2018 IL App (1st) 162573-U

FIRST DIVISION
April 30, 2018

No. 1-16-2573

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IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

HOWARD RAY, SR. and MARY RAY, as Special Administrators of the Estate of DASHAND RAY,	)	
Plaintiffs-Appellants,	)	Appeal from the Circuit Court of Cook County,
v.	)	
EPITOME RESTAURANT AND NIGHT CLUB d/b/a E2; DWAIN KYLES, CALVIN HOLLINS, LE MIRAGE STUDIO, LIMITED d/b/a EPITOME E2 and a/k/a HEROES SPORTS BAR & GRILL; LESLEY MOTORS, INC.; LESLEY BENODIN; ENVY PRODUCTIONS & ENTERTAINMENT COMPANY a/k/a ENVY PRODUCTIONS; MARCO FLORES; TEAM 1 SECURITY; ONESTI ENTERTAINMENT CORPORATION; RAPHAEL PELLOT; THE CITY OF CHICAGO, a Municipal Corporation; VAUGHN WOODS; CLEAR CHANNEL COMMUNICATIONS d/b/a WGCI; IRA NAVARRO; DONALD CRAYTON; and BRIAN KELLER a/k/a BRANDON KELLER,	)	No. 03 L 2376 (cons. with 03 L 1951 and other related cases)
	)	Honorable Kathy M. Flanagan, Judge Presiding.
Defendants,	)	
(The City of Chicago, Defendant-Appellee).	)	

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Pierce and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's grant of summary judgment in favor of defendant City is affirmed where plaintiffs failed to introduce evidence supporting their remaining allegation against the City.

¶ 2 Plaintiffs Howard Ray, Sr. and Mary Ray, as special administrators of the estate of their son and decedent, Dashand Ray, appeal from the circuit court's grant of summary judgment in favor of defendant, the City of Chicago (City). For the following reasons, we affirm the judgment of the circuit court.

¶ 3 I. BACKGROUND

¶ 4 At approximately 2:15 a.m. on February 17, 2003, a disturbance occurred on the second floor of the E2 Nightclub located at 2347 South Michigan Avenue in Chicago, Illinois. Security guards responded by releasing Mace or pepper spray, and, in response, many patrons panicked and fled to the staircase leading to the nightclub's only exit, causing a pile-up of people at the bottom of the stairs. The ensuing pandemonium tragically resulted in death or injury to many people who were at the club. Dashand Ray was one of the people who died. There were twenty wrongful death lawsuits and over thirty personal injury lawsuits filed. Those lawsuits were eventually consolidated and resolved, except for the remaining claim that is before us now.

¶ 5 The facts underlying this case are discussed in detail in a prior opinion we issued in that consolidated case. *Anthony v. City of Chicago*, 382 Ill. App. 3d 983 (2008). The facts that we summarize here are limited to those relevant to the present appeal.

¶ 6 On February 13, 2004, plaintiffs in the consolidated case filed one second-amended wrongful death master complaint and one first-amended personal injury master complaint against numerous defendants, including the City. Plaintiffs alleged that the City "had a duty to Plaintiff's

decedent to refrain from or engaging in, both directly and indirectly, individually and through its agents, servants and employees, acts and or omissions exhibiting reckless disregard and utter indifference in the execution and enforcement of the law." Plaintiffs alleged that the exit doors of the E2 Nightclub were "locked, blocked and/or barricaded." Plaintiffs then alleged the City "was guilty of" several "reckless, willful and wanton acts and/or omissions," including that it "failed to timely and properly remove and extricate patrons trapped in the stairwell from the top and bottom of the pile."

¶ 7 The City filed a motion to dismiss. The circuit court denied the motion on September 8, 2004. The court also allowed plaintiffs to amend the master complaints to include the following additional allegation:

> "Upon information and belief, as patrons filed down the stairwell from the second floor and attempted to exit through the glass front doors of the premises, the doors were jammed, closed and locked by an unknown Chicago police officer which caused or contributed to a pile up of the patrons at the bottom of the staircase."

This additional allegation, which is the one at issue in this appeal, will be referred to as the supplemental allegation.

