2018 IL App (2d) 170477-U
No. 2-17-0477
Order filed April 17, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

GREGORY M. MYLNARCYYK, Plaintiff-Appellant, v. THE PNC FINANCIAL SERVICES GROUP, INC. d/b/a PNC Bank, N.A., a Pennsylvania Corporation; CHICAGO TITLE AND TRUST COMPANY, as Trustee Under Trust No. 32488; JACK PALUCH, Individually d/b/a Archer Window Cleaning, Defendants. (Chicago Title and Trust Company, as Trustee Under Trust No. 32488; Jack Paluch, Individually d/b/a Archer Window Cleaning, Defendants-Appellees).	)	Appeal from the Circuit Court of Lake County. No. 15-L-572 Honorable Diane E. Winter Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Presiding Justice Hudson and Justice Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: In plaintiff's suit against building owner and window-washing company for injuries he sustained in a fall on the sidewalk outside the building, plaintiff presented no arguable basis for linking the allegedly slippery condition of the sidewalk to the window washing that was performed six weeks prior to his fall. Consequently, summary judgment for defendants was proper.

¶ 2 Plaintiff, Gregory Mlynarczyk, appeals the summary judgment entered in favor of defendants, Chicago Title and Trust Company (Chicago Title) and Jack Paluch (d/b/a Archer Window Cleaning) (Archer).[1] Plaintiff had sued Chicago Title, PNC Financial Services Group (PNC), and Archer for injuries sustained when he slipped and fell on a sidewalk adjacent to space rented by PNC in a building owned by Chicago Title. During briefing in this case, we granted PNC's unopposed motion to dismiss it from this appeal. For the following reasons, we affirm the summary judgment in favor of Chicago Title and Archer.

¶ 3 I. BACKGROUND

¶ 4 In the early afternoon of June 15, 2015, plaintiff was walking on the sidewalk along 1st Street in Highland Park. At the corner of Central Avenue and 1st Street was a building owned by Chicago Title as trustee (Central Avenue building). PNC leased space in the Central Avenue building for a local branch bank. Plaintiff was walking on the 1st Street sidewalk outside PNC when he slipped, fell, and was injured. The 1st Street sidewalk outside PNC was made of concrete, while the Central Avenue sidewalk outside PNC was made of brick pavers.

¶ 5 Plaintiff initiated this lawsuit in August 2015 and filed his second amended complaint in May 2016. Plaintiff brought negligence claims against Chicago Title, PNC, and Archer. Plaintiff alleged as follows. Chicago Title and PNC were negligent for "[a]llowing a slippery foreign substance such as detergent, soap or sealant to accumulate" on the sidewalks adjacent to PNC. Archer was negligent for "[p]lacing a slippery foreign substance such as detergent, soap or other window cleaning solution" on the sidewalk outside PNC when Archer cleaned PNC's windows on May 1, 2015. As a result of defendants' negligence, plaintiff, on June 15, 2015,

[1] Following the usage of the parties, we use "Archer" except when referring to Jack Paluch individually.

"did slip and fall down on the foreign substance which had accumulated on the walkway adjacent to [PNC]."

¶ 6 Chicago Title, PNC, and Archer filed motions for summary judgment under section 2-1005 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1005 (West 2016)). During the summary judgment proceedings, the parties submitted the depositions of plaintiff, Beth Loeb, Josea Montiel, Eusebius D'Souza, Jack Paluch, Carlos Morales Sanchez, and Ralph Schmidt. The parties also submitted portions of the depositions of Herbert Loeb and Sara Dowlatshahi. Plaintiff identified Schmidt as an expert witness. Schmidt set forth his opinion in his deposition and in plaintiff's discovery disclosure under Supreme Court Rule 213(f)(3) (eff. Jan. 1, 2017). Chicago Title submitted an affidavit from its expert, Michael Behm.

