2019 IL App (1st) 171289-U

FOURTH DIVISION
Order filed December 13, 2018
Modified Upon Denial of Rehearing February 7, 2019

No. 1-17-1289

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

PATRINIA ANN GUNBY and HERMAN GUNBY,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	Cook County
	)	
v.	)	
	)	No. 2014 L 5538
ALDI, INC., an Illinois corporation; and GALLAGHER BASSETT SERVICES, INC., an Illinois corporation,	)	
	)	Honorable
Defendants	)	Kathy M. Flanagan,
	)	Judge Presiding.
(ALDI, Inc., Defendant-Appellee.)	)	

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Rochford concurred in the judgment.
Justice Lampkin concurred in part and dissented in part.

ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County, wherein the court dismissed spoliation claims against a grocery store chain and its insurer and granted summary judgment in favor of the chain on negligence and loss of consortium claims.

¶ 2 Plaintiffs Patrinia Ann Gunby (Patrinia) and her husband Herman Gunby (Herman) filed an action in the circuit court of Cook County against defendants ALDI, Inc. (Aldi) and Gallagher Bassett Services, Inc. (Gallagher), Aldi's insurer, after Patrinia fell in an Aldi grocery store.

Patrinia asserted a negligence claim and Herman alleged loss of consortium against Aldi. Patrinia also alleged spoliation of evidence by both Aldi and Gallagher. The Gunbys appeal from the dismissal of the spoliation of evidence counts and the grant of summary judgment in favor of Aldi on the negligence and loss of consortium counts. As discussed herein, we affirm.

¶ 3 BACKGROUND

¶ 4 On May 27, 2012, Patrinia shopped with her niece at an Aldi grocery store in South Holland, Illinois. After making a purchase, Patrinia fell while inside of the store, between the cash register area and the store exit. She was transported by ambulance to a nearby hospital, where she was treated and released. Patrinia subsequently sought additional medical treatment, and she represented that she experienced continuing pain and various limitations on her lifestyle following the incident.

¶ 5 On May 23, 2014, the Gunbys filed a three-count complaint asserting (i) a negligence claim by Patrinia alleging, in part, that Aldi had permitted a foreign substance to remain on the floor for a substantial period of time, (ii) a spoliation claim by Patrinia against Aldi and Gallagher, alleging that they failed to preserve the "complete and unedited recorded video surveillance" from the day of the incident, and (iii) a loss of consortium claim by Herman against both defendants.

¶ 6 Aldi filed an answer and affirmative defenses to the negligence count. Aldi and Gallagher also filed a motion to dismiss the other counts pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)), arguing that the complaint violated provisions of the Code which require that separate causes of action against separate defendants be pleaded in separate counts. The circuit court granted the motion, dismissed all of the counts, and permitted the Gunbys to refile their complaint.

¶ 7 On September 2, 2014, the Gunbys filed a six-count first amended complaint. In count I, Patrinia asserted a negligence claim against Aldi. In counts II through V, Patrinia asserted spoliation of video surveillance against Aldi and Gallagher, based on "additional negligence" or intentional misconduct. In count VI, Herman asserted a loss of consortium claim against Aldi.

¶ 8 On September 29, 2014, Aldi and Gallagher filed a motion to dismiss all of the spoliation counts pursuant to section 2-615 of the Code. The defendants argued that Aldi's surveillance video system did not capture Patrinia's fall. They also asserted that the spoliation counts "run afoul" of the pleading requirements set forth in *Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188 (1995), by failing to allege sufficient facts to establish that any missing video footage proximately caused Patrinia any injury or damages. Aldi and Gallagher further contended that intentional spoliation of evidence is not a tort which has been recognized by the Illinois Supreme Court and, in any event, the conclusory allegations in the complaint were insufficient to state a claim. In an order entered on October 1, 2014, the circuit court dismissed the spoliation counts with prejudice.[1]

¶ 9 Aldi filed an answer and affirmative defenses to the remaining counts: Patrinia's negligence count (count I) and Herman's loss of consortium count (count VI). Aldi denied liability and alleged that Patrinia's conduct wholly or partially caused her injuries.[2]

¶ 10 Following discovery, Aldi filed a motion for summary judgment. Aldi argued that Patrinia failed to present any facts establishing that Aldi had actual or constructive notice of the foreign substance alleged to have caused her fall. Aldi further contended that her failure to

[1] Although the Gunbys assert in their petition for rehearing that the dismissal was without prejudice, the record indicates that the spoliation counts were dismissed with prejudice.

[2] Aldi subsequently filed a motion to dismiss the complaint pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2014)), asserting that the Gunbys lacked standing in their action against Aldi based on Herman's bankruptcy filing and Patrinia's status as his co-debtor in bankruptcy. In denying the motion to dismiss, the circuit court concluded that Herman had filed his bankruptcy petition individually and that the Gunbys were not estopped from pursuing their claims.

establish the presence of the foreign substance on the floor for any period of time before she fell – or that she came into contact with the substance – constituted a failure to establish proximate causation. Asserting that Herman's loss of consortium claim was derivative of and dependent upon Patrinia's underlying negligence claim, Aldi sought dismissal with prejudice of his claim.