¶ 8 On June 8, 2005, the circuit court certified three questions regarding the City's immunity for interlocutory review by this court, which we considered in *Anthony*, 382 Ill. App. 3d 983. At oral argument in *Anthony*, the City conceded that the supplemental allegation—set out in paragraph 7 of this order—"was not subject to the public duty rule, immunity and proximate cause arguments raised by the City concerning the other allegations in the master complaints." *Anthony*, 382 Ill. App. at 987. We held in that appeal that the City was "immune from liability

from its alleged failure to enforce laws or court orders or provide police protection" (*id.* at 996), which resolved the other claims against the City.

¶ 9 While the interlocutory appeal was pending, the City filed a partial motion for summary judgment with respect to the supplemental allegation. Although the parties fully briefed that motion, the circuit court did not rule on it. *Anthony* was released on May 16, 2008. Then, on June 21, 2011, the City filed a renewed motion for summary judgment with respect to the supplemental allegation, arguing that video evidence from the night of the incident—including digital footage recorded by the club's security cameras and footage recorded by a videographer, Kenneth Herzlich—disproved the allegation and that, further, none of the deposition testimony supported the allegation. According to the City, the security footage showed that "before and during the 13 minutes and 30 seconds when patrons began pushing through the upstairs lobby *** and piling up at the base of the staircase *** the exit door [was] opening and closing or being held open." The City also argued that the affidavits of two witnesses, Nikita Shelton and Kionna Henry—which plaintiffs had attached to their response to the City's initial motion for summary judgment—failed to either contradict the video evidence or support their allegation against the City.

¶ 10 Mr. Herzlich's footage, which is included in the record on appeal, shows the scene from outside the club, mostly at a distance. When the camera did zoom in closer to the entrance, it makes clear that there was only one front entrance, and only one glass door at the entrance. The security footage from the club, also part of the record on appeal, includes video footage from four different security cameras. The club itself was on the second floor of the building, but had a street-level entrance. Cameras 1 and 2 both capture different angles from just inside the front street entrance door of the club, before the stairwell to the second floor entrance of the club;

camera 3 is recording the lobby area at the top of the club's stairs, including a coat check and a door leading to the club's dance floor; and camera 4 is tracking the front street entrance door from just outside the club. The door in question, the single glass door at the front street entrance of the club, was visible from cameras 1, 2, and 4. According to the timestamp on the footage, recording began at 14:05:00 and continued for approximately 60 minutes. The City advised the trial court in its motion for summary judgment that the time stamp was approximately 12 hours and 2 minutes behind the actual time being recorded.

¶ 11 Starting at what is time-stamped as 14:15, camera 1 turns off, and either remains off or is too dark to make out for the rest of the footage. At various points the footage from cameras 2 and 3 is also too dark to make out. But camera 4 is on and the area it covered is well-lit during all of the footage. Footage from camera 3 clearly shows upstairs patrons began crowding together in a mass starting at approximately 14:17 on the time stamp. At this same time, camera 2 shows that the club's downstairs lobby was relatively empty. For the next couple of minutes, the front entrance door can be seen opening and closing, as people exited or entered through the door. By approximately 14:31 on the time stamp, it is clear that a pile of patrons has fallen to the bottom of the front stairwell. By the end of the footage, the upstairs area is mostly clear and people are being pulled from the pile at the bottom of the stairs. Throughout the security footage, camera 4 clearly shows the club's front entrance door opening and closing, or standing open.

¶ 12 The affidavits of Ms. Shelton and Ms. Henry were attached to the City's renewed motion for summary judgment. Ms. Shelton attested in her affidavit that she was a patron at the club on February 17, 2003, that she attempted to exit through the front entrance, that she saw a Chicago police officer "come through the front door entrance," and that she saw the same officer "close the front door." Ms. Henry attested that she was also at the club on February 17, that she

attempted to exit the club "by descending the front staircase to the front doors," that she "observed uniformed Chicago police officers refuse to open the front doors," and that she "observed uniformed Chicago police officers refuse to help extricate or remove patrons who were trapped in the stairway."

