Judge Billik denied Ms. Hirsch's motion without prejudice on December 13, 2012.

¶ 12 On August 29, 2013, Optima filed the case's second motion for summary judgment, this time before the Honorable Rodolfo Garcia, who began presiding over the case following Judge Billik's retirement from the bench earlier that year. This motion was joined by Coromandel, and was adopted and incorporated by Mr. Kelsey in a concurrent motion for summary judgment he filed soon thereafter. In the same vein as Mr. Kelsey's April 2009 motion, Optima argued the theory of the case defendants have relied on throughout this litigation: a defective drain tile system could not have been the cause of water entering Ms. Hirsch's basement because that system exists to alleviate exterior sources of water, and there is no factual support for any exterior water source at the time Ms. Hirsch alleged the flooding occurred. Unlike the April 2009 motion, however, Optima's motion included a "Summary of Expert Witness Findings" in the form of a letter by Thomas T. Burke, the Vice President and Head of Water Resources Department at Christopher B. Burke Engineering, Ltd. In this letter, Mr. Burke stated that he reviewed numerous case documents as well as topographical and historical rainfall records for the surrounding area and concluded that "there [was] no outside source of water that could have contributed to flooding of [Ms. Hirsch's] basement during June 2003," and therefore "the drain tile system did not contribute to flooding of the basement."

¶ 13 Ms. Hirsch's response to defendants' motions included a letter from "Plaintiff's expert" Gregory H. Pestine, a licensed engineer who was employed as a civil engineer and construction expert with Robson Forensic, in which he stated that he reviewed Mr. Burke's letter, commented that Mr. Burke's letter did not "explore or eliminate the many outside sources of water," and opined that "an outside source of water *** remain[ed] as a probable source for the water found

in the basement." Mr. Pestine also discussed drain tile systems generally and made several observations about the circumstances surrounding the flooding incident that indicated there was a problem with the drain tile system here.

¶ 14 During the hearing on defendants' motions, Judge Garcia noted that the letter from Mr. Pestine was "not an affidavit, but a letter from a purported engineering expert." Judge Garcia determined that the letter was not "a matter that should be considered in the context of resolving a summary judgment motion" and struck the letter from Ms. Hirsch's response. On June 18, 2014, Judge Garcia granted defendants' motions in part and denied them in part. The court entered judgment in favor of Optima on all counts directed against them; entered judgment in favor of Mr. Kelsey on count I, seeking rescission for fraudulent misrepresentation, and count X, promissory estoppel, but against Mr. Kelsey and in favor of Ms. Hirsch on count II, seeking damages for fraudulent misrepresentation; and entered and continued Coromandel's motion for summary judgment.

¶ 15 On July 16, 2014, Ms. Hirsch filed a motion for reconsideration of Judge Garcia's ruling. Attached to Ms. Hirsch's motion was an affidavit of Mr. Pestine which, in substance, resembled the letter attached to her response brief: the affidavit provided more detail regarding the "flaws" in Mr. Burke's letter and included several "opinions" regarding the source of the water found in Ms. Hirsch's basement. On September 24, 2014, Judge Garcia entered an order that granted Ms. Hirsch's motion for reconsideration and vacated his order of June 18, 2014, that granted part of defendants' motions for summary judgment, except for the portion of that order that struck Mr. Pestine's letter. Judge Garcia also set a briefing schedule for defendants to file a response to Ms. Hirsch's motion for reconsideration and for Ms. Hirsch to file any further motion regarding Mr. Pestine's affidavit.

¶ 16 On February 10, 2015, Judge Garcia denied Ms. Hirsch's motion to supplement her response to defendants' motions for summary judgment with Mr. Pestine's affidavit. On May 6, 2015, Judge Garcia again entered judgment in favor of Mr. Kelsey and against Ms. Hirsch on counts I and X, seeking rescission for fraudulent misrepresentation and alleging promissory estoppel, and denied defendants' motions for summary judgment with respect to all other counts. Judge Garcia then transferred the case to law division on June 3, 2015, finding that "all equitable claims [had been] disposed [of]."

¶ 17 In the law division, the case was assigned to the Honorable Margaret Ann Brennan. After this reassignment, Ms. Hirsch filed a renewed motion for leave to file a fifth amended complaint on August 18, 2015, which included primarily the same changes she had requested to make in her July 2012 motion before Judge Billik. Shortly thereafter, on August 28, 2015, Optima renewed its August 2013 motion for summary judgment, attaching and adopting all briefs it filed in support of that motion when defendants had presented it to Judge Garcia. Optima's motion was joined by Mr. Kelsey and Coromandel. In their renewed motion, defendants claimed that Judge Garcia's previous denial of this motion was "manifestly at odds with Illinois law and the facts of this case" and:

> "Since these Courts [in prior rulings denying Ms. Hirsch's motions to correct and amend her complaint] have found specifically that the occurrence date is June 2003, and the records previously produced to the various courts show that no rainfall in the amount needed to produce any water in [Ms.] Hirsch's basement fell in June 2003, there is no question of fact as to causation. Inasmuch as [Ms.] Hirsch is now improperly renewing *** her request to change dates and other alleged facts, summary judgment is appropriate."