¶ 7 In his deposition, plaintiff testified that, shortly before 2 p.m. on June 15, 2015, he was walked from his office to get lunch. En route, he passed the Central Avenue building. As plaintiff walked northward on the 1st Street sidewalk outside PNC's windows, he stepped on a patch that was "slicker than ice." He immediately lost his footing and came down on his right knee. He heard a "pop" and felt pain. The area under the windows was so slick that plaintiff had to scoot himself away from the windows before attempting to stand. As he tried to stand, he noticed a substance on his hands. The substance had come from the sidewalk, but appeared to have accumulated only in front of PNC's windows. The substance had "[n]o particular aroma." Plaintiff could best describe the scent as "cleaner, chemical." Plaintiff did not notice any particular color to the substance. Plaintiff had no personal knowledge of what the substance was, of how long it had been on the sidewalk before he fell, or of whether the owner of the Central Avenue building was aware of the substance. Based on the "totality of the circumstances"—specifically, the substance's location, texture, and scent—plaintiff's "best guess" was that the

substance was soap or detergent that had been used to clean the windows. Plaintiff had not noticed the substance prior to his fall, but had only infrequently walked that stretch of sidewalk. At the time he fell, plaintiff was wearing leather casual dress shoes with rubber soles.

¶ 8 Plaintiff testified that, after the fall, his wife took him to urgent care, where he was diagnosed with a fractured right patella. Later that afternoon, he returned with his wife to the scene of the accident. His wife took several photographs of the portion of the 1st Street sidewalk outside PNC where plaintiff fell. As depicted in the photos, this portion of sidewalk is made of concrete and is covered with a canopy. There is a drain positioned halfway between the building and the street. A row of windows runs along part of the sidewalk. The concrete surface is generally darker closer to the building. Given its irregular border, the darker portion appears to an area of staining or discoloration. The darker area in front of the windows appears smoother and more reflective than the rest of the sidewalk, including the other darker areas. Plaintiff testified that he fell while walking across the shiny area near the windows. Plaintiff attributed the shininess to the substance he detected. He acknowledged, however, that it had rained heavily earlier that day and that "wet looking concrete" would not have been "anything unusual." Plaintiff had not seen any shiny areas when he previously used the 1st Street sidewalk in front of PNC.

¶ 9 Beth Loeb testified that she is the beneficiary of the trust (the Trust) that owns the Central Avenue building. She is the contact person for some of the building's tenants. Beth was shown plaintiff's photographs of the 1st Street sidewalk where he fell. In her view, the shiny area under PNC's windows was due to discoloration, not the presence of a foreign substance. Beth had never seen a slippery substance under the windows on the 1st Street sidewalk. If she had seen such a substance, she would have informed her father, Herbert Loeb, who was in charge of

arranging maintenance and cleaning for the Central Avenue building. Beth also testified that none of the tenants of the Central Avenue building ever complained to her about a hazard on the sidewalks adjacent to the building. In the last 15 years, plaintiff's case was the only complaint for personal injuries brought against the Trust in its capacity as owner of the Central Avenue building.

¶ 10 Only a fragment of Herbert Loeb's deposition was submitted below. The record identifies him as the property manager of the Central Avenue building. Herbert testified that if he saw a slippery substance on the sidewalks along the Central Avenue building, he would have either directed Montiel, his maintenance worker, to clean it up or called the City of Highland Park, which owns the sidewalks.

¶ 11 Montiel testified that, since 2015, the Trust has employed him part-time at the Central Avenue building. His responsibilities include general maintenance, removal of trash, and a once-monthly hosing down of the sidewalks along 1st Street and Central Avenue. Montiel is on the premises about 25 hours per month. In June 2015, he saw no slippery substance on the sidewalks adjacent to the Central Avenue building. If he had seen such a substance in June 2015 or any other time, he would have removed it since it is part of his job. Montiel denied ever having to clean up any slippery residue left by the window washers after they finished with PNC's windows. The washers leave only wet areas on the concrete.