¶ 13 The consolidated plaintiffs filed a response in opposition to the City's motion, arguing that summary judgment was inappropriate because the video footage was inconclusive and a question of fact existed as to what happened on the night of the incident. Plaintiffs also attached the same affidavits of Ms. Shelton and Ms. Henry to their response that the City had attached to its motion.

¶ 14 The City attached to its reply, in support of its motion, full transcripts of the depositions of both Ms. Shelton and Ms. Henry. At her deposition, Ms. Shelton testified that she went to the club with two friends and was dancing with her friends on the dance floor when she heard the DJ call for security to go to the left side of the floor. She did not witness the disturbance, but she assumed there was a fight. "Maybe about a minute or two later," Ms. Shelton felt a tingling in her throat and began coughing. At that time, she stated that she observed "[c]haos" around her. People were "covering their mouths" and "starting to run towards the exit." Ms. Shelton also headed towards the exit but became stuck near the coat check. "People were pushing and shoving." She was pushed toward the front stairwell and made it partway down the stairs but then fell at the bottom of the stairwell and landed on her stomach. As Ms. Shelton described the scene: "everybody had kind of, like, fell at once. Arms were sticking out. People were underneath. People were hollering, screaming. I saw the two glass doors, the entranceway where I had first came into the club." She said that she "observed that the doors were closed." She further testified:

"Q. When you were lying down and you saw the glass doors, did you see those doors opening and closing at any time?

A. Yes.

Q. Okay. Did you see anyone close the door?

A. They were opening and closing. Police officers and firemen were going in and out when I was laying on the steps.

Q. Okay. But did you see anyone specifically shut the doors so people couldn't get out?

A. No. I just saw police holding the crowd back.

Q. Okay. Did you see anyone lock the doors?

A. No."

¶ 15 At her deposition, Ms. Henry testified that she was at the club with some friends when a fight broke out between two men about five feet away from her on the dance floor. Ms. Henry saw one security guard attempt to break up the fight, then spray "one long spray" of pepper spray at the two men. One of the two men kept fighting with the security guard, so two or three more security guards walked over and sprayed that individual with their cans of pepper spray. Ms. Henry started coughing and felt a "burning sensation," and then the crowd became more physical, pushing her towards the door. Ms. Henry was moved by the crowd to the front stairwell, by which time people were starting to scream and panic, and the crowd had become a stampede: "People were starting to collapse, and we were walking over people by then." Ms. Henry was eventually pushed to the top of the stairs and was able to see down the stairwell. She saw people falling at the bottom of the stairs. But she could see the front door at the time and, although no one was exiting through the door, she believed it was still open. She further testified

that a white male—whom Ms. Henry believed was a police officer—was "standing in the doorway" and "telling the people to move back into the party." She continued:

> "Q. So the front door is open?
>
> A. Yes. He's holding it—I believe he was holding it open with his leg.
>
> Q. Is anyone exiting from the front door at this point?
>
> A. No.
>
> * * *
>
> Q. What happens next?
>
> A. People were crying, screaming. I couldn't—I was kind of in a panic because the girl I was laying on, she was biting and pinching me. It was just crazy. I remember the man saying, 'Go back in the party.' By then they had closed the door. They weren't letting anybody out even though they couldn't get out by everybody being stacked up so high.
>
> Q. At this point, approximately how long had you been in this position where you are on this stairwell observing this?
>
> A. I can't say a specific amount of minutes. To me, it seemed like forever. I really can't say how long.
>
> Q. That's understandable. Okay. So you say that this female under you is biting and pinching you and that the front door is closed; is that correct?
>
> A. Yes, because we were hollering to tell him to open the door.
>
> * * *
>
> Q. Let's back up for a minute. You said that the door is closed. Is that policeman downstairs still at the bottom motioning for people to back up?

A. I can't say I recall seeing him after those first couple of minutes telling everybody to move back. By then my attention was onto the girl because she was biting me really hard and pinching me."

When asked whether she had "any personal knowledge of what caused all the people to become piled up on the stairs," Ms. Henry replied, "No." Later on during her deposition, the following exchange occurred:

"Q. Okay. During your testimony, we spoke a little bit about the door to the entrance on Michigan Avenue. Do you remember that testimony?

A. Yes.

Q. And you testified that when you first [were] at the top of the staircase and by the coat check, you believed the door was open; is that right?

