2017 IL App (2d) 160961-U
No. 2-16-0961
Order filed July 25, 2017

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MICAH J. KNUTH and JILL KNUTH,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiffs-Appellants,	)	
	)	
v.	)	No. 15-L-173
	)	
THE VILLAGE OF ANTIOCH and	)	
STATE BANK OF THE LAKES, as Trustee	)	
Under Trust #97-122	)	
	)	
Defendants	)	
	)	
(The Village of Antioch, Defendant-	)	Honorable
Appellant; Raymond Chevrolet, Inc., Third-	)	Michael J. Fusz,
Party Defendant).	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Burke and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in granting summary judgment for the defendant, the Village of Antioch, on plaintiffs' negligence claim that precipitation migrating from the defendant's water tower formed an unnatural accumulation of ice upon which plaintiff Micah Knuth slipped.

¶ 2 Plaintiffs, Micah Knuth (Knuth) and Jill Knuth, appeal the grant of summary judgment in favor of defendant, the Village of Antioch (the Village), on plaintiffs' complaint alleging that

Knuth fell and was injured because of an unnatural accumulation of ice that formed due to the Village's negligence. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Plaintiffs' first amended complaint, filed in June 2015, named the Village and State Bank of the Lakes (the latter was subsequently dismissed from the lawsuit). Plaintiffs alleged as follows. On March 8, 2014, Knuth slipped and fell while on the premises of the Raymond Kia dealership located within the Village. Adjacent to the dealership property was a water tower owned and operated by the Village. The tower had a gravel walkway. Knuth was walking on dealership property "in or near the area where the asphalt pavement ends and the gravel walkway surface commences." While walking in that area, Knuth lost his footing on an accumulation of ice and water that had formed on the dealership's property. The accumulation was attributable ultimately to the water tower. Specifically, "on March 8, 2014, and prior thereto, snow, water and other precipitation accumulated on the top surface of the curved water tower." This "unnatural" accumulation was facilitated by "various equipment, including cellular antennas, on top of the water tower." The accumulation on the tower "then melted or otherwise ran down or dripped off the water tower onto the *** area below." The land at the base of the water tower was "unreasonably dangerous" because of an "excessive" downward slope. This slope caused the melted snow and ice to run from the base of the water tower to the dealership property where it refroze, forming an "unnatural" accumulation. Knuth later slipped on the accumulation.

¶ 5 Plaintiffs alleged that the Village was negligent for (1) allowing precipitation to accumulate unnaturally on the top of the water tower; (2) creating an excessive slope that caused melted snow and ice from the tower to flow down onto adjacent property; (3) failing to warn adjacent property owners of the accumulations that formed on their properties due to the

migration of melted ice and snow; and (4) failed to remove the unnatural accumulations of water and ice that formed because of the migration of melted ice and snow.

¶ 6 In November 2015, the Village filed a third-party complaint for contribution against Raymond Chevrolet, Inc., which owns Raymond Kia. The Village alleged that Raymond Chevrolet was at fault for Knuth's injuries.

¶ 7 In June 2016, plaintiffs filed a disclosure pursuant to Supreme Court Rule 213(f)(3) (eff. Jan. 1, 2007), identifying architect John Van Ostrand as their controlled expert witness. Plaintiffs stated that Van Ostrand would render the following opinions at trial to a reasonable degree of certainty within his field of expertise:

> "(g) The ice that formed and accumulated unnaturally on the parking lot surface of [Kia Chevrolet] resulted from ice, snow, or other precipitation, first collecting on the top surface of the water tower, then melting as the temperature increased the day before [Knuth's] slip and fall injury, dropping off the top of the water tower and draining into the parking lot area of [Knuth's] slip and fall, accumulating there unnaturally and refreezing.
>
> (h) The ice that formed on the parking lot surface in the area where [Knuth's] slip and fall injury occurred was an 'unnatural accumulation of ice' because the precipitation that fell naturally on the water tower had melted and ran down and dripped off the drip-line of the water tower; and this unnatural ice formed at a later time having been affected by the shape and nature of the water tower along with the architectural configuration and lack of proper drainage of the area surrounding the water tower, which directed drain water to the area of the parking lot surface where [Knuth] fell.

(i) The area of the parking lot surface where [Knuth] fell was also unreasonably dangerous under the above condition because it lacked proper drainage in violation of good architectural practice.

(j) It was unreasonably hazardous for [the Village] to fail to properly maintain the property in accordance with International Property Maintenance Code that had been adopted by [the Village].

(k) According to the climatological data for the occurrence location, there had been periods of temperatures below freezing and precipitation since February 20, 2014; and that on March 5, 2014 the temperature rose causing precipitation that had unnaturally accumulated on top of the *** water tower to melt and unnaturally drain into the parking lot where [Knuth] slipped and fell, where it refroze when it hit the cooler ground surface and as the temperatures dropped the following day."

These opinions were recited verbatim in an affidavit from Van Ostrand. In a supplemental Rule 213(f)(3) disclosure, plaintiffs stated that Van Ostrand would testify at trial that the downward slope at the base of the tower was excessive and that the Village "had knowledge of snow and ice melting off the water tower yet failed to warn of this condition."

