2018 IL App (2d) 170585-U
No. 2-17-0585
Order filed June 28, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

VITO BASILE,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 14-L-001141
	)	
COLLEGE OF DU PAGE,	)	Honorable
	)	Robert G. Kleeman,
Defendant-Appellee.	)	Judge, Presiding.

PRESIDING JUSTICE HUDSON delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: In former student's negligence suit against public community college for injuries he sustained when he tripped and fell over a rod of metal piping protruding from a storage pallet in his laboratory classroom, the trial court properly granted summary judgment in favor of the college on grounds that the college was immune from liability under the Illinois Local Governmental and Governmental Employee Tort Immunity Act (745 ILCS 10/3-102(a) (West 2012)).

¶ 2 Plaintiff Vito Basile, a former student at College of Du Page (COD), appeals from the grant of summary judgment in COD's favor on his negligence action for injuries he sustained when he tripped and fell over a rod of metal piping protruding from a storage pallet in his heating, ventilation, and air conditioning (HVAC) laboratory classroom. The trial court held that

COD was immune from liability under the Illinois Local Governmental and Governmental Employee Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/3-102(a) and 10/3-108 (West 2012)). We affirm on grounds that section 3-102(a) of the Tort Immunity Act bars plaintiff's action.

¶ 3 I. BACKGROUND

¶ 4 COD is a public community college organized and existing under the Illinois Public Community College Act (110 ILCS 805/1-1 *et seq.* (West 2012)). Plaintiff was a full-time student at COD from 2011 to 2013. On the evening of November 20, 2013, plaintiff attended his HVAC class in a laboratory classroom on COD's campus. As plaintiff entered the classroom and walked toward his desk, he tripped on a rod of metal piping protruding from a storage pallet and fell to the concrete ground.

¶ 5 Plaintiff sued COD, alleging that COD was negligent in allowing the protruding rod to exist on its property, failing to remove the rod, and failing to warn plaintiff of the rod. COD moved for summary judgment on two of its affirmative defenses, namely, immunity under sections 3-102(a) and 3-108 of the Tort Immunity Act. COD argued that it had no actual or constructive notice of the protruding rod in advance of the incident and was therefore immune under section 3-102(a), which immunizes against liability resulting from a condition that is not reasonably safe on its property unless the local public entity has actual or constructive notice of the condition in reasonably adequate time prior to the injury to have taken remedial measures. COD argued alternatively that plaintiff's allegations amounted to an injury in a supervised activity in its classroom under section 3-108 for which COD could not be held liable absent willful or wanton conduct.

¶ 6 In support of its summary judgment motion, COD presented the deposition testimony of plaintiff, plaintiff's wife, HVAC professor James Janich, and HVAC instructor Patrick Broch—the self-described "lab rat" of the HVAC classroom. Janich testified that the HVAC laboratory classroom's primary function is to "teach students the entry level skills necessary to find a position in this industry." Toward that end, the laboratory classroom is filled with HVAC equipment. At the time of the incident, the laboratory classroom housed an old boiler with attendant parts placed on storage pallets. Janich testified that the boiler had been donated by the engineering department and moved to the laboratory classroom with the intention that the boiler would be a teaching mechanism on which the HVAC students would work. The boiler proved unsuitable for teaching and was being disassembled by HVAC Professor Bob Clark.

¶ 7 Broch likewise testified about the origin of the dismantled boiler: "We had moved a boiler from the old part of the school, and we were going to assemble it in our lab. And it was all the paraphernalia that goes with the old boiler. There's a lot of chunks that goes [*sic*] on those boilers." According to Broch, the boiler's attendant parts were on "two, possibly three" pallets. The pallets were about 3 feet wide and located approximately 10 to 15 feet from the entrance to the classroom.

¶ 8 Broch testified that as the "lab rat," he was "in the lab more than anybody else on the staff." He witnessed the incident and described the protruding rod over which plaintiff tripped. Specifically, Broch stated that one of the items on the pallets that "came in connection with the boiler" was a "hanger" for hanging pipes. He explained that there is a rod at the end of the hanger to hold the pipe and the rod protruded from the pallet by a foot. This is the protruding rod over which plaintiff tripped.

¶ 9 Broch further testified about the pallets and protruding rod:

"Q. That pallet with the rod that he fell on, do you know when that was placed in the lab?

A. No.

Q. Was it there when you got there about an hour before his fall?

A. It would have been there for several days.

Q. For several days in—strike that. For several days was it in that condition in the same place it was when [plaintiff] fell?