¶ 11 The exhibits to Aldi's motion for summary judgment included surveillance video footage recorded by multiple cameras inside the store, the deposition testimony of Patrinia and her niece, Marcy Ward (Ward), the recorded statement and deposition testimony of Aldi employee Norma Torres (Torres), and the deposition testimony of former Aldi employee Renee Washington (Washington). The surveillance video included, among other things, footage of Patrinia and Ward paying for their respective purchases at the cash register. The record on appeal does not include, however, any footage of the exit area where Patrinia fell.

¶ 12 During her deposition, Patrinia testified that she had taken prescribed medication for her diabetes on the morning of May 27, 2012. Later in the day, she shopped at the Aldi store with Ward. Patrinia testified that she lost consciousness after she fell while exiting the store. She had neither passed out nor experienced a diabetic episode before her fall at Aldi.

¶ 13 Patrinia did not feel her leg slip before falling and did not know the cause of the fall. She testified, in part: "It was like something grasped under my feet. What it was, I don't know." Although Patrinia did not observe anything on the ground – either before or after the fall – Ward subsequently informed her that "something red" was on the floor. Patrinia testified that Ward also stated that the paramedics who transported Patrinia to the emergency room "said something about where was [Patrinia] bleeding from because there's something red here." Patrinia subsequently testified that she personally heard the paramedics' inquiry regarding the source of her bleeding. She did not recall observing any red substance on her clothing after she regained

consciousness.

¶ 14 Patrinia's sole purchase from the Aldi store was a package of raw chicken legs. She acknowledged during her deposition testimony that packages of raw chicken contain blood. Although video footage showed her picking up the package of chicken at the cashier's counter, Patrinia stated that she then placed the package on the top of a box carried by Ward. Patrinia testified that she was not holding the package of chicken at the time of her fall.

¶ 15 During her deposition, Ward testified that she did not observe or know what caused her aunt to fall and did not know the condition of the floor before the fall. Ward also could not recall whether Ward dropped or otherwise placed the box of food – containing the package of chicken purchased by Patrinia – on the floor after the fall.

¶ 16 Following Patrinia's fall, Ward viewed "[s]omething red, sticky" on the floor which she initially described as larger than the size of a lemon and subsequently characterized as "a little smaller" than a lemon. Ward did not know how or when the red substance came to be on the floor, or whether Patrinia had viewed the substance. Although Ward did not witness anyone cleaning the area after the incident, she observed and photographed a mop bucket when she returned to the store to purchase additional items two hours later. Ward testified, however, that the photographs "don't exist" and she never showed them to anyone.

¶ 17 Torres, an Aldi cashier who was working at the time of the incident, explained during her deposition testimony that her job responsibilities included cleaning the store constantly throughout her workday. The video footage depicted Torres repeatedly cleaning different areas of the floor within the ten-minute period prior to Patrinia's fall. Although Torres did not view the fall, she heard Ward state "[s]he's diabetic, she's diabetic" immediately thereafter. Torres testified that she did not observe any substance on the floor prior to Patrinia's fall.

¶ 18 Washington, a former Aldi shift manager who was working at the time of the incident, did not witness Patrinia's fall. Washington could not recall the condition of the floor or having noticed any foreign substance in the exit area of the store prior to the fall. Although she testified that she completed a customer accident report after the incident, Washington had no independent recollection regarding any complaint by Patrinia as to what caused her fall.

¶ 19 In support of its response to Aldi's motion for summary judgment, the Gunbys submitted, among other things, the deposition testimony of William Stuart (Stuart), a former Aldi district manager. At the time of the incident, he was responsible for oversight of the South Holland store, including ensuring the functionality of its security systems. Stuart testified that he prepared a report regarding Patrinia's fall more than one week after the incident and transmitted "burned" (*i.e.*, copied) video footage to the Aldi divisional office. He further testified that he neither destroyed nor hid any video footage and he saved all of the video footage at or near the time of the incident.

¶ 20 At the time of his deposition, Stuart did not know the number, locations, or angles of the security cameras in the store. He also did not know whether Aldi had a policy or procedure regarding the retention or destruction of security footage. Stuart testified that, at his request, cameras were repositioned after Patrinia's fall. An invoice from the video camera company regarding repairs conducted in August 2012 reflects that the company repositioned a camera to view the exit area of the store at that time.

¶ 21 After considering the motion, the response thereto, Aldi's reply, and the supporting materials, the circuit court issued a memorandum opinion and order granting summary judgment in favor of Aldi on April 19, 2017, as to the two remaining counts: Patrinia's negligence claim and Herman's loss of consortium claim. The Gunbys timely filed this appeal.