¶ 8 Subsequently, the Village and Raymond Chevrolet filed separate motions for summary judgment on plaintiff's complaint. Submitted with the summary judgment pleadings were depositions from (1) Knuth; (2) David Hanson, supervisor of water and sewer for the Village; (3) Van Ostrand; and (4) Norman Golinkin, the Village's retained expert.

¶ 9 Knuth testified that March 8, 2014, was his first day of employment at Raymond Chevrolet, Inc. Knuth was hired to work as a salesperson at the Raymond Kia dealership. March 8 was a training day for Knuth, his responsibility being to observe other salespeople.

Knuth arrived for work in the morning but his accident did not occur until about 9 p.m. when he was finishing his duties. Earlier that day, he had gone behind the dealership building, where the dealership property abutted the property on which stood the Village's water tower, a tall structure with a spherical top. The dealership parked inventory vehicles in the back area. Knuth was not sure of the boundary between the dealership's property and the Village's property. Parts of the back area were paved and parts were gravel-covered. Utilized at Knuth's deposition was an aerial photograph of the dealership and the water tower. The photograph shows a circular paved lot immediately behind the dealership building. Due east of the paved area is a gravel area where the water tower stands. A paved path runs from the main paved area to the water tower. There also appear to be gravel areas to the west and north of the paved lot.

¶ 10 Knuth testified that, in his observations earlier in the day on March 8, the paved area was fairly clear of precipitation while the gravel area by the tower was mostly covered in ice. Knuth testified that he observed salt on the paved area but not on the gravel area. From the presence of the salt, and the contrasting conditions of the pavement and gravel, he concluded that there had been no efforts to remediate the icy condition of the gravel by the tower. Knuth described the ice on the gravel area as "kind of like a lake underneath the water tower"; it was "an excess of water that had frozen around the water tower." The ground was uneven, but the low areas were mostly filled with ice. According to Knuth, the accumulation of water and ice was "not something that you would normally see in a parking lot." There was "more water around the water tower than [on] the gravel side of the lot opposite the tower." Knuth could not estimate how far the icy area extended from the base of the tower. Knuth was shown a photograph of the area between the dealership building and the water tower. Knuth testified that the "pavement part *** goes down into the gravel. It's kind of a little valley in there." Consistent with Knuth's description, the

photo shows the ground sloping down from both the dealership building and the water tower. Knuth agreed that, given this topography, melted snow and ice would flow downhill from both the dealership building and the water tower.

¶ 11 Knuth also observed that the area around the base of the water tower had been blocked off with tape. The tape extended somewhat beyond the ball of the tower but not beyond the icy area around its base. Knuth asked a coworker about the tape. The coworker explained that the day before, when temperatures had been much warmer, ice fell from the top of the tower and damaged a customer's car parked underneath. The dealership then cordoned off the tower with tape. Knuth's coworkers also told him that the ice Knuth observed around the base of the tower was due to "melted ice on the water tower" that had "flowed out away from" the water tower. Knuth admitted that he did not know how long the ice on the gravel was there before he arrived at Raymond Kia on the morning of March 8.

¶ 12 Knuth testified that, at about 9 p.m. on March 8, he was in the back area checking that vehicles were locked before he left for the night. In performing this task, he walked on the ice-covered gravel. Despite walking with caution, he slipped, fell to the ground, and was injured. Knuth explained his reasons for believing that the ice on which he fell came from the tower and was not "snow from the sky that melted and then froze":

> "[B]ecause of what I had been told and because it had been warm the day before, everything was melting and then it became very cold the next day and everything had refroze, I assume that judging that most of the water was coming from the water tower and had melted off the water tower and then caused a lake and there was tape there that that probably is where the majority of it was from."

Knuth also testified, however, that he "really [did not] know where the water came from that formed that ice."

¶ 13 Van Ostrand, a forensic architect, testified that, in his understanding, plaintiff fell while walking on dealership property "at the edge where the payment [*sic*] and the gravel [meet]." Van Ostrand was asked whether he continued to adhere to the opinions expressed in plaintiffs' Rule 213(f)(3) disclosure. Van Ostrand testified that he still believed that the downward slope of the Village's property at the base of the water tower was unsafe and in violation of international standards of property maintenance that the Village had adopted in its municipal code. Van Ostrand explained that the property at the base of the water tower was 2 feet higher than the property 20 feet away. This meant that water "drains off in all directions away from the water tower." While Van Ostrand believed that water would migrate down from the base of the tower, he did not believe that that there would have been enough water to reach the area where Knuth slipped. Van Ostrand believed it was "possible" that runoff from the water tower could have reached the accident site, but he could not opine to a reasonable degree of certainty that the runoff "caused or contributed to [Knuth's] accident." He explained that there was a "kind of a valley" between the water tower and the accident site, and therefore water flowing from the base of the tower would have had to travel uphill to reach the accident site. Van Ostrand's description was corroborated by a photograph utilized at Knuth's deposition. The photograph shows the area between the dealership building and the water tower. The ground slopes downward from both the building and the water tower.