A. Was the rod protruding, I don't know. The pallet was there.

Q. Okay. But you don't know if the rod was protruding for a period of time before?

A. No, no."

Following testimony about the location and size of the pallets, questioning about the protruding rod continued:

"Q. Okay. You noticed it after the fall?

A. Yes.

Q. The rod and the hanger?

A. Yes. I had probably seen them, but somebody—if—it wasn't out all the time. It had been not loose and fallen out.

Q. The rod or the hanger hadn't?

A. Yeah. It hadn't been out for like weeks. It would have been out for, you know, a day or two.

Q. You're talking about the rod or the hanger would have been out?

A. The thing he tripped on.

Q. Would have been out for a day or two before the fall?

A. Yes.

Q. And during that day or two that it was out before the fall, you or no other College of Du Page employee did anything to secure it or move it back; correct?

A. I probably wasn't there.

Q. To the best of your knowledge, no College of Du Page employee did anything to secure it or move it back out of this path or walkway?

A. Yes.

Q. If you saw it extended like that, would you do something about it?

A. Yes.

* * *

Q. Okay when did you see the hanger?

A. After the fall."

¶ 10 Broch explained that the protruding rod was on one of the pallets. This pallet had been in the classroom for at least several weeks before the incident, but the rod was not protruding from the pallet during that time period. Broch stated that he had not been in the laboratory classroom for at most "a few days" prior to the day on which plaintiff tripped and that the rod was *not* protruding from the pallet when he was last there. Specifically:

"Q. But you did not see the protruding pipe on the pallet the day before that you were in the lab?

A. No.

Q. So, before then it looked safe to you?

A. Yes."

¶ 11 Following a hearing on COD's summary judgment motion, the trial court held that both sections 3-102(a) and 3-108 barred plaintiff's claim. Regarding the defense of immunity under section 3-102(a), the trial court found that there was no evidence that COD had actual or constructive notice of the protruding rod. The trial court disagreed with plaintiff's characterization of Broch's deposition testimony as evidence of notice, concluding: "[A]s I read the whole deposition, he's saying it couldn't have been out for more than a day or two. I would have seen it before then. And it goes on later on that page Line 16: If you saw it extended like that, would you do something about it? Yes. And he goes on to explain why: He didn't see it." The trial court further reasoned: "He's saying he didn't see it. He didn't have actual notice. He's saying that it couldn't have been for more than a day or two. I wasn't there, but he would have seen it if it was before then." Thus, the trial court held, COD was immune from liability under section 3-102(a).

¶ 12 In holding that COD also was immune under section 3-108, the trial court reasoned that the case was *not* a conventional premises case where, for instance, "a student in a classroom tripped over a broken floor board or a chipped tile or something like that." Rather, the trial court determined:

> "[T]his is a lab in an HVAC class where they brought in a disassembled boiler, as I understand it. There were parts and paraphernalia and pallets everywhere. And according to the plaintiff—and I take their arguments at face value—this was not stored properly. A rod came out of it at some point in time. It was protruding out in the path where somebody would walk. If we're bringing in a boiler to reassemble it as part of a classroom activity and it's not stored properly, I—frankly I think that that is activity which requires to be supervised.

* * *

This is an activity in a classroom, and part of that activity is bringing in and storing safely a boiler with all of its parts, intended parts. I'm inclined to find, and I do find, that 108 applies.

* * *

I do find that this is activity and it is supervision and I think that willful and wanton conduct would have to be applied."

¶ 13 Accordingly, as plaintiff did not plead willful and wanton conduct, the trial court granted COD's summary judgment motion on both affirmative defenses. Plaintiff timely appealed.

¶ 14 II. ANALYSIS

¶ 15 Plaintiff argues that the trial court improperly granted summary judgment in COD's favor. According to plaintiff, neither section 3-102(a) nor section 3-108 bar his action.

¶ 16 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(c) (West 2016). Summary judgment may be granted only if the movant's right to judgment is "clear and free from doubt." *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). In determining whether there is a genuine issue of material fact, the documents are construed strictly against the moving party and liberally in favor of the opponent. *Id.* at 131-32. "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). However, unsupported conclusions, opinions, or speculation are insufficient to raise a genuine issue of material fact.

Outboard Marine Corp., 154 Ill. 2d at 132; *Vulpitta v. Walsh Construction Co.*, 2016 IL App (1st) 152203, ¶ 22.

