2018 IL App (2d) 170754-U
No. 2-17-0754
Order filed September 27, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ELVIS WALKER, Plaintiff-Appellant, v. RICHARD WILSON, GRACE WILSON, 5 POINTS REALTORS, INC., and 5 POINTS PROPERTIES, INC., Defendant-Appellees (Wilson Family Limited Partnership and Luke Berry d/b/a Berry Enterprises, Defendants.)	)	Appeal from the Circuit Court of Winnebago County. No. 16-L-277 Honorable Eugene G. Doherty, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not err in granting summary judgment for defendants.

¶ 2 The plaintiff, Elvis Walker, appeals from the trial court's order of April 14, 2017, granting summary judgment in favor of the defendants Richard and Grace Wilson, 5 Points Realtors, Inc., and 5 Points Properties, Inc. (Wilson defendants or defendants) in this slip-and-fall case. Walker argues that summary judgment was improper because he demonstrated the

existence of questions of fact as to whether the accumulation of ice on which he fell was natural or unnatural, and whether the Wilson defendants were negligent in their snow removal efforts. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The following facts are drawn from the briefs on the motion for summary judgment and from the deposition transcripts submitted as exhibits to the briefs. Except where noted, these facts are undisputed.

¶ 5 On January 23, 2012, Walker was at the home of his sister-in-law, Dorothy Funchess, at 4568 Apple Orchard Lane in Rockford, where he often babysat Funchess's children while she was at work. Walker testified that it had been snowing and raining all day. Funchess agreed that it was freezing cold, although she did not believe that it was raining or snowing at the time of the incident.

¶ 6 After Funchess arrived back home that day, Walker, Funchess, and Funchess's two children left the home through her back door and began to walk toward her garage. Walker thought this was about 6 p.m.; it was "gloomy" but there was enough light to see. To reach the garage, the group had to traverse a paved area that ran between the grassy area in back of the homes and the garage (referred to as a "parking lot"). Walker testified that a snowplow operator was plowing the parking lot as they came out of the house, but he left before they got to the lot. One of the children fell in the middle of the lot. As Walker went to help her up, his feet slipped out from under him and he fell. Walker was injured and filed suit against the Wilson defendants (who include the partners in the limited partnership that owns the property, the property management company, and a related realty company). He also sued the operator of the plowing service that plowed the lot that day.

¶ 7 Walker described the ice he slipped on as bumpy and thick, as if it had been built up over time. In fact, "the whole lot was thick with ice." No salt or sand had been spread on the ice. There were snow piles on the sides of the lot and Walker had sometimes seen runoff from beneath them as they melted. However, he had no reason to think that was where the water had come from that formed the ice he fell on. He had no idea where that water had come from; he assumed it was from "the elements" but he did not know for sure. Funchess agreed that the entire lot was icy, that no salt or sand had been spread, and that her child and Walker fell in the middle of the lot. She was not sure where the ice came from or if it had accumulated over time. (She had seen snow accumulate over time at the property, but she was not sure about the ice.) When their group came out, they had no choice but to walk on the ice to get to the car—it was either that or walk in the deep snow. She had never complained about the ice and snow to the property managers, and she did not know if anyone else had.

¶ 8 Evelyn Doty, an employee of 5 Points Properties, Inc., was involved in managing the property where the accident occurred. She testified that the property was on her route home and that she would stop there to inspect the condition of the property to ensure that it had been plowed and salted or sanded after every snowfall. She was never made aware of any complaints involving ice or the plowing of the parking lot.

¶ 9 Walker visited the parking lot in June 2015 (the day before his deposition) and took pictures of it. The pictures showed that the paving had cracks and some holes. Walker stated that the pictures accurately reflected the condition of the lot in January 2012 when he fell, except that some of the holes that were filled in with tar in the pictures had not been filled in earlier. When asked to mark one of the pictures to show where he fell, he placed an X in an area where the pavement was cracked but there were no obvious holes. Walker testified that, "although [he]

couldn't see the cracks and holes under the ice on the day of [his] fall, they were there under the ice." Further, the lot was not completely flat: there were some dips in it. After a rain, there would be numerous puddles in the lot. Walker did not identify the exact location of the dips or puddles and did not say that there was such a dip or puddle in the area where he fell.

¶ 10 The Wilson defendants moved for summary judgment, raising three arguments. First, they argued, they had no duty to remove snow or ice that had accumulated naturally, and there was no evidence that the ice upon which Walker fell was an unnatural accumulation. Second, they argued that there was no evidence that they had or should have had notice of any dangerous condition on the premises, and thus they owed no duty to warn about or remove the condition. Finally, they argued that the ice was an open and obvious danger.