¶ 14 Van Ostrand instead believed that the ice accumulation was "more likely" caused by snow blowing from the top of the water tower than by water migrating from its base. Of the "two scenarios"—(1) migration of melted snow and ice from the base of the tower, and (2)

migration of snow by wind—Van Ostrand "favor[ed]" the latter. He proposed that the migration of snow to the accident site happened through a combination of precipitation, warming, and wind. In forming his opinion, he relied on weather data from the National Weather Service (NWS) stations at Kenosha and Waukegan. Van Ostrand recognized that the weather at these stations on the relevant dates might have varied from the weather at Antioch. Van Ostrand noted that the NWS stations measured "quite a bit of snow" between March 1 and 5, 2014 (Van Ostrand did not quantify the amount). He admitted that he had no specific knowledge of how much of this snow would have accumulated on the water tower prior to Knuth's injury. He commented that evidently enough snow had accumulated on the water tower to cause damage to a vehicle parked underneath.

¶ 15 Van Ostrand also cited data showing significant warming and wind on March 7. For several hours on March 7, the temperatures were above freezing and the wind, blowing prevailingly from the southwest, was "substantial." Van Ostrand noted that the water tower was roughly 200 feet high and the surrounding structures were at most 25 to 30 feet high. When the wind passed over the surrounding structures, it would dip down. Upon hitting the side of the tower, the wind would disperse, with some of it ascending to the top. The wind's contact with the globe would have created "turbulence," causing the precipitation on the top of the tower to "explode[] around the area." According to Van Ostrand, snow and ice would have fallen on the windward side of the surrounding property, which was where the accident occurred. Some of the precipitation would have melted where it fell and refroze the following day (March 8) when temperatures fell.

¶ 16 Van Ostrand acknowledged that he lacked meteorological training and had no prior experience with the specific matter of how wind can cause snow to migrate from the top of a

water tower. He was aware of no studies done on migration of precipitation from water towers. Nor had he done any experiments to confirm his assertion of how precipitation would migrate from the Village's tower. Van Ostrand noted simply that he is familiar with wind dynamics and "snow drifts" from his work in studying building collapses.

¶ 17 In Van Ostrand's opinion, section 302.3 of the International Property Maintenance Code, which the Village adopted, required the Village "to ensure that snow and/or ice does not blow off [its] property onto neighboring properties." One way in which the Village could have complied with this requirement was through "controlled" removal of accumulated snow and ice from the water tower. Another remedy—though Van Ostrand admitted that this was not required by section 302.3 or any other maintenance standard of which he was aware—was for the Village to warn its neighbors if precipitation from the tower migrated to their property and posed a hazard. Van Ostrand believed that, because the migrated precipitation would be "in chunks," the Village could tell it had migrated even if did not actually witness the migration.

¶ 18 Van Ostrand doubted that the ice in the gravel area was as extensive as Knuth described. He explained:

> "[I]f he [Knuth] was really right, then it filled up with enough snow or ice to just get to the incident site. And this would have been like ten inches deep in ice. I don't think—. Somehow, I doubt that."

¶ 19 Van Ostrand agreed, however, that an ice accumulation such as Knuth recounted could not have been caused simply by precipitation migrating from the water tower. Van Ostrand noted that an obvious contributing source would have been the snow that fell between March 1 and March 5. Van Ostrand admitted that he did not know whether Raymond Kia attempted to remove snow prior to Knuth's accident.

¶ 20 Van Ostrand testified initially that he could opine to a "reasonable degree of specialized architectural certainty" that "snow and ice migrat[ed] via wind and heat from the top of the water tower to the accident site[.]" Pressed further as to the significance of the recent snowfall, Van Ostrand admitted that he was not reasonably certain that precipitation migrating from the tower caused Knuth's fall:

> "Q. *** You've already said that the snow from the top of the water tower, the precipitation from the top of the water tower blowing off could not have covered the parking lot in the manner in which the Plaintiff described in his deposition.
>
> A. I think that is right.
>
> Q. So if the Plaintiff is accurate in his description of the parking lot, there must have been another source for the frozen precipitation which he observed on the gravel.
>
> Would you agree to that?
>
> A. Yes. And you could have had a mixture.
>
> Q. But you don't have any information as to where that other precipitation came from.
>
> A. I don't. Other than the weather reports.
>
> A. Right. We know there were a number of snow events between March 1st and March 5th, correct?
>
> A. Yes.
>
> Q. So that is a possible source of precipitation which [Knuth] described in his deposition as covering the surface of the gravel parking lot, correct?
>
> A. I'm sure it was those snowfalls.

Q. *** We now know of two possible sources for the snow which [Knuth] described; one being the water tower as you hypothesize, correct, as a possible source?

A. Well, yes, snow fell on the—You're saying snow fell on the ground as well as the water tower and I agree with that.

Q. Fair enough.

That gets me back to my question which is how can you say that the snow that [Knuth] slipped on or ice that [Knuth] slipped on was caused by precipitation migrating from the top of the water tower as opposed to precipitation that came from the sky and remained there or that migrated from somewhere upgrade and then remained at the accident site?