¶ 22 ANALYSIS

¶ 23 The Gunbys contend on appeal that the trial court erred in granting summary judgment in favor of Aldi on their negligence and loss of consortium claims and in dismissing the spoliation of evidence claims. We address each in turn below.

¶ 24 Negligence and Loss of Consortium Claims

¶ 25 The circuit court entered summary judgment in favor of Aldi on Patrinia's negligence claim and Herman's loss of consortium claim. Summary judgment is proper whenever the pleadings, depositions, admissions and affidavits on file, viewed in the light most favorable to the nonmoving party, demonstrate that there is no genuine issue of material fact between the parties and that the moving party is entitled to judgment as a matter of law. *Village of Bartonville v. Lopez*, 2017 IL 120643, ¶ 34; 735 ILCS 5/2-1005(c) (West 2016). In determining whether a genuine issue as to any material fact exists, a court must construe the pleadings, depositions, admissions and affidavits strictly against the movant and liberally in favor of the opponent. *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 162 (2007). "Summary judgment is a drastic measure and should only be granted if the movant's right to judgment is free and clear from doubt." *Schweihs v. Chase Home Finance, LLC*, 2016 IL 120041, ¶ 48. We review a court order granting summary judgment *de novo*. *Village of Bartonville*, 2017 IL 120643, ¶ 34.

¶ 26 Patrinia asserted a negligence claim against Aldi, and Herman's loss of consortium derives from that claim. "To recover damages based on negligence, plaintiff must allege and prove that defendant owed a duty to plaintiff, that defendant breached that duty, and that the breach was a proximate cause of plaintiff's injuries." *Richardson v. Bond Drug Co. of Illinois*, 387 Ill. App. 3d 881, 884 (2009). In this case, Aldi does not contest that it owed a duty of reasonable care to Patrinia, who was a business invitee. *Thompson v. Economy Super Marts,*

Inc., 221 Ill. App. 3d 263, 265 (1991) (stating that a defendant owes a business invitee on the defendant's premises a duty to exercise ordinary care in maintaining the premises in a reasonably safe condition). Their dispute centers on whether Aldi breached its duty to exercise reasonable care to maintain its premises in a reasonably safe condition for use by invitees and whether any breach was a proximate cause of Patrinia's fall. *E.g.*, *Richardson*, 387 Ill. App. 3d at 885.

¶ 27 Where a business invitee is injured by slipping on a foreign substance on the premises, liability may be imposed if the substance was placed there by the negligence of the proprietor or its servants. *Olinger v. Great Atlantic & Pacific Tea Co.*, 21 Ill. 2d 469, 474 (1961); *Donoho v. O'Connell's, Inc.*, 13 Ill. 2d 113, 118 (1958); *Ishoo v. General Growth Properties, Inc.*, 2012 IL App (1st) 110919, ¶ 21. A plaintiff need not present evidence that the defendant had notice of the substance "when the nature of the substance indicates that there was no conceivable way that the substance could have been on the floor other than through the agency of defendant's employees." *Swartz v. Sears, Roebuck & Co.*, 264 Ill. App. 3d 254, 272 (1993). See also *Wolfe v. Bertrand Bowling Lanes, Inc.*, 39 Ill. App. 3d 919, 927 (1976) (holding that the evidence demonstrated that "the cellophane cigarette wrapper upon which the plaintiff slipped and fell was a product related to the operation of the defendants' lounge and that the proof as to the cleanup operations by the defendants' waitresses was sufficient to justify the inference that it was more than likely that the defendants' servants, rather than another customer, dropped the wrapper in the path of trips from tables to the disposal container").

¶ 28 The Gunbys, however, do not argue that Patrinia's fall was caused by a substance on the floor attributable to Aldi or its employees. If a foreign substance was on the premises through the acts of third persons – or there is no showing of how it got there – liability may be imposed if it appears that the proprietor or its servant knew of its presence, or that the substance was there a

sufficient length of time so that, in the exercise of ordinary care, its presence should have been discovered. *Olinger*, 21 Ill. 2d at 474. "Thus, where the foreign substance is on the premises due to the negligence of the proprietor or his servants, it is not necessary to establish their knowledge, actual or constructive; whereas, if the substance is on the premises through acts of third persons, the time element to establish knowledge or notice to the proprietor is a material factor." (Internal citations omitted.) *Donoho*, 13 Ill. 2d at 118.

¶ 29 The record indicates that Aldi had neither actual nor constructive notice of a substance on the floor prior to Patrinia's fall. As to *actual* notice, the two Aldi employees working at the time of the incident, Torres and Washington, both testified that they did not personally notice or receive any complaints regarding a substance on the floor before the incident.