¶ 12 Shown plaintiff's photographs of the 1st Street sidewalk, Montiel identified some staining that he attributed to salt. Asked about the shiny areas under PNC's windows, Montiel replied that the finish there is "flat" (as opposed to "rough") and will shine when the sun hits it.

¶ 13 D'Souza testified that he has been the branch manager of PNC's Highland Park branch 2010 or 2011. D'Souza expects bank employees to inform him of anything unusual on the

sidewalks outside the bank. PNC has entrances on Central Avenue and 1st Street, and employees are required to use the 1st Street entrance. PNC employees walk the 1st Street sidewalk adjacent to PNC at least twice per work day, and none has ever complained about the sidewalk being slippery. D'Souza himself has not noticed any slippery areas on the sidewalk. As far as he knows, plaintiff is the only person to have slipped and fallen on the sidewalk.

¶ 14 D'Souza asserted that, for as long as could remember., the shiny area depicted in plaintiff's photographs has been on the sidewalk. D'Souza never complained to the landlord about the shininess. In his opinion, the shininess due simply to the finish of the concrete, though he admitted that, to his knowledge, no one has ever touched the area to confirm whether there is a substance there. D'Souza saw no slippery substance on the sidewalks next to PNC at any time around the date of plaintiff's accident.

¶ 15 D'Souza testified that PNC contracts with Archer for window cleaning. Archer does an excellent job and never leaves large puddle on the sidewalk.

¶ 16 Only a fragment of Dowlatshahi's deposition was submitted below. The record identifies her as an employee at PNC's Highland Park branch. She testified that she does not recall ever seeing a slippery substance on the sidewalks adjacent to PNC. She also does not recall any complaint, other than from plaintiff, that the sidewalks were slippery.

¶ 17 Paluch, owner of Archer since 1995, testified that Archer has cleaned PNC's windows three times per year since March 2013. Archer cleans windows using a solution made from a couple of drops of dish soap, such as Dawn or Palmolive, mixed with two-and-half gallons of water. The windows are cleaned by squeegee, and any solution that collects on the bottom of the window frame is wiped up with a sponge. Likewise, a sponge is used to wipe up any solution that runs from the window to the concrete. Paluch testified that he does not instruct his

employees to dump the bucket toward a drain in the sidewalk. He admitted that he does not instruct his employees what to do if they spill their bucket of solution on the ground, but he noted that such spills are rare.

¶ 18 Paluch testified that Archer last cleaned PNC's windows on May 1, 2015. Sanchez was the employee who did the washing. When Paluch informed Sanchez that plaintiff was blaming the window washing for his fall, Sanchez remarked that the cleaning solution would dry on the sidewalk in 30 minutes. Paluch did not ask Sanchez if he spilled solution on the sidewalk. According to Paluch, Archer's workmanship at PNC was never previously questioned.

¶ 19 Paluch was shown plaintiff's photographs of the 1st Street sidewalk outside PNC. He had no opinion on what caused the sheen on parts of the sidewalk. He stated that, in his 35 years of window washing, he has never seen the cleaning solution leave a soapy residue once it dries.

¶ 20 Sanchez testified that he has been employed with Archer since 2013. He cleaned the windows at PNC's Highland Park branch on May 1, 2015. He used a solution consisting of three drops of dish detergent mixed in a bucket half-full of water. Sanchez testified that the detergent had no scent, but he could not recall the brand of the detergent or its color. Sanchez initially testified that he often fills the bucket with water "from outside of the bank," but he later corrected himself and said that PNC has no water and that he brings his own. Sanchez explained that, when he cleans windows, he uses a sponge to wipe up any cleaning solution that collects on the sidewalk during the cleaning process. Sanchez recalled that solution collected on the sidewalk while he was cleaning PNC's windows on May 1, 2015. "[N]ot a lot" collected"—"[o]nly some inches." Sanchez cleaned it up with a sponge. PNC had no outside hose available for him to use in cleaning what he spilled. Sanchez testified that he customarily dumps out the bucket of cleaning solution after finishing a window job. Sanchez could not recall dumping the

bucket of solution after finishing with PNC's windows on May 1, 2015. Sanchez denied, however, that he would have dumped the bucket into the sidewalk drain.