In the order setting the briefing schedule for the summary judgment motion, Judge Brennan stated that Ms. Hirsch's motion for leave to file a fifth amended complaint was "entered and continued generally." However, it appears from the record that she never ruled on it.

¶ 18 On January 20, 2016, Judge Brennan granted defendants' motion for summary judgment and entered judgment in favor of defendants on all remaining counts except for count XI, a claim for declaratory judgment against Coromandel regarding whose responsibility it is to maintain the drain tile system going forward. Ms. Hirsch filed a motion for reconsideration which the court denied on April 15, 2016. In that order, the court stated that it found "no just reason for delaying either enforcement or appeal of this order and the January 20, 2016 order granting summary judgment to defendants pursuant to Illinois Supreme Court Rule 304(a)." On May 12, 2016, Ms. Hirsch filed a timely notice of appeal. Accordingly, this court has jurisdiction over this appeal under Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010).

¶ 19 ANALYSIS

¶ 20 On appeal, Ms. Hirsch contends that the circuit court (1) erred in granting defendants' renewed motion for summary judgment and entering judgment in favor of defendants on January 20, 2015; and (2) abused its discretion in denying Ms. Hirsch's motion to correct her fourth amended complaint on February 22, 2011, and denying her motion for leave to file a fifth amended complaint December 13, 2012. We address these arguments in turn.

¶ 21 I. Summary Judgment in Favor of Defendants

¶ 22 Summary judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2014). To determine whether a genuine issue of material fact exists, the court must

construe those documents "strictly against the movant and liberally in favor of the opponent," and summary judgment is precluded "where the material facts are disputed or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts." *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49. "Summary judgment is a drastic means of disposing of litigation and, therefore, should be granted only when the right of the moving party is clear and free from doubt." *Adames v. Sheahan*, 233 Ill. 2d 276, 296 (2009). We review a circuit court's entry of summary judgment *de novo*. *Standard Mutual Insurance Co. v. Lay*, 2013 IL 114617, ¶ 15.

¶ 23 A defendant moving for summary judgment bears the initial burden of production. *Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 624 (2007). This may be done in two ways: (1) "by affirmatively showing that some element of the case must be resolved in his favor," or (2) "by establishing that there is an absence of evidence to support the nonmoving party's case." (Internal quotation marks omitted.) *Id.* Once the defendant has met its initial burden of production, the burden shifts to the plaintiff to "produce facts that would arguably entitle it to a favorable judgment." *Helfers-Beitz v. Degelman*, 406 Ill. App. 3d 264, 267-68 (2010).

¶ 24 Defendants in this case attempted in their repeated summary judgment motions to establish the absence of evidence on causation, which all the parties agree is a necessary element of Ms. Hirsch's claims. According to Ms. Hirsch's complaint, flooding occurred in her basement in June 2003 and the damages that resulted were caused by the negligent design, installation, or maintenance of the drain tile system around the foundation of the Property. These defects, the failure to remedy these defects, and the failure to inform Ms. Hirsch of these defects prior to her purchasing the Property underlie each of her claims against defendants. Defendants set out to establish in their motions, relying now primarily on the opinion of their expert, Mr. Burke, that

Ms. Hirsch cannot make this necessary causal link.

¶ 25 In his letter, Mr. Burke explained that the purpose of a drain tile system is "to collect the water on the outside of the structure and convey it safely away from the structure," a point all parties generally agree on. As the purpose of a drain tile system is to dispose of exterior water, Mr. Burke's letter, as well as defendants' argument generally, focused on whether any exterior water source could have caused the June 2003 flood that Ms. Hirsch alleged occurred.

¶ 26 Defendants provided no evidence that affirmatively showed that the drain tile system was not defective, nor did they identify something that did not involve the drain tile system, such as an internal source of water, as the cause of the flooding in Ms. Hirsch's basement. Rather, defendants' summary judgment motion hinged on establishing the absence of any evidence that the drain tile system caused the flooding in Ms. Hirsch's basement by ruling out external sources of water, particularly rainfall, for a specified period of time.