A. Correct, yes.

Q. Do you have any reason to believe the door had been closed?

Q. Because on the way down—If the door was closed before I got on the stairs, I wouldn't have been able to get as far down as I did because the people were still able—the people were starting to get stacked up.

The reason why I say that the door was closed—and when I looked up, it was closed already—because the people were already crowded up; and by then people were trying to climb over people, and that's how we got stuck.

* * *

Q. Are you able to testify that the door being closed was what caused the people to back up onto the stairs?

A. I personally don't know if that was the reason why, but my theory

would be because people were being trampled. Instead of letting those people up, people were trying to walk over those; and that's how they got stacked up so high. I really can't say the reason why is because the door was closed. I really can't say that.

Q. At any point during the evening, did you observe that door being locked or unlocked by any person either working for the nightclub, the security, the police, anybody?

A. The main front door?

Q. Correct.

A. No, not to my—nothing that I can recall besides the firemen or—or the policemen in the doorway and it being closed. I don't know if it was locked or not.

Q. But you didn't observe anyone lock the door?

A. No, I didn't see anyone."

¶ 16 On April 11, 2012, the circuit court granted the City's renewed motion for summary judgment. In its order, the court explained that, after viewing all of the evidence submitted for summary judgment, there was no question of material fact:

"[T]here is no actual conflict as to what occurred, and there is no evidence in this record, to support the allegation that any officer of the Chicago Police Department engaged in any conduct that either caused the doors to be jammed, closed, and/or locked, thereby causing or contributing to the pile up of the patrons at the bottom of the staircase at the E2 Nightclub on February 17, 2003. The unequivocal lack of evidence to support the sole remaining allegation mandates that this Court

grants summary judgment for the City of Chicago."

¶ 17 II. JURISDICTION

¶ 18 On December 27, 2016, the circuit court entered final judgment in this case, dismissing all of the consolidated cases with prejudice. The Rays filed an initial notice of appeal on September 7, 2016, and filed a timely amended notice of appeal on January 4, 2017. We have jurisdiction over this appeal pursuant to Illinois Supreme Court Rules 301 and 303, governing appeals from final judgments entered by the circuit court in civil cases. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. Jan. 1, 2015).

¶ 19 III. ANALYSIS

¶ 20 The Rays make three arguments on appeal: (1) the circuit court erred by failing to consider all of the evidence before it; (2) the circuit court erred in granting summary judgment in favor of the City; and (3) the circuit court erred in refusing to allow the Rays to amend their complaint. We consider each argument in turn.

¶ 21 A. Circuit Court's Consideration of Evidence

¶ 22 The Rays contend that the circuit court committed reversible error by disregarding Ms. Henry's affidavit, by failing to liberally construe the remaining evidence in their favor, and by failing to consider "what the surveillance and news cameras did not capture." However, because our review of the grant or denial of a motion for summary judgment is *de novo*, it does not matter whether the circuit court failed to consider relevant evidence, so long as our independent review of the relevant evidence supports the court's ruling. See *Cohen v. Chicago Park District*, 2017 IL 121800, ¶ 17. As we discuss below, even liberally construing the evidence in the Rays' favor, summary judgment in favor of the City was proper.

¶ 23 B. Summary Judgment

¶ 24 The Rays' main argument on appeal is that the circuit court erred when it granted summary judgment in favor of the City. "Summary judgment is proper when the pleadings, depositions, affidavits, and other matters on file establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Cohen*, 2017 IL 121800, ¶ 17 (citing 735 ILCS 5/2-1005(c) (West 2012)). A defendant moving for summary judgment has the initial burden of production, which can be met by "either (1) affirmatively introducing evidence that, if uncontroverted, would disprove the plaintiff's case ([citation]) or (2) establishing that a lack of sufficient evidence will prevent the plaintiff from proving an essential element of the cause of action ([citation])." *Home Healthcare of Illinois, Inc. v. Jesk*, 2017 IL App (1st) 162482, ¶ 51. When a defendant meets the initial burden of production, "that burden then shifts to the plaintiff to show some factual basis to support the elements of his claim or defeat the defense." *Id.* "A plaintiff is not required to prove his or her case at the summary judgment stage; however, to survive a motion for summary judgment, the nonmoving party must present probative evidence that supports his or her position." *Rahic v. Satellite Air-Land Motor Service, Inc.*, 2014 IL App (1st) 132899, ¶ 21.