¶ 11 Walker responded that the question of whether an accumulation of ice was natural or unnatural in nature was a factual issue to by decided by the jury, and he argued that his testimony about the poor condition of the lot and the runoff from snow piles was sufficient to permit a reasonable person to conclude that a manmade condition—the poor condition of the lot's surface or a slope that caused the pooling of runoff—caused the ice to form. Walker also argued that, when defendants have allowed the deterioration of the premises over time to the point that a defect causes an injury, it is not necessary for a plaintiff to prove notice of the specific defect. He argued that the poor condition of the parking lot surface had been present for sufficient time for the Wilson defendants to have known of it. Further, they voluntarily undertook to have the lot plowed and regularly inspected to insure that it was cleared, but they had done this negligently. As for the argument about whether the ice was open and obvious, there was evidence that Walker had no choice but to encounter the ice in order to get to his car.

¶ 12 On April 14, 2017, the trial court issued a memorandum opinion and order, granting summary judgment in favor of the Wilson defendants. The trial court first found that there was no evidence that the accumulation of ice on which Walker fell was anything other than a natural accumulation. The trial court noted that Walker had argued that the formation of the ice "was somehow affected by the poor condition of the parking lot's surface underneath the ice," but rejected this argument on the basis of our prior decision in *Crane v. Triangle Plaza, Inc.*, 228 Ill. App. 3d 325, 332 (1992), which held that the mere fact that a parking lot surface is rough and full of holes is not sufficient to show that that condition is the cause of the ice accumulation that caused the injury. And although Walker had argued that the ice could have been the result of melted runoff from snow piles (in which case it would be an unnatural accumulation), there was no evidence that the ice in this case was the result of such runoff. In fact, Walker himself had stated that he believed that the weather, not runoff, was the source of the ice on which he fell. As landowners owe no duty to protect against injury from natural accumulations of ice or snow and there was no evidence that the ice on which Walker fell was anything other than a natural accumulation, the Wilson defendants did not owe him a duty. Accordingly, Walker could not prevail at trial and summary judgment was appropriate.

¶ 13 The trial court also addressed the issue of whether the defendants voluntarily undertook to plow and salt the lot but did so negligently. It found for the Wilson defendants on this issue as well, finding that as a matter of law there was insufficient time for them to have had constructive notice of any failure by the snowplowing contractor to properly plow and salt, because Walker testified that the contractor left the lot only a few minutes before he attempted to cross the lot and fell. The trial court did not address the defendants' third argument that the ice was an open and obvious danger.

¶ 14 The claims against the snowplowing contractor remained pending in the trial court, but Walker obtained a finding of immediate appealability pursuant to Illinois Supreme Court Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Mar. 8, 2016)). This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 On appeal, Walker argues that the trial court erred in granting summary judgment because he presented evidence from which a reasonable person could infer that either the condition of the parking lot surface or negligent snow removal resulted in an unnatural formation of ice, upon which he slipped. He also argues that the cracked and pitted parking lot was in itself a dangerous condition on the property that the Wilson defendants had a duty to repair.

¶ 17 "The purpose of summary judgment is to determine whether a genuine issue of material fact exists, not to try a question of fact." *Thompson v. Gordon*, 241 Ill. 2d 428, 438 (2011). Therefore, summary judgment is proper only when the pleadings, depositions, and admissions on record, together with any affidavits, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (West 2008); *Gaylor v. Village of Ringwood*, 363 Ill. App. 3d 543, 546 (2006). Although summary judgment has been called a "drastic measure," it is an appropriate tool to employ in the expeditious disposition of a lawsuit in which " 'the right of the moving party is clear and free from doubt.' " *Morris v. Margulis*, 197 Ill. 2d 28, 35 (2001) (quoting *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986)). In reviewing a trial court's grant of summary judgment, we do not assess the credibility of the testimony presented but only determine whether the evidence presented was sufficient to create an issue of fact. See *Jackson v. Graham*, 323 Ill. App. 3d 766, 779 (2001). We review the grant of summary judgment *de novo* (see *Morris*, 197 Ill. 2d at 35), and will reverse if we find that a genuine issue of material fact exists. However, "[m]ere speculation,

conjecture, or guess is insufficient to withstand summary judgment." *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313, 328 (1999).