¶ 30 The Gunbys contend, however, that a recorded statement which Torres provided to Gallagher creates a genuine issue of material fact regarding Aldi's knowledge of a red substance on the floor prior to the incident. During the Gallagher interview, Torres stated that she did not recall whether there was a "streak or something" on the floor where Patrinia had stepped. Torres noted that there was "always" smashed food on the floor but "the way [Patrinia] had fallen wasn't that part was at [*sic*]." Torres stated that she had placed a box near where Patrinia's hand was outstretched after her fall, although Torres did not explicitly state when she placed the box on the floor. According to Torres, "that's where, if anything was on the floor it there [*sic*]."

¶ 31 In their response to Aldi's motion for summary judgment, the Gunbys contended that these statements suggested that Torres had "placed a box over or near the smashed food where [Patrinia] fell, sometime prior to [Patrinia's] fall." According to the Gunbys, Torres "knew of the presence of the red sticky substance, placed a box over it, and left it there."

¶ 32 We reject the Gunby's contention that Torres' statements to Gallagher indicate there was

a foreign substance on the floor outside of the box where Patrinia fell and that Aldi had actual knowledge of a foreign substance on the floor before Patrinia's fall which led to her fall. Prior to her above-quoted remarks, Torres informed the Gallagher interviewer, "I don't remember seeing anything on the floor." During her subsequent deposition, Torres testified that she did not notice any substance on the floor prior to Patrinia's fall. Her recorded statement that "if anything was on the floor it there [*sic*]" indicates that she had no actual knowledge that a red foreign substance was, in fact, on the floor where Patrinia fell. When viewed in the context of her entire recorded interview, we do not view Torres's references to a "box" as meaning that she had covered a foreign substance on the floor before Patrinia's fall or that there was even a foreign substance where Patrinia fell before the fall. This conclusion is supported by Ward's deposition testimony, wherein she confirmed that she did not "see anything else in addition to that red substance on the floor at any point after [Patrinia] fell[.]" We find that Torres' statement to Gallagher was insufficient to establish a question or fact that Aldi had actual notice of a foreign substance.

¶ 33 We note that the instant case is factually dissimilar to *Pavlik v. Wal-Mart Stores, Inc.*, 323 Ill. App. 3d 1060 (2001), wherein the court found that employee statements established notice. The plaintiff in *Pavlik* fell in the defendant's store on a liquid substance she identified as hair conditioner. *Id.* at 1062. In her deposition, the plaintiff testified that, after she fell, one of the defendant's employees stated that the puddle of conditioner " 'should have been cleaned up before.' " *Id.* The plaintiff's father also testified in his deposition that an employee remarked, in reference to the puddle, " 'oh, she was supposed to clean that up and she didn't.' " *Id.* at 1063. The circuit court granted the defendant's motion for summary judgment, finding that the post-occurrence statements relied upon by the plaintiff in opposing the motion constituted inadmissible hearsay. *Id.* at 1066. The appellate court reversed, concluding that such statements

were made during the employment relationship regarding a matter within the scope of employment and thus fell within the party admission exception to the hearsay rule. *Id.*

¶ 34 The employee statements in *Pavlik* demonstrated that one or more members of the defendant's staff knew of the spill before the plaintiff fell. Unlike in *Pavlik*, the recorded remarks made by Torres to the Gallagher interviewer do not suggest that she had any knowledge of a red foreign substance on the floor prior to Patrinia's fall or otherwise constitute an "admission." While an employee has a responsibility "either to correct the unsafe condition or clean the spilled substance from the floor, or report the problem to her superiors" (*id.* at 1065-66), there is no indication that Torres had actual notice of a red foreign substance on the floor as described by Ward which would trigger such responsibility prior to Patrinia's fall.

¶ 35 Further, even assuming that a foreign substance was on the floor prior to Patrinia's fall, the record does not support a finding that Aldi should have known of its presence in the exercise of ordinary care. Constructive notice can only be demonstrated where the dangerous condition is shown to exist for a sufficient length of time to impute knowledge of its existence to the defendant. *Ishoo*, 2012 IL App (1st) 110919, ¶ 28. Although Ward testified that she observed a red substance on the floor *after* the incident, none of the deponents viewed any substance on the floor before the incident. *Cf. Blake v. Dickinson*, 31 Ill. App. 3d 379, 382 (1975) (noting that "the plaintiff's testimony concerning the cause of his fall conflicts significantly with the testimony of defendant and his three employees"). The footage from the cameras directed at the check-out lanes demonstrates that Torres swept the exit area in the minutes preceding Patrinia's fall.[3] The footage also supports Washington's testimony that she was not in the exit area of the store in the time period shortly before the incident. Based on the foregoing, constructive notice

[3] In the footage of the check-out lanes, Torres moves in and out of the frame while sweeping the area where customers are exiting the store after purchasing their items.

cannot be demonstrated. In other words, Patrinia failed to provide evidence demonstrating that, if there was a foreign substance on the floor where she fell, it was present for a sufficient length of time so that Aldi should have known of its existence. See *Hayes v. Bailey*, 80 Ill. App. 3d 1027, 1030 (1980) (providing that "it is incumbent upon the plaintiff to establish that the foreign substance was on the floor long enough to constitute constructive notice to the proprietor"). Because Patrinia failed to set forth evidence that Aldi knew or should have known of a foreign substance on the floor before the incident, the entry of summary judgment for Aldi on Patrinia's negligence count was proper. *E.g.*, *Tomczak v. Planetsphere, Inc.*, 315 Ill. App. 3d 1033, 1040 (2000) (concluding that "liability cannot be imposed upon the owner for the presence of a substance that no one had knowledge of immediately prior to the occurrence").