¶ 27 The primary evidence presented by defendants in their motion for summary judgment was Mr. Burke's letter. In his letter, Mr. Burke explained that he reviewed numerous documents produced during the course of litigation, plus "topography and historical rainfall records obtained from the National Oceanic & Atmospheric Administration (NOAA)," in order to determine the probable cause of flooding. After going through a history of the Property up until the time it was purchased by Ms. Hirsch, Mr. Burke examined rainfall and evaporation data recorded near the Property around the time the basement flooded. Mr. Burke explained that, according to Ms. Hirsch's deposition testimony, she discovered water in her basement on June 17, 2003, which is consistent with what was reported in the insurance claim paperwork. Using that date as a point of reference, Mr. Burke stated:

> "To determine the amount of rain that fell at [the Property], a search of

> nearby rainfall gages was conducted. The Chicago Botanical Garden weather station was selected because it is closest geographically to [the Property], at a distance of approximately 3.2 miles, and it is recorded by a federal agency—the [NOAA]. Based on the rainfall records received from NOAA for the Chicago Botanical Garden weather station, a total of 1.19 inches of rain was recorded during June 2003. Of the 1.19 inches of rainfall in June, there was no rain on the day of the alleged flooding, June 17th, nor was there any recorded precipitation in the preceding seven days.
>
> The NOAA gage also records evaporation on a daily basis. During the month of June 2003, the amount of potential evaporation measured was 5.19 inches. Combining the measured rainfall and the measured evaporation in June 2003 results in a net precipitation total of -4.00 inches for the month."

The NOAA weather reports referred to by Mr. Burke contain precipitation and evaporation amounts from June 1, 2003, to July 31, 2003, and appear to be consistent with Mr. Burke's representation of that data in his letter.

¶ 28 Mr. Burke's letter summarized his findings as follows:

> "It is evident based on the lack of precipitation in June 2003, rainfall could not have been a source of the water in the basement. The meteorological records do not support any possible flooding of the basement, not to mention the 3 to 4 feet that has been testified [*sic*]. There were no reports of a sprinkler malfunction in any of the information I reviewed. In addition, there were no reports of water main breaks or other utility breaks in the area. Therefore, it is not possible that an outside source of water caused the alleged flooding in the basement during June

2003.

> The purpose of a drain tile system is to remove water that builds up on the exterior of a building's foundation. Absent an outside source of water, a drain tile system does not serve a purpose. Since the drain tile system serves no function without an outside source of water, it cannot be the cause of alleged flooding."

¶ 29 Although defendants argue that Ms. Hirsch's complaint limits her to proving rainfall as the external source of water that came into her basement, they also attempted to eliminate other sources of water for a specified time period. Defendants cited Ms. Hirsch's March 27, 2009, deposition testimony to support their assertions that there was "[n]o record of any broken or non-working exterior piping" and that "[t]he exterior sprinkler system was inoperable between 2002 and 2008." In her deposition, Ms. Hirsch testified that she called the water department when she saw water coming out of two holes in her basement wall in July 2003, and someone immediately came to her house and did "soundings" to see if the water department's pipes were the source of the water. She further testified that the water department did not turn the water off, she never repaired the holes in the wall, and that the water "eventually stopped by itself." Ms. Hirsch also stated in her deposition that she never saw the sprinkler system function or operate in a certain area of her yard "until about 2008."

¶ 30 Defendants also attached to their motion for summary judgment what appears to be a one-paragraph interoffice memorandum from someone in the Deerfield, Illinois, water department to show that there were no issues with the municipal water or sewage pipe lines that may have contributed to the flooding in Ms. Hirsch's basement. However, in addition to a complete lack of foundation for this memo, the memo is dated March 8, 2007, and its contents specifically refer to events "[o]ver at least the past 2 plus years or so." Therefore, it says nothing

about what could have caused flooding of Ms. Hirsch's basement in June 2003.

¶ 31 As stated above, the law is clear that in order to succeed on their summary judgment motion, defendants had the burden of showing the absence of evidence to support Ms. Hirsch's case. See *Nedzvekas*, 374 Ill. App. 3d at 624. Defendants have simply not met their burden. They have failed to conclusively establish that there was no external source of water that the defective tile system could have failed to keep from Ms. Hirsch's basement.

¶ 32 First, we do not agree with defendants that Ms. Hirsch's complaint limits the source of water to rainfall. Rather, the complaint only mentions heavy rainfall as something that the allegedly defective drain tile system was intended to protect against.