¶ 25 When considering a motion for summary judgment, a court "must consider all the evidence before it strictly against the movant and liberally in favor of the nonmovant." *Colvin v. Hobart Brothers*, 156 Ill. 2d 166, 170 (1993). "A triable issue precluding summary judgment exists where the material facts are disputed or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts." *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). "If the plaintiff fails to establish any element of the cause of action, summary judgment for the defendant is proper." *Id.* A circuit court's ruling on a

motion for summary judgment is reviewed *de novo*. *Cohen*, 2017 IL 121800, ¶ 17.

¶ 26 Here, the Rays contend that summary judgment should not have been granted in favor of the City because there was a conflict between the parties as to what actually occurred, and that the City's video evidence was inconclusive and could be viewed as consistent with a finding that a Chicago police officer "engaged in conduct that either caused the doors to be jammed, closed, and/or locked at E2, thereby causing or contributing to the pile up of the patrons at the bottom of the staircase that caused the decedent's death." The Rays rely heavily on Ms. Henry's affidavit, which they contend offers some evidence to support the supplemental allegation.

¶ 27 The City responds that the evidence it used to supports its motion—including the video evidence and the depositions from Ms. Shelton and Ms. Henry—"affirmatively disprove[ed] the supplemental allegation and demonstrated that there is no evidence to support" the elements of the supplemental allegation.

¶ 28 In reply, the Rays argue that the City is reading the operative complaint too narrowly and is ignoring the initial allegation that "the exit doors of [the club] were locked, blocked and/or barricaded." But that statement of fact does not attribute the condition of the doors to a Chicago police officer. The only allegation that does so is the supplemental allegation, which states that a Chicago police officer "jammed, closed, *and* locked" (emphasis added) the door. For the purposes of this order, we will read this supplemental allegation broadly to encompass the disjunctive as well as the conjunctive. Even with this broad reading, however, we still find that the Rays have failed to provide evidence to create an issue of material fact in support of their supplemental allegation.

¶ 29 The City relies heavily on the video footage. Mr. Herzlich's recorded footage shows that the club's single front entrance was a glass door. The security footage shows that from the time

the patrons on the dance floor began crowding toward the stairwell through the pileup on the stairs and the end of the footage, the front entrance door was either standing open or was opening and closing. We have carefully reviewed the footage and it never shows the front entrance door closed for more than a few seconds at a time. This directly contradicts the Rays' claim that a police officer contributed to the pileup by affirmatively preventing patrons from exiting through that door by jamming, closing, or locking it.

¶ 30 The Rays take issue with the security footage, arguing that it is "inconclusive" due to its poor quality, poor lighting on the scene, and its one-frame-per-second recording speed. But, although camera 1 was off for a majority of the footage, and the scenes depicted by cameras 2 and 3 were sometimes too dark to see, camera 4 was operable and clearly lit for the entire incident. And camera 4 conclusively shows the front entrance door either being held open or being opened and closed for the entire duration of the incident. In addition, of the police officers who are visible in the footage, none are seen jamming, closing, or locking the door in any way, and, in fact, there is no evidence that the door was jammed, closed, or locked by anyone at any time.

¶ 31 The City quotes from the United States Supreme Court's decision in *Scott v. Harris*, 550 U.S. 372, 380 (2007): "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." In *Scott*, the Supreme Court held that the trial court should have granted summary judgment based on a videotape that blatantly contradicted the plaintiff's version of events and showed that a deputy did not violate the Fourth Amendment. *Scott* is a federal case, but the federal summary judgment standard is "substantially similar" to the Illinois summary judgment standard. *Estate of*

Henderson v. W.R. Grace Co., 185 Ill. App. 3d 523, 529 (1989). Here, the security footage contradicts the allegation that anyone, let alone a Chicago police officer, jammed, closed, or locked the front entrance of the club.