¶ 36 We further observe that proximate cause – an element of Patrinia's negligence claim – can be established only when there is a reasonable certainty that Aldi's acts caused her injury. See *Barker v. Eagle Food Centers, Inc.*, 261 Ill. App. 3d 1068, 1071 (1994); *Bellerive v. Hilton Hotels Corp.*, 245 Ill. App. 3d 933, 936 (1993). Although the issue of proximate cause in a negligence action is generally an issue of material fact to be determined by the trier of fact, it can be determined by a court as a question of law if the facts as alleged show that the plaintiff would never be entitled to recover. *Richardson*, 387 Ill. App. 3d at 886. See also *Vertin v. Mau*, 2014 IL App (3d) 130246, ¶ 8 (noting that the "mere occurrence of an accident does not support an inference of negligence, and absent positive and affirmative proof of causation, the plaintiff cannot sustain the burden of establishing the existence of a genuine issue of material fact").

¶ 37 Although Patrinia testified that something "caught [her] leg" and "made [her] slip," she also testified that she did not know if any substance was on the ground in the area where she

fell.[4] Aldi's counsel subsequently asked, "Would you agree that you do not know if a red substance caused you to fall?" Patrinia answered, "Correct." Liability cannot be predicated upon surmise or conjecture as to the cause of the injury. *Bellerive*, 245 Ill. App. 3d at 936. See also *Richardson*, 387 Ill. App. 3d at 886 (providing that "[w]hen attempting to prove causation, a plaintiff must show circumstances that justify an inference of probability, as opposed to a mere possibility"). In the instant case, Patrinia has failed to present sufficient evidence of a causal nexus between her injuries and Aldi's conduct, where neither the factual allegations in the amended complaint nor the deposition testimony and other evidence in the record demonstrate with any measure of *probability* that (i) a foreign substance was on the floor prior to her fall and (ii) the presence of such substance caused her fall. See *Hayes*, 80 Ill. App. 3d at 1031 (where business invitee slipped and fell on a puddle of water in a restroom, the appellate court "agree[d] with the trial judge that the failure to show how long the water had been on the floor was a failure to show proximate cause"). See also *Barker*, 261 Ill. App. 3d at 1072 (noting that the mere possibility of a causal connection is insufficient to raise the requisite inference of fact).

¶ 38 Although Patrinia is not required to prove her case at the summary judgment stage, she must present evidentiary facts to support the elements of her negligence claim (*Richardson*, 387 Ill. App. 3d at 885), which she has failed to do. We thus affirm the circuit court's grant of summary judgment in favor of Aldi on the negligence count (count I) of the amended complaint.

¶ 39 Based on the foregoing, Herman's claim for loss of consortium must fail. Because his loss of consortium action derives from Patrinia's negligence action against Aldi, his recovery for loss of consortium is dependent upon the establishment of Aldi's liability for Patrinia's alleged injuries. *E.g., Pease v. Ace Hardware Home Center of Round Lake No. 252c*, 147 Ill. App. 3d

[4] Aldi's counsel inquired, "Do you know if any substance was on the ground in the area where you fell?" Patrinia responded, "No, I don't know."

546, 555 (1986). Furthermore, to the extent that Herman has failed to advance any arguments on appeal regarding his loss of consortium claim, those arguments are forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018) (providing that points not argued are forfeited).

¶ 40 Spoliation of Evidence Claims

¶ 41 Patrinia also contends on appeal that her spoliation of evidence claims were wrongfully dismissed. As a threshold matter, we note that the Gunbys' briefs refer to the four spoliation counts included in the amended complaint. Two of the four counts, however, were asserted against Gallagher, which is not a party to this appeal. The Gunbys' notice of appeal did not reference Gallagher as an appellee, and Gallagher did not accede in this court's jurisdiction by participating in the appeal, *e.g.*, through the filing of briefs. See *Nussbaum v. Kennedy*, 267 Ill. App. 3d 325, 328 (1994). We further note that Patrinia does not advance arguments on appeal specifically relating to any claims against Gallagher, and thus such claims are forfeited. Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018). We solely consider the dismissal of her claims against Aldi for negligent spoliation (count II) and intentional spoliation (count III).