¶ 33 Even with respect to establishing that rainfall could not have been the source of the water, Mr. Burke's letter at best undermined rainfall as a source of water that may have entered Ms. Hirsch's basement on June 17, 2003. Although Mr. Burke acknowledged Ms. Hirsch's March 2009 testimony that she later realized that the date that she discovered the flood in her basement was on or about July 11, 2003, Mr. Burke stated that he focused exclusively on June 17, 2003, because Judge Agran ruled that Ms. Hirsch could not contradict her earlier statements regarding the date of the flood in his order of February 22, 2011. As noted later in this order, we are reversing Judge Agran's order to the extent that he ruled that Ms. Hirsch's testimony about the June 17, 2003, date was a judicial admission, and thus she is not bound by that date. Even if, on remand, Ms. Hirsch is not allowed to amend her current complaint, she asserted in that complaint that her basement "flooded in June 2003" and Mr. Burke's letter does not establish that rain could not have infiltrated the basement during the relevant time period, since that period is the entire month of June. Mr. Burke's assertion that "a total of 1.19 inches of rain was recorded during June 2003" offers no information about rainfall any time preceding June 2003. Rainfall

that occurred prior to that month could have entered her basement or contributed to water entering her basement in June, a possibility that is not foreclosed by the evidence presented in that letter.

¶ 34 As to evidence in support of ruling out other non-rainfall exterior sources of water, Mr. Burke's letter merely states: "There were no reports of a sprinkler malfunction in any of the information I reviewed. In addition, there were no reports of water main breaks or other utility breaks in the area." These statements were supported only by Ms. Hirsch's deposition testimony and the Deerfield water department memorandum. This evidence certainly does not definitively establish that there was no broken or non-working exterior piping that might have contributed to the flooding of Ms. Hirsch's basement, that the sprinkler system near the Property could not have been a source of water because it was completely inoperable for a period of years, or that the flood water could not have originated from operating sprinklers in another area of the lawn.

¶ 35 Defendants have presented no proof here that the drain tile system could not have been the cause of damage to the Property because neither rain nor the sprinkler system nor other pipes could have been an external source of the water that flooded Ms. Hirsch's basement. Rather, defendants' evidence and argument amount to, at most, merely "pointing out" the absence of evidence at this point as to the external source of water that allegedly entered the basement due to a defective drain tile system. This is simply not enough to carry defendants' burden. See *Nedzvekas*, 374 Ill. App. 3d at 624 ("When a defendant seeks to establish that the nonmovant lacks sufficient evidence to prove an essential element, the defendant is required to do more than 'point out' the absence of evidence."). Having failed to meet their burden, defendants did not shift the burden to Ms. Hirsch to present evidence that would arguably entitle her to a favorable judgment.

¶ 36 However, the evidence that Ms. Hirsch did present only further demonstrates that there are issues of fact that preclude summary judgment. Defendants ignored, or only briefly mentioned and did not explain, a host of evidence indicating the existence of a defect in the drain tile system and possible exterior sources of the flood water. Some of this evidence was even mentioned in Mr. Burke's letter: Mr. Kelsey noticing water accumulating in his basement in 1997 resulting in Optima installing a total of three sump pumps for the Property; Mr. Kelsey "observ[ing] a small stream of water *** originat[ing] from a point on the west wall of the basement" resulting in Optima "putting a patch over the location where the water entered;" and Ms. Hirsch asserting that in July 2003 she, along with a home inspector, observed water entering her home through "two pinholes in the western wall" of the basement but did not hear her sump pump running at that time. Ms. Hirsch additionally provided evidence of defendants hiring Roto-Rooter to "rod and jet," or clear out the accumulated sediment from, the drain tile system a total of nine times between March 1997 and February 2002 when Mr. Kelsey owned the Property. Mr. Burke mentioned these things as part of the "Case Background" of his letter but they did not factor into his summary of the findings or opinions regarding the cause of the flooding.

¶ 37 Ms. Hirsch also included the affidavit of her expert, Mr. Pestine, in her response to defendants' motion for summary judgment. Defendants argue before this court that Ms. Hirsch cannot rely on that affidavit because Mr. Pestine's earlier unsworn letter was stricken from Ms. Hirsch's response brief to the summary judgment motions ruled on by Judge Garcia, and because Judge Garcia later denied Ms. Hirsch's motion to supplement her response with Mr. Pestine's affidavit. Defendants also assert that Ms. Hirsch has forfeited any right to question the rejection of these documents on appeal because she did not include Judge Garcia's orders in her notice of appeal or make a "developed argument" on appeal that the documents should have been allowed.

These arguments are completely without merit. This is not an appeal of any decision made by Judge Garcia, and his evidentiary rulings on prior motions are irrelevant here. When defendants renewed their motion before Judge Brennan, Mr. Pestine's affidavit was not struck from Ms. Hirsch's response to that motion, and Ms. Hirsch therefore was under no obligation to "question the trial court's rejection of [Mr.] Pestine's letter and affidavit" on appeal as defendants contend. We also note that Judge's Garcia's denial of Ms. Hirsch's motion to supplement was not based on the substance of Mr. Pestine's affidavit, but on procedural grounds, due to the affidavit not being included in her initial response to defendants' motions.