How can you say with any reasonable degree of certainty that the snow from the water tower caused the accident as opposed to the snow from the parking lot?

A. Because there is missing data. I don't know anything about the snow removal process. And that is necessary to know—you know, to opine in the way that you're suggesting.

Q. Are you saying then that you cannot opine that the snow from the water tower, as opposed to snow from a natural snow event, caused [Knuth's] accident without more data?

Is that what you're saying?

A. Yes."

¶ 21 Van Ostrand testified further:

"Q. To be clear, it is true that it's your opinion that if there was an unnatural accumulation in the parking area where [Knuth] fell, it's your opinion that the source—the only source that you can point to with any kind of certainty is the water tower itself?

A. Yes.

Q. I think with—

A. I can say, the reason for that, because I know the snow fell naturally all over—it would have been all over the site. But I don't know about the removal component of that. So I can't—I can't go further than knowing that it fell."

¶ 22 Hanson testified that he has observed condensation on the water tower in different seasons. The condensation would run down the tower to its base. Hanson agreed that, since the area at the base of the tower was higher than surrounding land, it was "likely" that rain or melted snow would run downhill from the base of the tower. Hanson was unaware of any drainage system (such as drain tiles) around the tower, but noted that the tower and its grounds, including its drainage, were inspected every three to five years. The most recent inspection was in 2015. Hanson testified that he has observed icy conditions "downhill" from the water tower, that is, between the water tower and the dealership building. He could not recall the condition of the area in March 2014. Hanson noted that the area around the base of the water tower is grass, which, over the years, has been intermixed with gravel because of snow plowing. Because it consists of grass and is not intended as a parking lot, the Village does not salt or remove snow from that area. The Village has an easement road that runs past the water tower to a booster station. The Village is responsible for removing snow from that road, but for the past several winters Raymond Kia has done it.

¶ 23 Hanson testified that Raymond Kia employees would frequently park vehicles under the water tower, though the Village had never given them permission. "[E]very winter," during periods of thawing, Hanson or another Village employee would orally advise Raymond Kia employees not to park under the tower because of the risk of falling snow or ice. Hanson could not recall the last time before Knuth's accident that the Village gave such an advisory. To Hanson's knowledge, these advisories were the only efforts the Village made to keep vehicles away from the base of the tower. The Village does not barricade any of its three water towers or remove precipitation from them. Hanson testified that he had never personally witnessed precipitation fall from the top of any of the towers. He was unaware that, on March 7, 2014, ice fell from the water tower near Raymond Kia and damaged a vehicle that the dealership had parked underneath the tower. He was also unaware that Raymond Kia filed a complaint with the Village about the damage or that someone had blocked off the tower with tape. Hanson noted that, on a daily basis, a Village employee checks the booster station at the water tower near Raymond Kia.

¶ 24 Golinkin, an architect and structural engineer, testified that that there is no scientific, architectural, or engineering standard requiring a property owner to remediate snow that blows from the owner's land onto neighboring land or to warn the neighboring property owner of snow that so migrates. Golinkin made no independent inquiry into weather conditions leading up to Knuth's accident but was aware of the weather data that Van Ostrand cited in his deposition. In Golinkin's opinion, it was not possible to determine whether the accumulation on which Knuth slipped was from snow that blew from the tower or from snow that fell directly from the sky. Golinkin noted that Van Ostrand was himself unsure how the precipitation had gotten there.

¶ 25 Golinkin further opined that, since any snow or ice falling off the top of the tower would have landed within the Village's own property, the Village had no duty to warn of falling precipitation or otherwise ensure that people would keep away from the base of the tower. Golinkin saw the situation as "no different than snow or ice falling off a tall tree on some homeowner's property." Golinkin was unaware of the exact boundaries between the Village's property and Raymond Kia's property, but he inferred based on documents he was provided that Raymond Kia's vehicle was on the Village's property when it was struck by ice falling from the water tower.

¶ 26 Golinkin acknowledged that the area around the base of the tower is about two feet higher than the surrounding property. Golinkin denied that this elevation would cause "all" water to drain onto adjacent land. He said: "Some of that water is going to be absorbed into the ground. Some of the water is going to be directed to other areas of the *** water tower property. Some may be directed on to the adjacent property."

¶ 27 In its summary judgment motion, the Village contended that it had no duty to "monitor and remediate accumulations of snow and ice on neighboring properties merely because such snow and ice may have transited [the Village's] property while borne on the wind." On the issue of causation, the Village noted that Van Ostrand could not opine to a reasonable degree of certainty that the ice on which Knuth slipped was from snow that blew from the water tower rather than fell directly from the sky. The Village further observed that, "[a]side from Mr. Van Ostrand's speculation that the snow could have blown from the top of the water tower to the location of Mr. Knuth's fall, there is no evidence that the precipitation on which he slipped came from anywhere but the sky above."