¶ 42 A motion to dismiss pursuant to section 2-615 of the Code challenges the legal sufficiency of the complaint. *Cochran v. Securitas Security Services USA, Inc.*, 2017 IL 121200, ¶ 11; 735 ILCS 5/2-615 (West 2014). In ruling on a section 2-615 motion, the court must accept as true all well-pleaded facts in the complaint, as well as any reasonable inferences that may arise from them. *Cochran*, 2017 IL 121200, ¶ 11. "The essential question is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted." *Id.* We review an order granting a section 2-615 motion to dismiss *de novo*. *Id.*

¶ 43 Patrinia initially contends that the circuit court granted the motion to dismiss on

October 1, 2014 – two days after the motion was filed – without allowing her to present arguments or to file a written response. The record does not reflect, however, that Patrinia requested argument or a written response, or that any such request was denied. We further note that Patrinia did not file a motion to reconsider the order. In any event, our review is *de novo* (*id.*), and we have read and evaluated Patrinia's arguments on appeal challenging the dismissal.

¶ 44 We first consider count II of the amended complaint, the negligent spoliation claim. Under Illinois law, spoliation of evidence is a form of negligence. *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270, ¶ 26. See also *Boyd*, 166 Ill. 2d at 194 (holding that "[a]n action for negligent spoliation can be stated under existing negligence law without creating a new tort"). Accordingly, a plaintiff claiming spoliation of evidence must prove that: (1) the defendant owed the plaintiff a duty to preserve the evidence; (2) the defendant breached that duty by losing or destroying the evidence; (3) the loss or destruction of the evidence was the proximate cause of the plaintiff's inability to prove an underlying lawsuit; and (4) as a result, the plaintiff suffered actual damages. *Martin*, 2012 IL 113270, ¶ 26. Accord *Miller v. Gupta*, 174 Ill. 2d 120, 129 (1996). Aldi contends that Patrinia failed to adequately allege these required elements.

¶ 45 As to the "duty" element, the general rule is that there is no duty to preserve evidence. *Martin*, 2012 IL 113270, ¶ 27; *Boyd*, 166 Ill. 2d at 195. A duty may arise, however, through an agreement, a contract, a statute, or another special circumstance. *Id*. Moreover, a defendant may voluntarily assume a duty by affirmative conduct. *Id*. "In any of the foregoing instances, a defendant owes a duty of care to preserve evidence if a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action." *Id*. The amended complaint in the instant case fails to adequately allege the existence of a duty to preserve evidence because, among other things, count II fails to adequately allege the existence

of material evidence that was in need of preservation in the first place, *i.e.*, the existence of store surveillance video recording the incident and/or the area where the incident occurred. Similarly, count II fails to adequately allege a *breach* of duty – *i.e.*, the loss or destruction of evidence – because the amended complaint fails to allege that there was surveillance video of the incident or the exit area of the store which could have been lost or destroyed.

¶ 46 As to the causation element, a plaintiff must allege that an injury proximately resulted from a breach of duty. *Boyd*, 166 Ill. 2d at 196. "Therefore, in a negligence action involving the loss or destruction of evidence, a plaintiff must allege sufficient facts to support a claim that the loss or destruction of the evidence *caused the plaintiff to be unable to prove* an underlying lawsuit." (Emphasis in original.) *Id.* The sole reference to causation in count II is a single sentence: "The loss of the evidence is the proximate cause of the plaintiff's inability to prove the underlying lawsuit." As Illinois is a fact-pleading state, however, "bare conclusions of law or conclusory factual allegations unsupported by specific facts are not deemed admitted for the purposes of a section 2-615 motion to dismiss." *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 35. Moreover, because the store's cameras did not record the incident or the relevant area of the store, there can be no loss or destruction which would cause Patrinia to be unable to prove her case. See *Bulduk v. Walgreen Co.*, 2015 IL App (1st) 150166-B, ¶ 28 (affirming grant of summary judgment in favor of defendant on negligent spoliation claim "[s]ince the video footage did not record the incident, its loss or destruction could not cause plaintiff to be unable to prove her case").

¶ 47 Actual damages must also be alleged. *Boyd*, 166 Ill. 2d at 197. A threat of future harm, not yet realized, is not actionable, and the wrongful conduct must impinge upon a person. *Id.* "Consequently, a plaintiff is required to allege that a defendant's loss or destruction of the

evidence caused the plaintiff to be unable to prove an otherwise valid, underlying cause of action." *Id*. Count II contains a conclusory allegation that Patrinia "suffered actual damages as a result of the loss of the video surveillance evidence." The amended complaint fails to allege any facts, however, setting forth how an alleged loss or destruction of video has resulted in Patrinia being unable to prove any of the elements of her underlying negligence claim.

¶ 48 For the foregoing reasons, the amended complaint was insufficient, and the dismissal of the negligent spoliation count pursuant to section 2-615 of the Code was proper.