¶ 38 We acknowledge defendants' argument that Mr. Pestine's affidavit is of limited value because, according to his account of what documents he used to form the opinions in his affidavit, he did not assert that he reviewed any case documents, such as party depositions, insurance claim paperwork, or other discovery materials produced in this case. Mr. Pestine stated that his opinions were based on his review of Mr. Burke's letter and NOAA climatological data records from July 2001 and April through July 2003. Whether Mr. Pestine actually reviewed only these two items before creating the affidavit is called into question by certain statements he made in the affidavit referring, for example, to portions of Ms. Hirsch's deposition testimony that were not included in Mr. Burke's letter. But assuming this is true, even with only that information, plus his knowledge and ability to opine generally on the subject as an engineering and construction expert, there is nonetheless significant value in Mr. Pestine's affidavit.

¶ 39 In his affidavit, Mr. Pestine began by explaining the flaws in Mr. Burke's letter. Although some of these flaws are evident to a layperson, as we recognized above, Mr. Pestine's background and experience allowed him to provide a thorough explanation of each of these issues. Mr. Pestine explained that Mr. Burke improperly limited his climatological review to

June 2003, that a review of the records from May and April 2003 "would be prudent," and, having reviewed the rainfall records from that year beginning in April, asserted that "[a] flood could have occurred in May, June, or July of 2003" due to "heavy rainfall in both May and July" in northern Illinois. Mr. Pestine also opined about other possible sources of external water, commenting that "[a] utility break would not be necessary for a large amount of water to be present" in the basement, and that it could have been irrigation water due to "[p]rolonged lawn sprinkling." Mr. Pestine noted that "[o]ther sources which were not addressed or ruled out by Mr. Burke include hydrant flushing, watering of plantings and trees, underground springs, and temporary issues with municipal water systems in the area" and that Mr. Burke "conducted no investigation into internal sources of water, or external sources of water beyond precipitation."

¶ 40 After reviewing the rainfall records and noting that there was no indication of any interior water source such as a pipe leak, which is "generally easily identifiable and remain[s] until repaired," Mr. Pestine opined that "an outside source of water *** remains as a probable source for the water found in the basement." When water enters the basement through the foundation walls above the drain tile, "[t]his is evidence that the water could not enter the drain tile system" due to the system being "plugged and ineffective." Mr. Pestine further stated that the need to hire Roto-Rooter to clear out the drain tile system twice per year is "unusual" and is "indicative of a problem with the construction of the drain tile system." He also noted that homes are typically equipped with one sump pit and one sump pump, and owning a second sump pump "is considered insurance." However, the installation of a third sump pump is "an indication that a problem exists," and the fact that none of the three sump pumps were operating when Ms. Hirsch saw water entering her basement in July 2003 "indicates water was unable to enter the drain tile system and is a good indication that the system was plugged and storm water was unable to reach

the sump pit."

¶ 41 Defendants cite *Strutz v. Vicere*, 389 Ill. App. 3d 676 (2009), for the proposition that:

> "[A]bsent positive and affirmative proof of causation, plaintiff cannot sustain the burden of establishing the existence of a genuine issue of material fact. [Citation.] Liability cannot be predicated on conjecture, rather proximate cause is established when there is reasonable certainty that the defendant's acts or omissions caused the injury." (Internal quotation marks omitted.) *Id.* at 679.

Defendants assert that Ms. Hirsch did not provide "affirmative proof of any actual cause of the flooding" but relied only on "speculation" and "conjecture" and, therefore, did not establish the existence of a genuine issue of material fact.

¶ 42 We do not agree with defendants' portrayal of the evidence put forth by Ms. Hirsch. The relevant question to defendants' motion is whether *any* exterior water source may have caused the basement flood, and, as explained above, Ms. Hirsch presented considerable evidence that the water likely came from an exterior source. Ms. Hirsch was not obligated to confirm the specific exterior water source in order to survive defendants' motion. While "[l]iability cannot be predicated upon surmise or conjecture as to the cause of injury," a plaintiff can establish proximate cause "by circumstantial evidence when an inference can reasonably be drawn from it." *Olson v. Williams All Seasons Co.*, 2012 IL App (2d) 110818, ¶¶ 26-28 (finding summary judgment against the plaintiff was inappropriate where there was no direct evidence of the cause of the injury, but "sufficient circumstantial evidence and the reasonable inferences that might be drawn therefrom[ ] creat[ed] genuine issues of material fact"); see also *Payne v. Mroz*, 259 Ill. App. 3d 399, 403 (1994) ("circumstantial evidence may be sufficient [to support a plaintiff's claim] when an inference may *reasonably* be drawn from it" (emphasis in original)).