¶ 28 The Village contended in the alternative that the affirmative defense of governmental immunity applied. See *Wilson v. City of Decatur*, 389 Ill. App. 3d 555, 558 (2009) (governmental immunity is an affirmative defense). The Village cited sections 2-109 and 2-201 of the Local Governmental and Governmental Employees Tort Immunity Act (Immunity Act) (745 ILCS 10/2-109, 2-201 (West 2014)), which immunize the discretionary acts of government employees. The Village pointed to Van Ostrand's position that the Village could have taken the preventative measures of removing precipitation from the water tower or warning Raymond Kia when precipitation was carried by wind onto its property. The Village asserted that, "[i]n order to carry out this hypothetical program of remediation or warning, any Village of Antioch employee would have needed to use discretion." First, the Village would have had to exercise discretion in determining "whether such a policy or program is even appropriate in the first place (the Village has none)." Second, "in the carrying out of such a program, Village employees would need to use their own discretion in determining when snow removal was appropriate."

¶ 29 In their response to the summary judgment motion, plaintiffs asserted the theory that the ice on which Knuth slipped was an unnatural accumulation "caused by snow and ice that had initially landed on the water tower; was blown off the water tower; [and] unnaturally accumulated and refroze in the area where [Knuth] slipped and fell." Plaintiffs did not assert their original theory, alleged in their first amended complaint, that the accumulation was caused by precipitation that dropped from the tower or ran down its surface to its base, from which it migrated along the ground to the area of the accident.

¶ 30 While the Village's summary judgment motion was pending, plaintiffs moved for leave to file a second amended complaint. Their proposed complaint retained the allegation that melted snow and ice dropped from or ran down the tower and migrated to the area where Knuth

fell. Plaintiffs added the allegation—consistent with the theory espoused in their response to the summary judgment motion—that the water tower "altered the natural wind pattern" and that accumulated precipitation on the tower was "caused to be blown off the top surface of the curved water tower, land, and refreeze" in the area of the accident.

¶ 31 The trial court issued a written order disposing of the Village's summary judgment motion and other pending matters. While the order indicates that the court held a hearing on the summary judgment motion, no transcript of the hearing appears in the record. The court granted the Village's motion. The court found "no credible evidence that [Knuth] fell due to an unnatural accumulation of precipitation." The court alternatively held that the Immunity Act barred plaintiffs' claims, but did not cite any particular provision of the Act. The court also determined that its ruling mooted Raymond Chevrolet's summary judgment motion. Additionally, the court dismissed the Village's third-party complaint against Raymond Chevrolet and denied plaintiffs' motion for leave to file a second amended complaint.

¶ 32 Plaintiffs filed this timely appeal.

¶ 33 II. ANALYSIS

¶ 34 A. Introduction and General Principles

¶ 35 Plaintiffs challenge the grant of summary judgment in favor of the Village. The trial court granted summary judgment on two independent grounds: first, plaintiffs failed to establish a triable issue of fact on the elements of negligence, and, second, the affirmative defense of governmental immunity applied. We uphold the dismissal on the first ground. Consequently, we need not determine whether governmental immunity applies.

¶ 36 The following principles guide our review in cases involving summary judgment. Summary judgment is proper where the pleadings, depositions, admissions, affidavits and

exhibits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill. 2d 17, 30-31 (1999). A triable issue of fact exists where there is a dispute as to a material fact or where, although the facts are not in dispute, reasonable minds might differ in drawing inferences from those facts. *Id.* at 31. Although summary judgment is an expeditious method of disposing of a lawsuit, it is a drastic remedy and should be allowed only when the right of the moving party is free and clear from doubt. *Id.* In order to survive a motion for summary judgment, a plaintiff need not prove her case, but she must present a factual basis that would arguably entitle her to a judgment. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12. We review *de novo* a ruling on a motion for summary judgment. *Id.*

¶ 37 Plaintiffs' action against the Village is for negligence. "In a negligence action, the plaintiff must plead and prove the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and injury proximately resulting from the breach." *Id.* Plaintiffs alleged that Knuth slipped on an accumulation of ice that, though located on the property of Raymond Kia, was attributable to the Village, the adjoining landowner. "Under the 'natural accumulation rule,' a landowner in Illinois is generally not liable for injuries when the slip and fall occurred on a surface where the snow and ice accumulation was natural and unaggravated by the landowner." *Whittaker v. Honegger*, 284 Ill. App. 3d 739, 743 (1996). "However, the owner may indeed be liable if the ice accumulated because the owner either aggravated a natural condition or engaged in conduct which created a new, unnatural or artificial condition." *Id.*

¶ 38 B. Plaintiffs' Theories on Appeal

¶ 39 Our first task is to ascertain precisely which of plaintiffs' allegations are properly before us as to the origin of the accumulation on which Knuth slipped. The Village observes that plaintiffs propose two theories on appeal as to that origin, while their first amended complaint alleged only one of the theories.

¶ 40 The Village is correct that plaintiffs' briefs on appeal make alternating references to (1) melted snow and ice migrating along the ground from the water tower to the property of Raymond Kia (the water-migration theory); and (2) snow migrating by wind from the top of the water tower to the property of Raymond Kia (the snow-migration theory).