¶ 21 Schmidt testified that he is a consulting structural and civil engineer. On July 13, 2015, he investigated the area of the accident. Based on his site observations and the depositions of D'Souza, Paluch, Sanchez, and Dowlatshahi, Schmidt opined to a reasonable degree of engineering certainty that the foreign substance he observed on the sidewalks outside PNC on July 13, 2015, was residue left from the cleaning solution that Paluch used to clean PNC's windows on May 1, 2015.

¶ 22 Schmidt described what he observed on July 13, 2015. According to him, the condition of the sidewalks outside PNC as he observed them on July 13 matched what was depicted in the photographs that plaintiff took on May 1, 2015. Schmidt observed a foreign substance on the concrete surface of the 1st Street sidewalk. The substance extended out several feet from PNC's windows but was more concentrated closer to them. Schmidt touched the substance, which he found to be "slippery" and "oily." Its color was "lighter brown with grit." It appeared to be a "hydrocarbon type." Schmidt claimed that the substance was not a sealant or other finish associated with concrete surfaces. The areas with the substance were darker, but not all darker areas necessarily had the substance, because moisture might have made the surface darker. Schmidt attributed the shininess of the concrete surface to the substance. Schmidt took his own photographs of the 1st Street sidewalk outside PNC.

¶ 23 Schmidt also observed the substance on the Central Avenue sidewalk outside PNC. The substance was in a lower concentration on the Central Avenue sidewalk than on the 1st Street sidewalk. Schmidt took a photograph of the brick-paved surface of the Central Avenue sidewalk. The photo, which is in the record, shows apparent bicycle tracks and footprints on the

brick. The tracks and prints are darker than the surrounding surface. According to Schmidt, the tracks and prints were formed in the foreign substance. Schmidt believed that the substance had been there "a long time" because the tracks were beginning to wear away. Schmidt did not notice if the substance on the Central Avenue sidewalk was concentrated under the windows.

¶ 24 Schmidt admitted that he did not have the substance chemically tested. He explained that he was performing a qualitative rather than quantitative analysis. He was looking for the "attributes" of the substance, not its "composition," and it was enough, in his view, that the substance was slippery.

¶ 25 Schmidt opined that the foreign substance was residue from Archer's cleaning solution applied on May 1. He based his opinion on three considerations. The first was his observation that that the substance was concentrated under PNC's windows on 1st Street. The second was Sanchez's testimony that some of the cleaning solution spilled onto the sidewalk. The third was Schmidt's understanding that Archer "[was] the last one[]to perform any type of clean work" on or around the sidewalks—or, as Schmidt expressed it in his Rule 213(f)(3) disclosure, that "[n]o other contractors worked anywhere near the sidewalk or adjacent building, which would have placed a foreign substance on the sidewalk." Schmidt explained that he derived this understanding from the depositions he reviewed, but he did not specify further.

¶ 26 Schmidt adhered to his opinion as to the origin of the substance despite admitting that it "wasn't a detergent" and that it was "more oily or hydrocarbon[-]based as opposed to soapy." Schmidt did not bother to test whether a cleaning solution with the composition that Paluch and Sanchez described could have left a substance such as Schmidt observed. Schmidt's reason was that soapy solution was "not the type of material [he] was picking up."