¶ 43 In support of their assertion that Ms. Hirsch did not provide sufficient evidence to defeat summary judgment, defendants draw comparisons to cases that were significantly more tenuous and that involved plaintiffs who presented substantially less evidence than Ms. Hirsch did here. See, *e.g.*, *Mack v. Viking Ski Shop, Inc.*, 2014 IL App (1st) 130768, ¶ 21 (where the inference the plaintiff sought to establish to prove his claim found "no support in the record"); *Strutz*, 389 Ill. App. 3d at 681 (where, in a slip-and-fall case, "none of the testimony and affidavits addresse[d] the issue of what caused [the plaintiff's] fall" and the "possibility" that it was caused by the defendants' conduct could not establish proximate cause); *Payne*, 259 Ill. App. 3d at 402-03 (where success on the plaintiff's claim required the plaintiff to prove two suppositions, "[n]either supposition [was] supported by the record," and both were considerably undermined by witness testimony); *Kennedy v. Joseph T. Ryerson & Sons, Inc.*, 182 Ill. App. 3d 914, 919 (1989) (the plaintiff "failed to present sufficient facts to support his assertions regarding the conduct of [the] defendant and the cause of the accident," and his version of events was directly contradicted by an unrebutted eyewitness). Those cases are distinguishable and do not guide our decision here.

¶ 44 In its brief in support of the motion that is the subject of this appeal, Optima referred to this case as a "long and tortuous saga." We certainly agree and strongly urge the parties to either settle this matter or get to a trial on the merits. It is unfortunate that this litigation, which is approaching its thirteenth year of existence, remains unresolved and that the legal fees incurred likely far outweigh any damages that Ms. Hirsch might have sustained. We are nonetheless compelled to find that defendants did not carry their burden of establishing the absence of evidence to support Ms. Hirsch's case and that there remain genuine issues of material fact which preclude summary judgment in favor of defendants.

¶ 45 II. Denial of Ms. Hirsch's Motions

¶ 46 We turn now to the issue of whether the circuit court abused its discretion in denying Ms. Hirsch's motions to correct her fourth amended complaint and for leave to file a fifth amended complaint. Ms. Hirsch has sought on three occasions to make changes to her fourth amended complaint: her first motion was denied in a memorandum opinion by Judge Agran on February 22, 2011; her second was denied without prejudice and without further explanation by Judge Billik on December 13, 2012; and her most recent, filed before Judge Brennan on August 18, 2015, was never ruled on. Ms. Hirsch argues that the court abused its discretion in denying her motions on February 22, 2011, and December 13, 2012.

¶ 47 Judge Agran's ruling of February 22, 2011, included a finding that Ms. Hirsch made binding judicial admissions regarding the date her basement was flooded. We first address whether that finding was made in error.

¶ 48 "A judicial admission is a deliberate, clear, unequivocal statement of a party about a concrete fact within that party's peculiar knowledge." *Hansen v. Ruby Construction Co.*, 155 Ill. App. 3d 475, 480 (1987). "[A] party cannot create a factual dispute by contradicting a previously made judicial admission." *Id.*

¶ 49 In her December 2010 motion, Ms. Hirsch sought to correct her fourth amended complaint by "deeming all references *** to June 2003 to mean July 2003." In his ruling of February 22, 2011, Judge Agran noted the previous occasions that Ms. Hirsch had referred to "June 2003" throughout this litigation and found that "[Ms.] Hirsch's statements in her affidavit and at her deposition are judicial admissions and she cannot now contradict those statements." Judge Agran stated that he was specifically referring to Ms. Hirsch's affidavit dated October 12, 2006, in which she referred to "the flood of June 2003," and the deposition conducted February

18, 2009, during which she identified June 17, 2003, as the specific date she discovered the flood. On appeal, defendants argue that we should agree with the court's ruling that Ms. Hirsch has made judicial admissions that she cannot contradict in any subsequent amended pleadings. Ms. Hirsch contends that nothing she has said constitutes a judicial admission, and we agree with Ms. Hirsch.

¶ 50 "[A]ssertions made in a deposition constitute binding judicial admissions only if they are unequivocal." *Hansen*, 155 Ill. App. 3d at 480. In her deposition, Ms. Hirsch testified that when she returned home on June 17, 2003, she entered her basement and found water on the floor. Ms. Hirsch was also asked about the insurance claim paperwork which reflects that June 17 was the date she discovered the flood in her basement. Ms. Hirsch testified that she reported the flooding incident to her insurer, that she believed the date that she provided to her insurer was true, and that she did not know where her insurer would have gotten that information but from her. She was then asked: "Can we agree then that June 17th appears to be the most accurate date that you discovered the water flooding to have occurred?" She responded: "Most likely." Defendants argue that these statements constitute "unequivocal testimony" that June 17 was the date she discovered the flooding of her basement, and that the flood occurred in June 2003.