¶ 18 To prevail on a negligence claim such as that presented by Walker here, a plaintiff must show that the defendants owed him a duty, that they breached that duty, and that their breach caused his injury. *Crane*, 226 Ill. App. 3d at 328. Under Illinois law, a landowner owes no duty to remove natural accumulations of snow and ice. *Murphy-Hylton v. Lieberman Management Services, Inc.*, 2016 IL 120394, ¶ 19. "However, landowners do owe a duty of reasonable care to prevent unnatural accumulations of ice and snow on their premises where they have actual or constructive knowledge of the dangerous condition. [Citation.] Thus, liability may arise where snow or ice 'accumulated by artificial causes or in an unnatural way ***, and where it has been there long enough to charge the responsible party with notice and knowledge of the dangerous condition.' " *Id.* ¶ 20 (quoting *Fitzsimons v. National Tea Co.*, 29 Ill. App. 2d 306, 318 (1961)).

¶ 19 As the supreme court explained in *Murphy-Hylton*, there are two main theories on which a landowner may be held liable for unnatural accumulations of snow or ice: (1) where negligent design or maintenance of the property caused snow or ice to accumulate in the spot where the fall occurred, or (2) where the landowner voluntarily undertook to remove snow or ice but did so negligently. *Id.* ¶ 21.

¶ 20 A. Unnatural Accumulation Caused by Defective Condition

¶ 21 A defendant may be held liable if it has " 'permitt[ed] unnatural accumulations due to defective construction or improper or insufficient maintenance of the premises." *Id.* (quoting *Bloom v. Bistro Restaurant Ltd. Partnership*, 304 Ill. App. 3d 707, 711 (1999)). For example, the owner of a parking lot has been held to owe the plaintiff a duty where the slope of the lot caused or aggravated the formation of water or ice in the spot where the plaintiff fell. See

McCann v. Bethesda Hospital, 80 Ill. App. 3d 544, 550-51 (1979); see also *Stroyeck v. A.E. Staley Manufacturing Co.*, 26 Ill. App. 2d 76, 82 (1960) (reasonable inference that landowner should have known that unlighted walkway with 13% grade would become dangerously icy during seasonal conditions). Similarly, where water regularly dripped from the roof at the location of the fall and accumulated in a depression there, and there was no snow or ice elsewhere, a jury could reasonably conclude that a defective condition of the premises caused the icy accumulation. *Lapidus v. Hahn*, 115 Ill. App. 3d 795, 800-01 (1983). However, there must be evidence that the condition of the property caused or aggravated an unnatural accumulation of ice at the place of injury. Absent evidence that the defendants "were responsible for an unnatural accumulation of water, ice or snow which caused [the] plaintiff's injuries," summary judgment is properly entered in the defendants' favor. *Crane*, 228 Ill. App. 3d at 328.

¶ 22 Upon reviewing the record, we agree with the trial court that Walker did not present any evidence that the ice upon which he slipped was an unnatural accumulation that was caused by the condition of the parking lot. Although Walker presented evidence that the lot was cracked and had holes, there was no evidence that those conditions in fact caused water to pool or ice to form in the spot where he fell. Walker identified an area of pavement that was cracked as the location of his fall. But Walker did not present any expert testimony that cracked pavement would cause water or ice to collect in that spot, and there was no evidence those cracks actually caused the pooling of water or the formation of an icy spot. Further, there is nothing about the mere existence of pavement cracks that would cause a reasonable person to infer that water would pool—in fact, given that pavement is ordinarily a non-porous surface, cracks could actually improve the drainage of a paved area, depending on other factors. Similarly, although Walker testified that the parking lot's surface had dips and that there would be numerous puddles

after rain, there was no evidence of such a dip or puddle in the spot where he fell. Walker described the ice where he fell as "thick," but there is no evidence that it was any thicker there than in any other part of the lot.

¶ 23 Walker argues that the cracked and pitted condition of the parking lot was itself a dangerous condition and that the defendants owed a duty to repair, or at least give notice of, that condition. However, Walker's fall was not caused by the cracks in the surface of the lot but by the ice on the lot. Without some connection between the condition of the lot's surface and the accumulation of the ice, the natural accumulation rule applies, and a plaintiff must present some evidence that the accumulation was unnatural in order to prevail.

¶ 24 In *Crane*, the plaintiff sustained injury from falling on ice that she believed likely formed as a result of the parking lot's slope and the existence of depressions in which water would collect and freeze. The trial court granted summary judgment in favor of the defendants. We affirmed, finding that the plaintiff had failed to present any evidence that the ice was an unnatural accumulation (in that case, from runoff from melting snow piles created by plowing). *Id*. at 331.