¶ 27 Chicago Title's expert, Behm, has a master's degree in architecture with an emphasis in structural engineering. He stated in his affidavit that he visited the scene of the accident on February 26 and March 1, 2017. Based on the depositions of plaintiff and others, his examination of the accident site, and a window-washing experiment he performed on March 1, 2017, Behm opined to a reasonable degree of certainty that the substance detected by plaintiff and Schmidt on the 1st Street sidewalk did not originate from the cleaning solution used by Sanchez on May 1, 2015.

¶ 28 Behm stated that, during his first visit to the site on February 26, 2017, he examined the 1st Street and Central Avenue sidewalks outside PNC. He saw no foreign substances on their surfaces. Behm noted that some of the concrete on the 1st Street sidewalk was broom-finished and some was trowel-finished. Behm explained that broom-finished concrete has a more textured surface while trowel-finished concrete can appear wet even when it is dry. Behm noted that, though he observed no foreign substances on the 1st Street sidewalk outside PNC on February 26, sections of the sidewalk appeared shiny. According to Behm, the coloration and texture of the 1st Street sidewalk appeared the same on February 26, 2017, as it did in the photographs taken by Schmidt on July 13, 2015.

¶ 29 When Behm returned to the site on March 1, 2017, he conducted an experiment to test Schmidt's theory that the slippery substance observed by him and plaintiff on the sidewalks outside PNC was a residue left by the cleaning solution used by Archer on May 1, 2015. For the first stage of his experiment, Behm prepared a solution of seven drops of Dawn dishwashing detergent in two and a half gallons of water—twice the concentration that Paluch and Sanchez testified Archer would use on windows. Behm applied a liberal amount of the solution to one of PNC's windows along the 1st Street sidewalk. Behm then used a squeegee, allowing any excess

solution to run off the window sill onto the concrete below. Behm used a towel to soak up some of the solution from the sidewalk. After this, Behm used a hairdryer to dry a 12 by 6 inch section of the wet sidewalk. Behm noted that the surface, once dried, was neither slippery nor had any detectable scent or residue. Behm walked on the dried surface with leather-soled shoes, which tend to have less traction than the rubber-soled shoes that plaintiff wore on the day he fell. Behm did not lose his footing. Behm touched the area but nothing came up on his fingers.

¶ 30 For the second stage of the experiment, Behm added a "significant squeeze" of a another brand of dishwashing detergent, Palmolive, to the existing solution and followed the same steps as before. The result was the same: the dried surface of the sidewalk was not slippery and there was no detectable residue or scent.

¶ 31 Behm asserted that Schmidt's specific description of the slippery substance made it even less likely that it originated with Archer's cleaning solution. Far from being oily and hydrocarbon-based, a solution comprised of dishwashing liquid "would help cut and clean up a hydrocarbon substance."

¶ 32 The trial court held a hearing on the motions for summary judgment. The record contains no report of proceedings of the hearing. In a written order issued on the same day as the hearing (and prepared by counsel for Chicago Title), the trial court held that Chicago Title did not have constructive notice of the substance on which plaintiff slipped. The court further held that there was "no admissible evidence establishing that [Archer's] May 1, 2015 window cleaning was the source of the substance plaintiff slipped on[.]"

¶ 33 Plaintiff filed this timely appeal.

¶ 34 II. ANALYSIS

¶ 35 I. Chicago Title and Archer's Motion to Strike

¶ 36 Chicago Title and Archer have filed a joint motion to strike portions of plaintiff's reply brief because they present points that were not raised in plaintiff's opening brief and, therefore, are waived. See Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017) ("Points not argued [in the opening brief] are waived and shall not be raised in the reply brief[.]"). First, defendants ask us to strike plaintiff's argument that circumstantial evidence supports an inference that Archer was responsible for the substance on which plaintiff slipped. "Circumstantial evidence is the proof of certain facts and circumstances from which the trier of fact may infer other connected facts that usually and reasonably follow from human experience." *In re Gregory G.*, 396 Ill. App. 3d 923, 929 (2009). Contrary to defendants' reading, plaintiff relied on such evidence in his opening brief. Most notably, he relied on Archer's May 1, 2015, washing of PNC's windows and plaintiff's subsequent observation of the slippery substance under PNC's windows. Plaintiff did not label this evidence "circumstantial," as he does in his reply brief, but that is of no consequence. Therefore, we disagree with defendants that plaintiff failed to present an argument in his opening brief based on circumstance evidence.