¶ 41 The Village is also correct that plaintiffs' first amended complaint alleged only the water-migration theory. As alleged there, and as framed on appeal, the water-migration theory is that the accumulation on which Knuth slipped was formed when melting ice and snow on the water tower migrated to the base of the tower, either by running along its surface or dropping down, and from there migrated along the ground to the area of the accident, where it refroze. In their Rule 213(f)(3) disclosures, plaintiffs stated that Van Ostrand would hold to the water-migration theory in his testimony at trial. At his deposition, Van Ostrand testified that he no longer held the water-migration theory to a reasonable degree of certainty, and advocated instead the snow-migration theory, which is that snow drifted directly from the water tower to the area of the accident, where it melted and later refroze. In opposing summary judgment, plaintiffs relied on the snow-migration theory but not the water-migration theory. Contemporaneously, they moved to amend their complaint to add the snow-migration theory. The trial court denied their motion and entered summary judgment on plaintiffs' first amended complaint.

¶ 42 The Village asserts that plaintiffs could not properly rely on the snow-migration theory in resisting summary judgment below—and by extension cannot rely on it in this appeal—because

the complaint then on file (their first amended complaint) did not allege that theory. The Village quotes *Bauer v. Hubbard*, 228 Ill. App. 3d 780, 786 (1992), for the proposition that "a plaintiff cannot defend against a motion for summary judgment by presenting evidence on issues which are not pleaded in his complaint." The Village's objection has merit, but it is untimely. When plaintiffs relied in the trial court on the snow-migration theory in resisting summary judgment, the Village addressed the theory on its merits and did not assert that plaintiffs were procedurally barred from relying on the theory because it was not alleged in their first amended complaint. By failing to raise it in the trial court, a defendant forfeits an objection that a theory advanced by the plaintiff in opposition to summary judgment was not alleged in the complaint. See *Clifford v. Wharton Business Group, L.L.C.*, 353 Ill. App. 3d 34, 41-42 (2004) *Williams v. Alfred N. Koplin & Co.*, 114 Ill. App. 3d 482, 486 (1983) ("While defendants assert that this is a new theory not pleaded in the trial court, any objection to the lack of specificity in pleading this allegation has been waived by defendants' failure to object below when the facts to support this theory were raised in plaintiff's affidavit and specific argument was made to the trial court on this basis by plaintiff in opposition to defendants' motion for summary judgment."). The Village forfeited its objection to plaintiffs' reliance on the snow-migration theory. We note that the Village makes no corresponding argument that plaintiffs abandoned the water-migration theory by failing to argue it in opposition to summary judgment.

¶ 43 We proceed to determine whether a genuine issue of material fact exists with respect to either of plaintiffs' two theories, water-migration or snow-migration. We hold that plaintiffs have failed to demonstrate, with respect to either theory, that a triable issue of fact exists on the element of causation.

¶ 44 An unnatural accumulation may be "the direct result of the [landowner's] clearing of the ice and snow, or *** caused by design deficiencies that promote unnatural accumulations of ice and snow." *Webb v. Morgan*, 176 Ill. App. 3d 378, 382-83 (1988). Under both of plaintiff's theories, the accumulation on which Knuth slipped was caused by design deficiencies and not by snow removal efforts. "[The] plaintiff has the burden of affirmatively proving the ice upon which he fell was an unnatural accumulation caused or aggravated by defendants." *Koziol v. Hayden*, 309 Ill. App. 3d 472, 476 (1999). "Although the plaintiff need not prove her case in order to defeat a motion for summary judgment, she 'must present some facts to show that the case was unnatural or caused by defendant.' " *Madeo v. Tri-Land Properties, Inc.*, 239 Ill. App. 3d 288, 294 (1992) (quoting *Crane v. Triangle Plaza, Inc.*, 228 Ill. App. 3d 325, 332 (1992)). See *Bloom v. Bistro Restaurant Ltd. Partnership*, 304 Ill. App. 3d 707, 710 (1999) ("In order to withstand a motion for summary judgment, a plaintiff must come forward with sufficient evidentiary materials to permit the trier of fact to find that defendant was responsible for an unnatural accumulation of water, ice or snow that caused plaintiff's injuries."). This showing requires proof of an "identifiable cause" of the accumulation. *Branson v. R & L Investment, Inc.*, 196 Ill. App. 3d 1088, 1094 (1990). "Mere speculation or conjecture is not sufficient to establish liability." *Id.* The plaintiff must present "concrete evidence" linking the accumulation on which the plaintiff slipped with a condition caused by the defendant. *Madeo*, 239 Ill. App. 3d at 292. The link may be demonstrated by direct evidence or circumstantial evidence, which includes expert testimony. *Id.* at 294. "Absent such a showing, summary judgment for the defendant is appropriate since the court owes no duty to reason some remote factual possibility." *Branson*, 196 Ill. App. 3d at 1095.

¶ 45 We begin with the water-migration theory. The crux of this theory is that runoff from the water tower migrated to the dealership property because of the "excessive" slope of the land on which the water tower stood. "[T]he mere existence of a slope in [a] lot is not enough to defeat a motion for summary judgment." *Crane*, 228 Ill. App. 3d at 331. Rather, "[w]hen a plaintiff alleges that the design of a sloping surface created an unnatural accumulation of ice, there must be evidence presented of the dangerous nature of the slope, that the slope was the proximate cause of the plaintiff's injuries and that the landowner had notice of the defect." *Wells v. Great Atlantic & Pacific Tea Co.*, 171 Ill. App. 3d 1012, 1015-16 (1988). "Once such evidence has been produced, the issue of whether the slope was a dangerous condition which created an unnatural accumulation of ice is a question of fact." *Id.* at 1016.