¶ 25 Especially pertinent here, the plaintiff in *Crane* argued that the rough and bumpy condition of the parking lot meant that the accumulation of ice in depressions was necessarily an unnatural condition, citing *Hankla v. Burger Chef Systems, Inc.*, 93 Ill. App. 3d 909 (1981), which in turn relied on *Geraghty v. Burr Oak Lanes, Inc.*, 5 Ill. 2d 153 (1955). We rejected this argument, finding the cited cases inapplicable. *Geraghty* did not involve snow and ice at all but rather a lot in which timbers were concealed by grass and weeds. *Geraghty*, 5 Ill. 2d at 162. Thus, the natural accumulation rule did not apply. *Hankla* did involve ice and snow, but the source of the injury was an ordinary curb where the step down had been concealed by a natural

accumulation of snow, which the court found the landowner owed no duty to keep clear. *Hankla*, 93 Ill. App. 3d at 911.

¶ 26 Neither in *Crane* nor here do we hold that a rough and poorly maintained paved surface can never give rise to an unnatural accumulation of ice or snow—that is, an accumulation that has been caused by the design or condition of the paved surface. To the contrary, ice may be considered an unnatural accumulation if there is evidence showing that a defendant maintained its property in an unreasonably defective condition that caused ice to form in the spot where the plaintiff fell. See *Lapidus*, 115 Ill. App. 3d at 800-01; *Wolter v. Chicago Melrose Park Associates*, 68 Ill. App. 3d 1011, 1018 (1979). Here, however, Walker presented no evidence that the ice on which he slipped formed as the result of the underlying condition of the parking lot. Accordingly, the trial court did not err in granting summary judgment for the Wilson defendants on Walker's theory that a condition of the property caused an unnatural accumulation.

¶ 27 B. Unnatural Accumulation Caused by Negligent Snow Removal

¶ 28 In the alternative, Walker argues that the ice on which he fell was present because the Wilson defendants voluntarily undertook to remove snow and ice in the lot (by hiring a snow removal service), but performed that voluntary undertaking negligently. Further, he argues, he presented sufficient evidence supporting this theory to defeat summary judgment: he and Funchess testified that the entire lot was thick with ice and that no salt or sand had been spread, and Funchess further stated that the snow removal efforts were usually inadequate and that snow would pile up over time. Walker also asserts that his testimony that the ice was thick and bumpy permits a reasonable inference that it had been there for some time, and he notes that Funchess testified that the ice had built up.

¶ 29 In raising this argument, Walker fails to recognize that the natural accumulation rule also applies to snow removal efforts—that is, even where a landowner has been negligent in removing snow or ice, it cannot be held liable unless its snow removal efforts caused an unnatural accumulation of snow or ice. See *Murphy-Hylton*, 2016 IL 120394, ¶ 22 ("under the voluntary undertaking theory, liability has been recognized where the landowner voluntarily undertakes the task of removing a natural accumulation of snow and ice and does so negligently, *creating an unnatural accumulation* on [the] property" (emphasis added)). Walker argues that a voluntary undertaking is an exception to the natural accumulation rule, citing *Claimsone v. Professional Property Management, LLC*, 2011 IL App (2d) 101115, ¶ 21. Walker misreads our decision in that case, which noted that the voluntary undertaking theory imposes only the duty to "perform the service [snow removal] in such a manner as not to increase the risk of harm" to invitees. *Id*. This statement of the voluntary undertaking theory is consistent with the supreme court's statement in *Murphy-Hylton*, as a snow-removal effort that actually increases the risk to those on the property has, in effect, created an unnatural accumulation. See *Murphy-Hylton* ¶ 22 (a landowner may "creat[e] an unnatural accumulation" if it negligently performs the voluntarily-undertaken "task of removing a natural accumulation of snow and ice").

¶ 30 Thus, even under the voluntary undertaking theory, Walker must present evidence that the snow removal efforts caused or worsened the accumulation of ice on which he fell so as to make it an unnatural accumulation. Here, there is no evidence that any snow removal efforts caused or worsened the ice on which Walker fell. Although there was a ridge of piled-up snow at the edge of the lot, Walker did not fall on that ridge. Nor is there any evidence that runoff from previous melting of that snowy ridge caused the formation of the ice near the middle of the lot on which Walker did fall. Walker himself testified that, although he had occasionally seen

runoff from the snow pile, he believed the ice that caused him to fall formed as the result of the weather, not from such runoff. Finally, we agree that the thickness of the ice could create a reasonable inference that it had accumulated over time. However, that thickness does not, in itself, suggest that the accumulation was unnaturally caused or that a natural accumulation of snow and ice had been made worse by the defendants' snow removal efforts.

¶ 31 We note that the parties also briefed the issue of whether the ice constituted an open and obvious danger such that Walker owed a duty to avoid it and the Wilson defendants should be relieved of liability. However, having found that the natural accumulation rule applies to all of Walker's claims against the Wilson defendants, we need not reach that issue.

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, the order of April 14, 2017, of the circuit court of Winnebago County, granting summary judgment in favor of the Wilson defendants, is affirmed.

¶ 34 Affirmed.