¶ 37 Second, defendants ask us to strike plaintiff's argument to the extent that it relies on certain paragraphs of Schmidt's Rule 213(f)(3) disclosed opinion that plaintiff did not cite in his opening brief. The rule on which defendants base their waiver claim prohibits the raising of new "points" in a reply brief. See Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017). Plaintiff did not raise a new "point" by including additional record citations in support of his original argument. Consequently, we reject this claim of waiver.

¶ 38 For these reasons, we deny defendants' motion to strike.

¶ 39 II. Admissibility of Schmidt's Opinions

¶ 40 Plaintiff challenges the summary judgment in favor of Chicago Title and Archer. As part of that challenge, he takes issue with what he claims was the trial court's disregard of Schmidt's opinion because it would not be admissible at trial. When assessing a motion for summary judgment, the trial court may not consider evidence that would be inadmissible at trial. *Berke v. Manilow*, 2016 IL App (1st) 150397, ¶ 21. The trial court stated in its written order that there was "no admissible evidence" connecting the May 1, 2015, window washing to the substance on which plaintiff slipped. Plaintiff suggests that Schmidt's opinion was the evidence that the court referred to as not admissible. Chicago Title and Archer agree with this interpretation. We also agree, as Schmidt's opinion was the only evidence produced by plaintiff as to which there could be a dispute regarding admissibility.

¶ 41 Plaintiff claims that the trial court erred in holding that Schmidt's opinion would not be admissible at trial. First, plaintiff suggests that the trial court was procedurally barred from making that determination because neither Chicago Title nor Archer "made any motion to strike the opinions of *** Schmidt." We reject this suggestion. Chicago Title, in its reply in support of its motion for summary judgment, claimed that Schmidt's opinions would be inadmissible at trial because they were based on speculation. Chicago Title did not ask the court to strike them *per se*, but plaintiff cites no authority for the necessity of an actual motion to strike. We fail to see a functional difference, at the summary judgment stage, between asking the court to disregard an expert opinion and asking it to strike that opinion.

¶ 42 Moreover, even if no defendant had moved the court to consider whether the opinions were admissible, the trial court could still have considered the matter *sua sponte*. See *Essig v. Advocate BroMenn Medical Center*, 2015 IL App (4th) 140546, ¶ 89 ("Given the purpose of summary judgment, a party's failure to object when the other party cites clearly inadmissible

facts or opinions does not mean that the trial court must accept those facts or opinions and set the case for trial if they create issues of material fact.").

¶ 43 Second, plaintiff alternatively challenges the merits of the court's holding as to the admissibility of Schmidt's opinions. We must first determine our standard of review. Generally, rulings on the admissibility of evidence are reviewed for an abuse of discretion. *Greco v. Orthopedic & Sports Medical Clinic, P.C.*, 2015 IL App (5th) 130370, ¶ 21. In *In re Estate of Hoover*, 155 Ill. 2d 402 (1992), the supreme court applied a bifurcated standard in reviewing a summary judgment. The plaintiffs brought a will contest, asserting undue influence and lack of testamentary capacity. The defendants moved for summary judgment. In opposition to the motion, the plaintiffs produced the affidavit of an expert who opined that the defendants had unduly influenced the testator. The court denied the defendants' motion to strike the affidavit, but nonetheless entered summary judgment for them. *Id.* at 407-09.

¶ 44 When the matter reached the supreme court, the court applied an abuse-of-discretion standard to whether the trial court erred in striking the affidavit. *Id.* at 420. The court reviewed *de novo*, however, whether summary judgment was proper. *Id.* at 415.