¶ 49 As to count III of the amended complaint, the Illinois Supreme Court has not expressly recognized intentional spoliation as a cause of action. The plaintiffs in *Boyd*, 166 Ill. 2d at 201, asked our supreme court to recognize intentional spoliation of evidence as a new tort. The *Boyd* court stated, "Even if we were inclined to do so, count II of plaintiffs' complaint fails for factual insufficiency." *Id*. See also *Cangemi v. Advocate South Suburban Hospital*, 364 Ill. App. 3d 446, 472 (2006) (finding no Illinois case that specifically recognizes intentional spoliation of evidence as a tort in Illinois). As in *Boyd*, even if intentional spoliation were a tort in Illinois, Patrinia has not alleged *facts* to support such a cause of action in count III. *Coghlan*, 2013 IL App (1st) 120891, ¶ 35 (providing that conclusory allegations are insufficient). Furthermore, as with negligent spoliation, the injury contemplated by a claim for intentional spoliation presumably must relate to the ability to bring an underlying claim. See *Cangemi*, 364 Ill. App. 3d at 472. As discussed above, Patrinia has not alleged sufficient facts to support a claim that the loss or destruction of any evidence caused her to be unable to prove her underlying negligence claim. The intentional spoliation count, like the negligent spoliation count, did not – and cannot – state a cause of action for which relief may be granted. We thus conclude that dismissal of the spoliation counts was proper under section 2-615 of the Code.

¶ 50 Finally, Patrinia contends that the "evidence here establishes the four elements for the use of" Illinois Pattern Jury Instruction, Civil, No. 5.01 (IPI 5.01). IPI 5.01 provides that if a party has failed to offer evidence or produce a witness within his power to produce, jurors may infer that the evidence or testimony would be adverse to the party if: (1) the evidence or witness was under the control of the party and could have been produced by the exercise of reasonable diligence; (2) the evidence or witness was not equally available to an adverse party; (3) a reasonably prudent person under the same or similar circumstances would have offered the evidence or produced the witness if he believed the evidence or testimony to be favorable to him; and (4) no reasonable excuse for the failure has been shown. *Id.*

¶ 51 We reject Patrinia's argument. As discussed above, there is no indication that the "evidence" to which Patrinia refers – *i.e.*, video footage of Patrinia's fall and/or the exit area of the store – ever existed. In any event, her reliance on a pattern jury instruction is misplaced. *E.g.*, *Zuppardi v. Wal-Mart Stores, Inc.*, 770 F.3d 644, 652 (7th Cir. 2014) (noting that "[t]here are no jury instructions if there is no trial, and there is no trial unless the plaintiff is able to put forth sufficient evidence at the summary judgment stage to withstand the motion").

¶ 52 CONCLUSION

¶ 53 The judgment of the circuit court of Cook County is affirmed in its entirety.

¶ 54 Affirmed.

¶ 55 JUSTICE LAMPKIN, concurring in part and dissenting in part:

¶ 56 I concur with the majority's decision affirming the dismissal of plaintiff Patrinia's spoliation claims. However, I respectfully dissent with the decision to affirm the award of summary judgment in favor of defendant Aldi regarding plaintiffs' negligence and loss of consortium claims. I would reverse the circuit court's decision that granted summary judgment in

favor of defendant on those claims.

¶ 57 Viewing the pleadings, depositions, admissions and affidavits on file in the light most favorable to plaintiffs, there is a genuine issue of material fact about whether defendant knew that a substance was on its floor and posed a falling hazard to its invitees, and defendant is not entitled to judgment as a matter of law. See *Village of Bartonville*, 2017 IL 120643, ¶ 34.

¶ 58 Plaintiff Patrinia's fall occurred in May 2012, and in June 2012, defendant's cashier gave a recorded telephone interview to defendant's insurer about the incident. The cashier stated that she was returning a package of chicken to a cooler and did not see Patrinia's fall. The cashier heard Ward, Patrinia's niece, call out, so the cashier went to look and saw that Patrinia had fallen on her side close to the exit door. Patrinia looked like she was "fading away" and her eyes were "rolling and stuff." The cashier thought Ward had said there was something on the floor. The cashier called the shift manager, who "took over from there."

¶ 59 According to her interview statement, the cashier did not remember whether there was anything visible on the floor, or if there was something like maybe a "streak or something but [she did not] remember what it was." She thought it might have been smashed food or something like smashed blueberries because the store always had smashed food. If anything was on the floor near the exit, she [the cashier] had "put a box [there]." Although the cashier did not see where Patrinia had stepped or how she fell, the cashier speculated that Patrinia did not slip on any streak of smashed food because Patrinia's outstretched hand was "where [the cashier's] box was at."