¶ 46 Plaintiffs have shown no error in the trial court's judgment with regard to the water-migration theory. Plaintiffs cite no expert opinion in their favor on that theory, as indeed there was none upon which they could have properly relied in opposing summary judgment. At his deposition, Van Ostrand effectively abandoned the water-migration theory. He testified that he continued to believe that the grade of the Village's property caused water to flow downhill from the water tower to adjacent property in violation of international standards. Van Ostrand, however, could no longer opine to a reasonable degree of certainty that runoff from the water tower "caused or contributed to [Knuth's] accident." The reason was that, at the time of the accident, there was a "valley" between the water tower and the place where Knuth slipped. "Opinions that are inadmissible at trial cannot be used in opposition to a motion for summary judgment." *Essig v. Advocate BroMenn Medical Center*, 2015 IL App (4th) 140546, ¶ 49; see also *Watkins v. Schmitt*, 172 Ill. 2d 193, 203-04 (1996) ("[A]ny evidence which would be inadmissible at trial cannot be considered by the court in support of or opposition to a motion for

summary judgment.") To be admissible at trial, an expert's opinion must be to a reasonable degree of certainty within his field of expertise. *Torres v. Midwest Development Co.*, 383 Ill. App. 3d 20, 27 (2008). Since Van Ostrand did not hold the water-migration theory to that degree of certainty, his opinion may not be considered in opposition to summary judgment,

¶ 47 Expert testimony is not necessary to establish a causal link between a condition created by the defendant and an accumulation on which the plaintiff slipped. See *Johnson v. National Super Markets, Inc.*, 257 Ill. App. 3d 1011, 1016-17 (1994). The court in *Johnson* said:

> "It is within the common knowledge of a person to know what the temperature is on a particular day and that water can melt, freeze, or refreeze depending on the temperature at any given time. It is also within common knowledge for a person to know that, if a parking lot slopes toward the entrance of the store and snow melts, the water will run downhill and collect at the entrance. Further, we believe that it is within common knowledge that if the sun shines, snow will melt, and if it is in a large pile, the water from the snow will run down the pile, and if the temperature drops, it will refreeze in the area in which it collected."

¶ 48 This court's decision in *Madeo* is illustrative. There, this court affirmed the grant of summary judgment in the defendants' favor. The plaintiff slipped on a patch of ice in a parking lot. She alleged that the ice was an unnatural accumulation caused by water flowing from a snow pile that the defendants had formed on a higher end of the lot. The plaintiff testified that temperatures were above freezing on the day of the accident and on the days before. She presented no expert opinion that the ice was attributable to the snow pile or that the slope of the lot was conducive to the formation of such ice. We commented, though, that the plaintiff might have defeated summary judgment even without expert testimony had she "produc[ed] evidence

that the ice where [she] slipped formed a sheet extending from the snow pile to the place where she fell." *Id.* at 293. Instead, the plaintiff's daughter testified that the ice was a two-foot by three-foot patch. Consequently, "[o]ther than stating, in essence, that 'water flows downhill,' plaintiff provided no evidence as to how the grade in the lot could have caused water from the snow bank to reach the spot where plaintiff slipped." *Id.* at 294. As the plaintiff was simply "invit[ing] speculation as to the cause of the ice," summary judgment in the defendants' favor was appropriate. *Id.*

¶ 49 Though in the case at hand plaintiffs presented expert testimony that the slope in this case would have caused water to migrate down from the water tower, plaintiffs were actually the worse for that testimony because their expert identified a topographical feature—a "valley" between the water tower and the area of the accident—that undercut plaintiffs' position that the ice on which Knuth slipped was due to water migrating from the base of the tower. Plaintiffs were in the awkward position below of having to discredit or mitigate their own expert's opinion in order to advance the water-migration theory. Understandably, they made no such attempt, but pressed only the snow-migration theory in opposition to summary judgment. On appeal, they forge ahead with both theories without any acknowledgement of Van Ostrand's turnabout on the water-migration theory. Their argument on that theory is cursory. They intersperse general legal principles with the following purported facts that they derive from Knuth's and Hanson's testimony: (1) "there was an excessive amount of water around the water tower that extended well beyond the perimeter that had been taped off by the dealership"; (2) "in the past, there had been problems with ice and snow falling from the water tower in winter months and then with water draining downhill from the Village property onto the abutting parking lot"; (3) "[t]he ice covered gravel near the water tower was diabolically [*sic*] different than the abutting asphalt

parking lot, which was clear and not covered with any ice"; and (4) "ice had melted from the water tower the day before." These facts suggest that the ice on which Knuth slipped was contiguous to a source of runoff (analogous to the snow pile in *Madeo*). Still, we reject plaintiffs' argument for their failure even to recognize Van Ostrand's damaging opinion on the water-migration theory. It is not for us to conjure up argument that the lay testimony in this case maintained the viability of the water-migration theory despite Van Ostrand's adverse testimony (for instance, while Knuth also testified to a "valley," which may have been the same as Van Ostrand described, Knuth said that he was on the gravel side—the tower side—of the valley when he slipped). See *Hytel Group, Inc. v. Butler*, 405 Ill. App. 3d 113, 127 (2010) (the reviewing court will not take up the appellant's burden of research and argument).