¶ 45 The more recent case of *Bank of America, N.A. v. Land*, 2013 IL App (5th) 120283, applied the same bifurcated standard. In *Land*, a mortgage foreclosure proceeding, the plaintiff bank moved for summary judgment, submitting in support an affidavit from its vice-president. The trial court granted summary judgment for the plaintiff. On appeal, the defendant claimed that the trial court erred in relying on the affidavit because it would have been inadmissible hearsay at trial. The court reviewed this issue under the abuse-of-discretion standard. *Id.* ¶ 13. The court reviewed *de novo* whether summary judgment was proper. *Id.* ¶ 10.

¶ 46 There is, we acknowledge, a line of cases dealing with a similar issue, namely the standard of review for rulings on challenges to the sufficiency of affidavits under Supreme Court Rule 191 (eff. Jan. 4, 2013). Rule 191 sets forth certain requirements for affidavits submitted in conjunction with proceedings for summary judgment (735 ILCS 5/2-1005 (West 2016)) or involuntary dismissal (735 ILCS 5/2-619 (West 2016)). As this district has observed, our appellate courts are divided on whether a decision on a motion to strike an affidavit for noncompliance with Rule 191 is properly reviewed *de novo* or for abuse of discretion. See *D'Attomo v. Baumbeck*, 2015 IL App (2d) 140865, ¶ 71 ("Courts of review in this state have assessed a decision whether to strike a Rule 191 affidavit under both an abuse-of-discretion standard and a *de novo* standard."); *Cain v. Joe Contarino, Inc.*, 2014 IL App (2d) 130482, ¶ 61 ("There is no unanimity among appellate courts as to the proper standard for reviewing a motion to strike an affidavit for lack of compliance with Rule 191(a)."). In fact, this district is itself divided on the issue. Compare *Bayview Loan Servicing, LLC v. Szpara*, 2015 IL App (2d) 140331, ¶ 18 (*de novo* standard) with *McDonald v. Lipov*, 2014 IL App (2d) 130401, ¶ 34 (abuse-of-discretion standard). Our supreme court has not resolved the controversy, and in at least one case recognized the issue but found it unnecessary to decide it. See *Robidoux v. Oliphant*, 201 Ill. 2d 324, 345 (2002) (declining to settle which standard of review is appropriate for challenges to compliance with Rule 191, because the result would be the same under either standard). Nor has the court overruled or abrogated *Hoover*. Consequently, we hold that the abuse-of-discretion standard governs our review of whether the trial court erred in holding that Schmidt's opinions would be inadmissible at trial.

¶ 47 However, our review under that standard is precluded because the record contains no report of proceedings of the summary judgment hearing. There are definite criteria for

admission of expert testimony. See *Yanello v. Park Family Dental*, 2017 IL App (3d) 140926, ¶ 44; Ill. R. Evid. 702-705 (eff. Jan. 1, 2011). The trial court did not provide in its written order the reasons for holding that Schmidt's opinions would be inadmissible at trial, and whatever reasons the court may have given at the hearing are unknown to us. As the appellant, plaintiff had the burden to supply a record complete enough to support his claims of error. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391 (1984). "[I]n the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Id.* at 392. "Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Id.* Given the critical gap in the record, we presume that the trial court did not err in disregarding the opinions of Schmidt on the ground that they would not be admissible at trial.

¶ 48 III. Summary Judgment

¶ 49 Plaintiff contends that, even apart from Schmidt's opinions, he made a showing adequate to resist summary judgment. We disagree.