¶ 51 However, these portions of Ms. Hirsch's deposition must not be considered in isolation. To determine whether deposition testimony is so "unequivocal and deliberate" as to constitute judicial admission of a fact, a court is "required to consider [the deponent's] entire deposition, not just isolated portions of it." *Schmall v. Village of Addison*, 171 Ill. App. 3d 344, 348 (1988). During Ms. Hirsch's deposition, she repeatedly showed uncertainty regarding the date she discovered the flood—she testified that she discovered the flood after having been away from her house for about two weeks to care for her parents, but seemed unsure of the exact date when she

returned home. According to the deposition transcript, immediately after the portion of the testimony relied on by defendants, Ms. Hirsch stated, "Oh, it couldn't have been June 17th. It was before that." Several questions later, she was asked again, "Did you discover the water on June 17, 2003?" and she responded, "No." She was asked, "For whatever reason, you left your town home for a couple of weeks in June of 2003—how about that—is that correct?" and she responded, "Well, it was either June or July." The deposition did not proceed much longer after that due to disagreement between the attorneys on several issues, one of which was whether the court order permitting this deposition allowed for questions regarding a flood that occurred in July 2003 as opposed to June 2003. Viewing this deposition as a whole, Ms. Hirsch's testimony hardly qualifies as a "deliberate, clear, unequivocal statement" (*Hansen*, 155 Ill. App. 3d at 480) that she discovered the flood on June 17, 2003. Furthermore, during the continuation of Ms. Hirsch's deposition, when it resumed on March 27, 2009, she explicitly stated that she discovered the floodwater in her basement on July 11, 2003, not anytime in June.

¶ 52 Nor do we find that Ms. Hirsch's October 12, 2006 affidavit constitutes a judicial admission that the flood occurred in June 2003. In this affidavit, Ms. Hirsch made statements about different occasions when she observed or otherwise learned of water entering her basement, including multiple references to the flooding incident that is the subject of this lawsuit. In the final paragraph, she made one reference to that flooding incident as "the flood of June 2003," and this sole reference is the basis for defendants' argument that Ms. Hirsch made a judicial admission in her affidavit that the flood occurred that month. We do not find this passing reference to the flooding incident to be a "deliberate, clear, unequivocal statement" (*id.*) specifying when the flood occurred. It appears instead that this was merely an attempt to refer to this particular flooding incident as opposed to other events she was also describing in the

affidavit which occurred at different points in time. Furthermore, to be a binding judicial admission, the testimony must be peculiarly within the individual's knowledge. *Id.* at 482. Here, the only information that would be within Ms. Hirsch's "peculiar knowledge" would be the date she *discovered* her basement was flooded, which, because she had been away from home and discovered the flood upon her return, was not necessarily when the flood occurred, which is what defendants contend that she conceded.

¶ 53 Finding that Ms. Hirsch did not make a judicial admission regarding the date her basement flooded, we next turn to the circuit court's decisions to deny Ms. Hirsch's motions to correct her fourth amended complaint and for leave to file a fifth amended complaint.

¶ 54 It is "within the sound discretion of the trial court" to decide whether to allow a party to amend her complaint, and the court's decision "will not be disturbed absent an abuse of discretion." *Addison v. Distinctive Homes, Ltd.*, 359 Ill. App. 3d 997, 1003 (2005). However, courts should exercise their discretion "liberally in favor of allowing amendments where doing so furthers the ends of justice." *Id.* A reviewing court generally considers four factors to determine whether a circuit court's denial of a plaintiff's motion to amend constitutes an abuse of discretion: "(1) whether the proposed amendment will cure the defective pleading; (2) whether the proposed amendment would surprise or prejudice the opposing party; (3) whether the proposed amendment was timely filed; and (4) whether the movant had previous opportunities to amend." *In re Estate of Hoover*, 155 Ill. 2d 402, 416 (1993) (citing *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 274-76 (1992)). The "overriding concerns" for whether a plaintiff should be allowed to amend her complaint are "justness and reasonableness." *Id.* Indeed, in *Thomas v. Davenport*, 196 Ill. App. 3d 1042 (1990), where, as in the present case, the plaintiff failed to properly allege the date of the incident, although the plaintiff should have been

aware of the date at the time the original complaint was filed, this court reversed the circuit court's order denying leave to amend, noting:

> "While recognizing that an amendment should not ordinarily be permitted to set up matters which the pleader had full knowledge of at the time of filing the original pleading where no excuse is presented for not putting its substance in the original pleading, such amendment will be allowed where justice is not served by denying leave to amend; doubts should be resolved in favor of allowing amendments." *Id.* at 1046.