¶ 32 Moreover, in this case the plaintiffs did not produce evidence to contradict what the video footage shows happened. One witness, Ms. Henry, did testify that she saw a person she believed to be a police officer "standing in the doorway" and "telling the people to move back into the party." But plaintiffs did not allege that the Chicago police prevented patrons from leaving the club by standing in front of the door and ordering patrons back into the club. That is completely different conduct from jamming, closing, or locking the door. Although we must construe allegations liberally in favor of the plaintiff on a motion for summary judgment, we cannot in effect amend a complaint, which is what plaintiffs are asking for here when they ask us to consider this testimony as creating a factual issue.

¶ 33 Once the City met its burden of production by affirmatively introducing the video footage evidence which, "if uncontroverted, would disprove the [Rays'] case," the burden then shifted to the Rays to show some factual basis to support their allegation. This they did not do. In response to the City's motion, the Rays relied primarily on the affidavits of Ms. Shelton and Ms. Henry. But even construed liberally in favor of the Rays, these affidavits provide no direct support for the Rays' allegation that a Chicago police officer jammed, closed, or locked the front entrance door. Ms. Henry's statement that she "observed uniformed Chicago police officers refuse to open the front doors" is not the equivalent of a Chicago police officer affirmatively jamming, closing, or locking the front door. And Ms. Shelton's statement that she saw a police officer "close the front door," which is also not equivalent to the allegations in the complaint, is affirmatively contradicted by her own deposition testimony in which she answered "no" to the question of

whether she saw "anyone specifically shut the doors so people couldn't get out." The Rays contend that the statements from Ms. Shelton and Ms. Henry are *consistent* with their allegation that a police officer "jammed, closed and locked" the front entrance door. But this is simply not enough when the security footage affirmatively negates the allegation. The affidavits relied on by the Rays do not create a genuine issue of fact. Therefore, we find that the circuit court properly granted summary judgment in favor of the City.

¶ 34 C. Leave to Amend the Complaint

¶ 35 Lastly, the Rays argue that the circuit court should have permitted them to amend their complaint to "conform to the proofs that were available at the time the court ruled on the City's motion for summary judgment." Notably, however, plaintiffs never filed a motion seeking leave to amend their complaint before the circuit court. Instead, the plaintiffs suggested in a footnote in the summary judgment briefing that such an amendment could be allowed. After the circuit court granted the City's renewed motion for summary judgment, the Rays filed a notice of appeal, without ever providing the circuit court with a proposed amended complaint or even a motion to file one.

¶ 36 We first note that plaintiffs failed to properly raise this issue before the circuit court. For a circuit court to exercise its discretion with respect to ruling on a motion for leave to amend, "it must review the proposed amended pleading to determine whether it would cure the defect in the pleadings, whether it was timely, whether it prejudiced the opposing party, and whether there were previous opportunities to amend." *In re Huron Consulting Group, Inc. Shareholder Derivative Litigation*, 2012 IL App (1st) 103519, ¶ 68. Moreover, a proper motion for leave to amend a complaint "must contain an argument for permitting an amendment pursuant to [these] factors and include a copy of the proposed amended pleading." *Id.* Here, plaintiffs provided the

circuit court with none of these things—no actual motion filed, no argument pursuant to the factors, and no proposed amendment.

¶ 37 The City argues that, if the circuit court had denied a motion for leave to amend, this ruling would not be an abuse of discretion. The City argues that any amendment to include allegations based on the affidavits or testimony of Ms. Shelton and Ms. Henry would still not enable the Rays to overcome summary judgment. The City also contends that any amendment "would be either irrelevant or barred by immunity," and an amendment after summary judgment was granted would be untimely.

¶ 38 We need not get into any of this, however, because issues that were not raised before the circuit court are considered forfeited and may not be raised for the first time on appeal. *Martinez v. River Park Place, LLC*, 2012 IL App (1st) 111478, ¶ 29. Accordingly, because plaintiffs did not properly present a motion for leave to amend to the circuit court or obtain a ruling on any such motion, we will not consider the Rays' argument on appeal that the trial court abused its discretion in denying them leave to amend their complaint.

¶ 39 IV. CONCLUSION

¶ 40 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 41 Affirmed.