¶ 50 Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005 (West 2016). "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." *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill. 2d 17, 31 (1999). "Because summary judgment is a drastic means of disposing of litigation, the pleadings and supporting documentation are construed strictly against the movant and liberally in favor of the opponent, and summary judgment should be granted only when the movant's right is clear and free from

doubt." *Peters v. R. Carlson & Sons, Inc.*, 2016 IL App (1st) 153539, ¶ 13. While a party need not prove his case in order to survive summary judgment, he must present a factual basis that would arguably entitle him to judgment. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12. Mere speculation, conjecture, or guess is insufficient to withstand summary judgment. *Barrett v. FA Group., LLC*, 2017 IL App (1st) 170168, ¶ 26. We review summary judgment rulings *de novo*. *Id.* ¶ 13.

¶ 51 Plaintiff's claims against Chicago Title and Archer sound generally in negligence. To prevail on a claim of negligence, the plaintiff must plead and prove the existence of a duty owed by the defendant, a breach of that duty, and injury proximately resulting from that breach. *Bruns*, 2014 IL 116998, ¶ 12,

¶ 52 In the summary judgment proceedings below, plaintiff alleged a specific origin for the substance on which he slipped on June 15, 2015: Archer's washing of PNC's windows on May 1, 2015. Plaintiff claimed that Archer was negligent for depositing the substance and that Chicago Title was negligent for failing to remove the substance in the weeks before plaintiff's fall. Plaintiff presents the same theory in his briefs on appeal. However, at oral argument, plaintiff tried to advance a theory of Chicago Title's liability that was not tethered to any particular view as to the origin of the slippery substance. Plaintiff's stance at oral argument was that Chicago Title was liable for failing to remove the slippery substance no matter its origin. We reject plaintiff's attempt to alter, at oral argument, the theory of liability he presented both in the summary judgment proceedings and in his appellate briefs. See *US Bank, National Ass'n v. Avdic*, 2014 IL App (1st) 121759, ¶ 34 (theories not raised during summary judgment proceedings are forfeited on appeal); Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017) ("Points not argued [in the opening brief] are waived and shall not be raised *** in oral argument[.]"). Thus,

if plaintiff presented no arguable basis below for finding that Archer deposited the substance, then summary judgment was appropriate for both Archer and Chicago Title alike.

¶ 53 Plaintiff claims that the following evidence is sufficient, independent of Schmidt's opinions, to establish a triable issue of fact on whether the substance originated with Archer: (1) Sanchez testified that he spilled some of the window cleaning solution on the sidewalk; and (2) the slippery substance that plaintiff detected on June 15, 2015, was concentrated under PNC's windows.

¶ 54 Sanchez, however, testified that he spilled "not a lot" of solution and that he cleaned up the spill. Moreover, Behm stated that he experimented with cleaning solutions with a higher concentration of detergent than Sanchez used, and even these solutions, when allowed to accumulate on the sidewalk, did not leave a slippery surface once dried. Based on these findings, Behm concluded, to a reasonable degree of certainty, that the slippery substance detected by plaintiff on June 15, 2015, and later by Schmidt on July 13, 2015, could not have come from the cleaning solution that Sanchez applied on May 1, 2015.

¶ 55 Plaintiff did not rebut Sanchez's testimony that he cleaned up the spilled cleaning solution. More importantly, he did not rebut Behm's findings, which were essentially that, even if Sanchez had failed to clean up the solution, it would not have left a slippery surface on the sidewalk.

¶ 56 Nothing in the record compensated for plaintiff's failure to rebut this evidence directly undercutting his specific theory of how the substance in question accumulated on the sidewalk. There was deposition testimony from PNC employees and managers of the Central Avenue building as to the condition of the sidewalk preceding the day of the accident. This evidence overwhelmingly favored Archer and Chicago Title by indicating that daily users of the sidewalks

outside PNC never complained of a slippery substance on their surface. Thus, we must conclude that plaintiff did not present an arguable basis for finding that Archer's washing of PNC's windows on May 1, 2015, caused the slippery substance to accumulate on the sidewalk. Accordingly, summary judgment for Archer and Chicago Title was appropriate.

¶ 57 IV. CONCLUSION

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

¶ 59 Affirmed.