¶ 50 We move to plaintiffs' snow-migration theory, which is that, on the day before Knuth's accident, weather conditions caused snow to migrate from the water tower to the dealership property where it melted and refroze, forming the accumulation of ice on which Knuth later slipped. Plaintiffs claim support for this theory in Van Ostrand's deposition testimony. They cite only the portions of Van Ostrand's testimony favorable to their position. They neglect to mention that, after extensive questioning, Van Ostrand made a crucial concession regarding the snow-migration theory, as he did with the water-migration theory. Van Ostrand testified that "quite a bit of snow" fell between March 1 and 5 (Knuth's accident occurred on March 8). Pressed as to the significance of that snow fall, Van Ostrand admitted that he could not opine to a reasonable degree of certainty that Knuth's accident was caused by snow migrating from the water tower as opposed to snow falling directly from the sky. Because Van Ostrand's opinion on causation was not to a reasonable degree of certainty, it would have been inadmissible at trial (*Torres*, 383 Ill. App. 3d at 27), and, consequently, it was not a proper consideration in a

summary judgment proceeding (*Essig*, 2015 IL App (4th) 140546, ¶ 49 ("Opinions that are inadmissible at trial cannot be used in opposition to a motion for summary judgment.").

¶ 51 The lay testimony was not of itself adequate to create a triable issue of fact on causation. Hanson testified to the risk of snow and ice falling from the tower during periods of thawing, and Knuth testified that he was told by a coworker that precipitation had fallen from the tower the day before and damaged a car parked underneath. No lay witness testified to any instance of snow blowing from the tower onto dealership property or to the potential for such migration. Nor did any lay witness address the significance of the snowfall that Van Ostrand referenced.

¶ 52 This court's decision in *Russell v. Village of Lake Villa*, 335 Ill. App. 3d 990 (2002), provides a helpful comparison with the case at hand. The plaintiff in *Russell* was at a commuter train station when he lost his footing on ice that had accumulated on a section of brick pavers that was separated by a curb from the station's parking lot. The ice was contiguous to snow that had been piled on the curb when the defendant, the Village of Lake Villa, plowed the parking lot. Ice had also formed on other sides of the snow pile. This court reversed the grant of summary judgment in the defendant's favor:

> "It is the plaintiff's burden to present facts indicating a 'direct link' between the snow pile and the ice. [Citation.] We believe that plaintiff in the present case has presented facts that indicate such a direct link. The ice surrounded the base of the snow pile and was contiguous with it and appeared to have come from water that melted off the snow. Plaintiff testified that the days were warm and the nights were below freezing. He described the ice where he slipped as clear, smooth, and transparent. He recalled no recent precipitation. [Glen McCollum, defendant's director of public works], stated that

the snow mound was not from a new snow event and it appeared to have melted and refrozen, causing the ice patch." *Id.* at 996.

¶ 53 In contrast to *Russell*, there was "recent precipitation" (*id.*) as of the time of Knuth's accident. In view of Van Ostrand's concessions regarding the snow that fell in the days preceding the accident, and the failure of the lay testimony to address the snowfall, we conclude that plaintiffs' factual presentation on the snow-migration theory failed to show an "identifiable cause" (*Branson*, 196 Ill. App. 3d at 1094) of the ice on which Knuth slipped.

¶ 54 Plaintiffs cite several slip-and-fall cases, which they rely on for general principles without discussing their facts. Suffice it for us to remark that, in those decisions that upheld judgments for the plaintiff for an injury from an unnatural accumulation of ice, there was no evidence of potential *natural* causes of the accumulation, such as the recent snowfall that plaintiffs' expert described in the present case. See *Graham v. City of Chicago*, 346 Ill. 638 (1931), *Webb*, 176 Ill. App. 3d 378 (1988), *Ide v. City of Evanston*, 267 Ill. App. 3d 881 (1994).

¶ 55 Our finding that plaintiffs have failed to show the existence of a triable issue of fact on the element of causation is a sufficient ground for affirming the grant of summary judgment in the Village's favor. See *Smith v. Tri-R Vending*, 249 Ill. App. 3d 654, 658 (1993) ("A defendant in a negligence suit is entitled to summary judgment if he can demonstrate that the plaintiff has failed to establish a factual basis for one of the required elements of a cause of action for negligence."). Finding no error in the trial court's determination that plaintiffs made an inadequate showing on the elements of negligence, we decline to address whether plaintiffs' claims are barred by the Tort Immunity Act.

¶ 56 III. CONCLUSION

¶ 57 For the foregoing reasons, we affirm the judgment of the circuit court of Lake County.

¶ 58 Affirmed.