¶ 17 If the moving party supplies facts, which, if not contradicted, would entitle the party to judgment as a matter of law, the nonmoving party cannot rely upon his pleadings alone to create a genuine issue of material fact. *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986); *Fields v. Schaumburg Firefighters' Pension Board*, 383 Ill. App. 3d 209, 224 (2008). To survive summary judgment, the opponent must present some factual basis that would arguably entitle him to judgment. *Fields*, 383 Ill. App. 3d at 224. We review summary judgment rulings *de novo*. *Outboard Marine Corp.*, 154 Ill. 2d at 102.

¶ 18 Plaintiff argues that COD is not entitled to immunity under section 3-102(a) of the Tort Immunity Act. According to plaintiff, he was not required to show that COD had notice of the protruding rod because COD created the dangerous condition. Plaintiff contends that, even if he were required to show notice, lab instructor Broch admitted actual notice of the protruding rod, and, in any event, there were genuine issues of material fact regarding COD's actual and constructive notice of the protruding rod.

¶ 19 Section 3-102(a) provides:

¶ 20 "Except as otherwise provided in this Article, a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used, and shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in

reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition." 745 ILCS 10/3-102(a) (West 2012).

¶ 21 Accordingly, the Tort Immunity Act requires that a local public entity have actual or constructive notice of a condition that is not reasonably safe to be liable for negligence for the care and maintenance of its property. "Section 3-102(a) requires proof that the defendant had timely notice of the specific defect that caused the plaintiff's injuries, not merely the condition of the area." *Zameer v. City of Chicago*, 2013 IL App (1st) 120198, ¶ 16. The plaintiff maintains the burden of proving notice. *Id.*, ¶ 14; *Burke v. Grillo*, 227 Ill. App. 3d 9, 18 (1992). Thus, to survive summary judgment, plaintiff needed to adduce evidence sufficient to support a finding that COD had either actual or constructive notice of the protruding rod in adequate time to have taken remedial measures. See *Zameer*, 2013 IL App (1st) 120198, ¶ 16.

¶ 22 A. Creation of Dangerous Condition

¶ 23 Initially, plaintiff argues that the trial court improperly required him to show that COD had notice of the protruding rod because COD created the dangerous condition during the process of dismantling the boiler. Plaintiff concedes that he forfeited this argument by failing to raise it in the trial court but argues that we should consider the issue under the plain-error doctrine. Application of the plain-error doctrine to civil cases should be "exceedingly rare" and only where there was a "prejudicial error so egregious that it deprived the complaining party of a fair trial and substantially impaired the integrity of the judicial process itself." *U.S. Bank National Ass'n v. Hartman*, 2016 IL App (1st) 151556, ¶ 24. Plaintiff contends that "forcing [him] to show notice when he otherwise was not required to unfairly deprived him of his opportunity to receive a trial on the merits." We need not resolve the applicability of the plain-error doctrine to this case because a review of the record establishes that there was no error.

¶ 24 Plaintiff argues that COD is not entitled to immunity under section 3-102(a) because it created the dangerous condition of the protruding rod. He cites *Harding v. City of Highland Park*, 228 Ill. App. 3d 561 (1992), in support. In *Harding*, the plaintiff was injured after falling into a water meter pit. *Id.* at 571. There was evidence that city employees removed the cover from the pit and improperly replaced it. *Id.* The *Harding* court reasoned that this evidence amounted to actual or constructive notice; thus, the immunity provided by section 3-102(a) did not apply. *Id.* The court concluded that "when an affirmative act of a municipality's agents or employees causes a dangerous condition, no actual or constructive notice of said condition is required." *Id.*

¶ 25 *Harding* is inapposite. Here, plaintiff provides no factual basis to support the contention that COD or its agents or employees caused the rod to protrude from the pallet. He relies solely upon Janich's testimony that COD HVAC Professor Clark was in the process of dismantling the boiler. According to plaintiff, the protruding rod "can be logically" traced to the dismantling process. He contends that this court should "assume" that Professor Clark misplaced the rod. Plaintiff presents no evidence or reasonable inferences that Professor Clark was the cause of the protruding rod. His argument amounts to improper speculation insufficient to create a genuine issue of material fact as to his claim that COD created a dangerous condition. See *Outboard Marine Corp.*, 154 Ill. 2d at 132; *Vulpitta*, 2016 IL App (1st) 152203, ¶ 22. The trial court properly required plaintiff to establish that COD had notice of the protruding rod.