¶ 55 In his ruling of February 22, 2011, Judge Agran denied Ms. Hirsch's motion in which she sought to make two "corrections" to her complaint. He disposed of her request to change the date of the occurrence by finding she had made judicial admissions, and he did not apply the *Loyola* factors in this portion of his ruling. Regarding Ms. Hirsch's request to strike the sentence about finding standing water in her basement, Judge Agran applied the *Loyola* factors and stated:

> "With the possible exception of the first factor, none of the other factors weigh in favor of allowing Plaintiff to amend her complaint for the fifth time in more than 5 ½ years after this litigation began. The proposed amendment is, by any reasonable measure, untimely and Plaintiff has had multiple prior opportunities to amend her complaint. Defendants would also likely be prejudiced by the proposed amendment, particularly in light of the pending motion for summary judgment and the significant costs already expended on motions and discovery."

In his December 13, 2012, ruling on Ms. Hirsch's motion for leave to amend, Judge Billik denied her motion without prejudice and did not explain his reasoning or discuss the *Loyola* factors. Ms. Hirsch argues that these denials were abuses of the court's discretion and should be reversed.

¶ 56 A court abuses its discretion where its decision is guided by an erroneous legal conclusion. *Najas Cortes v. Orion Securities, Inc.*, 362 Ill. App. 3d 1043, 1047 (2005) (citing *Koon v. United States*, 518 U.S. 81, 100 (1996)). As explained above, we find that Ms. Hirsch did not make a judicial admission as to the date the flood occurred, and Judge Agran's decision to deny that portion of her motion appears to be based entirely on this erroneous finding. Therefore, Judge Agran's ruling as to this portion of Ms. Hirsch's motion constitutes an abuse of discretion.

¶ 57 Judge Agran properly invoked the *Loyola* factors in deciding whether to allow Ms. Hirsch's request to strike the sentence about standing water, and he found that at least three factors weighed against her, including the "surprise or prejudice" factor. "Prejudice to the party opposing an amendment is the most important of the *Loyola* factors, and substantial latitude to amend will be granted when there is no prejudice or surprise to the nonmovant." (Internal quotation marks omitted.) *Hartzog v. Martinez*, 372 Ill. App. 3d 515, 525 (2007). When the *Loyola* court originally applied this factor, it considered whether the parties had notice of the plaintiff's intention to amend the complaint and whether there was an impending trial in the case. *Loyola*, 146 Ill. 2d at 275. Courts have since found that " '[p]rejudice may be shown where delay before seeking an amendment leaves a party unprepared to respond to a new theory at trial.' " *Hatzog*, 372 Ill. App. 3d at 525 (quoting *Miller v. Pinnacle Door Co.*, 301 Ill. App. 3d 257, 261 (1998)).

¶ 58 Judge Agran's comment about the significant costs already incurred in this litigation was indisputably true. However, we have not found, nor have defendants provided, any legal precedent that suggests a court should consider the amount of money already spent during litigation when determining whether a plaintiff's request to amend her complaint would "surprise

or prejudice" defendants. Furthermore, while a pending motion for summary judgment may be a reason to delay a proposed amendment, it is not, in itself, a reason to deny such a motion outright. See 735 ILCS 5/2-1005(g) (West 2014) ("Before or after the entry of a summary judgment, the court shall permit pleadings to be amended upon just and reasonable terms."); see also *Hoover*, 155 Ill. 2d at 416. This misapplication of the law constitutes an abuse of discretion in Judge Agran's ruling. See *Najas Cortes*, 362 Ill. App. 3d at 1047.

¶ 59 We cannot comment on Judge Billik's application or analysis of the *Loyola* factors, the significance of his decision to deny the motion without prejudice, or whether or to what extent his December 2012 ruling was influenced by Judge Agran's February 2011 ruling, because this information is not in the record. Nor can we determine how Judge Agran would have exercised his discretion under a proper application of the law. For the reasons stated, we vacate the previous orders of both Judge Agran and Judge Billik and remand for Ms. Hirsch to present a motion for leave to amend to the circuit court. We believe the current circuit court judge on remand is in the best position to consider Ms. Hirsch's motion, in light of this order. Regarding timing, the court should consider the timeliness of each of Ms. Hirsch's requests in terms of when she first made the request, whether before Judge Agran, Judge Billik, or Judge Brennan.

¶ 60 CONCLUSION

¶ 61 For the foregoing reasons, we reverse the granting of summary judgment in favor of defendants and against Ms. Hirsch, reverse the denial of Ms. Hirsch's motions to correct her fourth amended complaint and for leave to file a fifth amended complaint, and remand the cause for further proceedings consistent with this order.

¶ 62 Reversed and remanded.