¶ 60 According to the depositions taken in 2015 and 2016, Patrinia did not see a substance on the floor before she fell but she felt that "something caught [her] leg," and it was "like something grasped under [her] feet." Once she fell, she was "knocked out" and regained consciousness at

the hospital. Ward did not observe anything on the floor before Patrinia's fall. However, when the paramedics lifted Patrinia up, Ward saw a sticky red circle, about the size of a lemon, on the floor. The substance looked like strawberry jam. When Ward returned to the store later that day, she noticed that the sticky circle had been cleaned up. Neither defendant's shift manager nor cashier observed Patrinia's fall. The shift manager could not recall either the condition of the floor or whether she noticed any foreign substance on the floor in the exit area prior to Patrinia's fall. The cashier was in the exit area of the store to sweep any debris with a broom three times within 10 minutes before Patrinia's fall, and the cashier did not notice any substance on the floor prior to Patrinia's fall.

¶ 61 None of the video recordings captured the exit area of the store where Patrinia fell. The recordings contained footage showing that the cashier, prior to the fall and during lulls between ringing up customers' purchases, used a push broom or swept some areas of the floor (near the counter and along some store aisles). The footage showed the cashier walk off-camera in the direction of the exit a few times with the push broom.

¶ 62 The footage showed that after Patrinia made her purchase and walked off-camera in the direction of the exit, the cashier left her checkout counter and returned a package of chicken to a cooler. Then the cashier suddenly rushed through the checkout area and off-camera in the direction of the exit, quickly returned to the checkout area to grab a large roll of paper towels from a counter, and then rushed off-camera again in the direction of the exit area. The shift manager also walked off-camera in the same direction. Shortly thereafter, the shift manager and cashier walked past the checkout area and off-camera into an office. Then the cashier and shift manager left the office and walked off-camera in the direction of the exit. Later, the cashier resumed her position at the checkout counter and served several customers. Then, during a lull,

the cashier walked out of view and returned to the checkout area with a mop and bucket. She mopped the area around a closed checkout counter until another customer approached the cashier's counter.

¶ 63 The plaintiffs are not required to prove their case at the summary judgment stage; in order to survive a motion for summary judgment, they must present a factual basis that would arguably entitle them to a judgment. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002). Summary judgment is a drastic means of disposing of litigation and the court has a duty to construe the record strictly against the movant and liberally in favor of the nonmoving party. *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 518 (1993). Moreover, summary judgment should be entered only when the right of the moving party is clear and free from doubt. *Id*. The court may draw reasonable inferences from the *undisputed* facts, but where reasonable persons could draw divergent inferences from the undisputed facts, the issue should be decided by a trier of fact and the motion denied. *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 271-272 (1992).

¶ 64 I disagree with the majority's conclusion that plaintiffs failed to present evidentiary facts to support a finding that defendant knew about a foreign substance on the floor near its exit area. Ward averred that she saw a sticky red substance like strawberry jam on the floor when the paramedics lifted Patrinia up from the floor. Also, the cashier's vague and disjointed statement during her telephone interview with the insurer indicated that, prior to Patrinia's fall, the cashier may have put a box on or near some kind of smashed food on the floor near the exit area. Moreover, after the fall and before Patrinia was transported to the hospital, the cashier thought Ward said that there was something on the floor. In contrast to her telephone interview, the cashier's deposition testimony indicated that she swept any debris in the exit area three times

during 10 minutes prior to Patrinia's fall and did not notice any substance on the floor. This discrepancy alone presents a genuine issue of material fact that precludes entry of summary judgment.

¶ 65 Instead of leaving to the fact-finder the issues of the deponents' credibility and the cashier's inconsistent statements in her telephone interview and deposition, the majority invades the fact-finder's province to resolve factual disputes and decide which inferences to draw from the facts. Contrary to the majority's conclusion that only one inference can be drawn—that the cashier did not mean to say during her telephone interview that she put a box on or near a streak of some kind of smashed food in the exit area, I believe another inference can be drawn. Based upon the facts presented here, a trier of fact could infer that, prior to Patrinia's fall, the cashier noticed a streak of smashed food on the floor by the exit area and put a box there because she could not properly clean the streak with her push broom. Moreover, the cashier put the box in the exit area before Patrinia fell because the cashier said that after Patrinia fell, her outstretched hand was near that box. Because material facts are disputed and reasonable persons could draw divergent inferences from the facts, deposition testimony, and cashier's telephone interview, the issue of actual notice should have been decided by the trier of fact.

¶ 66 Finally, I disagree with the majority's conclusion that, because the alleged facts show that plaintiffs would never be entitled to recover, the issue of proximate cause in this matter could be determined by a court as a question of law. Plaintiffs have shown circumstances that justify an inference of probability, as opposed to a mere possibility, that a sticky substance was on the floor prior to Patrinia's fall and the presence of that substance caused her fall. Although Patrinia did not see the substance before she fell, she felt something catch or grab under her feet before she fell. Patrinia lost consciousness after she fell, but Ward saw the red sticky substance on the floor

after the paramedics lifted Patrinia up from the floor. Moreover, the cashier told the insurer that she thought Ward said something was on the floor. These facts are sufficient to preclude the court from determining the issue of proximate cause as a question of law.