¶ 26 B. Actual Notice

¶ 27 Plaintiff contends that instructor Broch admitted actual notice of the protruding rod and that the admission constitutes an evidentiary admission that may be introduced substantively against COD as a statement by a party-opponent pursuant to Illinois Rule of Evidence

801(d)(2)(D) (eff. Jan. 1, 2011). According to plaintiff, Broch's testimony that "it would have been there for several days" and "it would be a few days" amounted to an admission of actual notice of the dangerous condition of the protruding rod on COD's property, which was sufficient to impute notice to COD. Alternatively, plaintiff argues that Broch's testimony created a genuine issue of material fact with respect to COD's actual notice of the protruding rod.

¶ 28 Plaintiff relies upon selected portions of Broch's deposition testimony without regard to context or completeness. The transcript of Broch's deposition demonstrates that Broch's statement that "it would have been there for several days" referred to the presence of the pallet in the laboratory classroom, not the existence of the rod protruding from the pallet. Specifically, in response to the question of whether "[f]or several days was it in that condition in the same place it was when [plaintiff] fell," Broch responded, "Was the rod protruding, I don't know. The pallet was there." He further explained that he had not been in the classroom for at most "a few days" prior to the day on which plaintiff tripped and that the rod was *not* protruding from the pallet when he was last there. To be sure, Broch testified that he would have done something about the protruding rod if he had seen it and that he saw the rod after plaintiff tripped. Construing the testimony strictly against COD and liberally in favor of plaintiff, there simply is no basis upon which to hold either that Broch admitted actual notice of the protruding rod or that his testimony created a genuine issue of material fact with respect to COD's actual notice of the protruding rod.

¶ 29 C. Constructive Notice

¶ 30 Plaintiff also argues that there were genuine issues of material fact with respect to COD's constructive notice of the protruding rod. COD contends that plaintiff forfeited this issue by failing to raise it in the trial court. However, a review of plaintiff's response in opposition to

COD's summary judgment and the transcript of the hearing on the summary judgment motion reflect that plaintiff raised the issue of COD's constructive notice *albeit* in a cursory manner without citation to authority. Also, the trial court addressed the issue and held that there was no evidence of constructive notice. Thus, we will address the issue.

¶ 31 Constructive notice under section 3-102(a) is established where a " 'condition has existed for such a length of time, or was so conspicuous, that authorities exercising reasonable care and diligence might have known of it.' " *Burke*, 227 Ill. App. 3d at 18 (quoting *Finley v. Mercer County*, 172 Ill. App. 3d 30, 33 (1988)). To prove constructive notice, the plaintiff must present some evidence regarding the length of time the condition existed. *Zameer*, 2013 IL App (1st) 120198, ¶¶ 20-21.

¶ 32 Plaintiff contends that Broch should have discovered the protruding rod in light of his testimony that he had been in the laboratory classroom for an hour before the start of the class and that the protruding rod was in the walkway 10 to 15 feet from the laboratory classroom's entrance. Plaintiff cites Broch's deposition testimony that the protruding rod was "obvious if you were looking forward" in describing the placement of the pallets in the classroom and the location of the incident.

¶ 33 Plaintiff's argument assumes that Broch saw the protruding rod before plaintiff tripped. However, Broch's uncontroverted deposition testimony was that he did *not* see the protruding rod until after plaintiff tripped. Broch affirmatively testified that the rod had not been protruding when he was last in the classroom. Moreover, plaintiff presented no evidence upon which to infer that the rod was protruding during the time Broch was in the classroom before class or that Broch should have seen the protruding rod in this HVAC laboratory classroom with teaching equipment strewn throughout. Thus, plaintiff failed to meet his burden of presenting some

evidence regarding the length of time the protruding rod existed. See *Zameer*, 2013 IL App (1st) 120198, ¶¶ 20-21 (affirming summary judgment in the city's favor under section 3-102(a) where there was no evidence as to the length of time the defect existed). In sum, there were no genuine issues of material fact regarding COD's constructive notice of the protruding rod.

¶ 34 Accordingly, the trial court properly granted summary judgment in COD's favor on the basis that it is immune from liability under section 3-102(a) of the Tort Immunity Act. In light of our holding, we need not address the issue of whether COD also is immune from liability under section 3-108 of the Tort Immunity Act.

¶ 35 III. CONCLUSION

¶ 36 For the reasons stated, we affirm the trial court's grant of summary judgment in COD's favor.

¶ 37 Affirmed.