2018 IL App (5th) 180223-U

NO. 5-18-0223

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

ANTON CHAIRS, a Minor, By and Through His Mother and Next Friend, Malekia Chairs, Plaintiff-Appellant, v. ATHLETE'S SHOE, INC., and BIERMAN WELDING, INC., Defendants-Appellees.	)	Appeal from the Circuit Court of Effingham County. No. 14-L-47 Honorable Allan F. Lolie, Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justices Welch and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held*: Order granting summary judgment in favor of the defendants reversed where genuine issues of material fact exist as to what occurred during alleged incident causing injury to the plaintiff and resolution of these issues by the trier of fact in favor of the plaintiff could support a duty on the part of the defendants as a matter of law.

¶ 2 The plaintiff, Anton Chairs, a minor, by and through his mother and next friend, Malekia Chairs (Anton), appeals the March 20, 2018, order of the circuit court of Effingham County which granted the motions for summary judgment filed by the defendants, Athlete's Shoe, Inc. (Athlete's Shoe), and Bierman Welding, Inc. (Bierman),

on Anton's negligence complaint against each of them. For the reasons that follow, we reverse and remand for further proceedings not inconsistent with this order.

¶ 3 FACTS

¶ 4 On November 17, 2014, Anton filed a complaint in the circuit court of Effingham County against Athlete's Shoe[1] and Bierman. The complaint contains the following allegations. Athlete's Shoe owns and operates a retail store on its premises located adjacent to the Days Inn hotel in Effingham. Athlete's Shoe had an agreement with Bierman "to sell and install railings" on Athlete's Shoe's premises. On or about July 6, 2012, Anton and his family stayed at the Days Inn. A Days Inn employee instructed the family to park their van and attached cargo trailer in the back area of the Days Inn parking lot, adjacent to Athlete's Shoe's property. Anton, along with his other family members, exited the family van and "[Anton] rested (swung) on the red railing near the van, unaware that the railing was unsafe." While [Anton] leaned against the railing, "the heavy concrete filled railing suddenly and without warning came apart and struck or otherwise fell onto [the] [p]laintiff, causing him to sustain serious and permanent injuries."

¶ 5 Count I of the complaint, directed toward Athlete's Shoe, alleged a cause of action for negligence based on Athlete's Shoe's alleged failure to properly maintain and keep the railing located on its premises in a reasonably safe condition, failure to warn Anton against the dangerous condition, and/or failure to barricade the unsafe railing.

[1]The complaint alleges Athlete's Shoe was doing business as Prime Sole, but Prime Sole is not captioned in the complaint before the circuit court or in the notice of appeal.

Count II of the complaint, directed toward Bierman, alleged a cause of action for negligence based on Bierman's sale and erection of a defective railing on Athlete's Shoe's property and failure to warn the railing it installed was dangerous. The complaint alleged that, as a proximate result of the negligence of Athlete's Shoe and Bierman, Anton suffered internal injuries within his abdomen, resulting in cardiopulmonary arrest, perforation of his colon, septic shock, respiratory failure, anoxic brain injury, and acute renal failure, all of which are of a permanent nature. Both Athlete's Shoe and Bierman filed answers to the complaint, generally denying the allegations therein and asserting affirmative defenses of, *inter alia*, contributory negligence and/or failure to mitigate damages.

¶ 6 On August 11, 2017, Athlete's Shoe filed a motion for summary judgment as to count I of Anton's complaint. The following affidavits and depositions were attached to Athlete's Shoe's motion. By way of affidavit, Michael Borries attested he is the president of Athlete's Shoe and has been president for over 20 years. Mr. Borries laid a foundation for a photograph attached to his affidavit, described as Exhibit 10 to the deposition of Malekia Chairs. The photograph depicts a railing with a green arrow pointing to it, which Mr. Borries attested was located on the premises of Athlete's Shoe on the date in question. Mr. Borries averred the railing in the photograph was made for Athlete's Shoe by Bierman. Mr. Borries further averred Athlete's Shoe did not have any railing similar in configuration to the rail depicted in the photograph, but shorter in length, on its premises. Mr. Borries averred the rail depicted in the photograph could be manually moved from its position along the edge of the property, and was the only movable railing

Athlete's Shoe ever had on its property. According to Mr. Borries' affidavit, Athlete's Shoe never had a movable railing of a shorter length on its property, never owned a movable railing other than that depicted in the photograph, and never ordered any other railing from Bierman. Finally, Mr. Borries attested he never saw the movable railing depicted in the photograph in any other position than standing upright on its base, never received a report of any railing being in a collapsed position on the property of Athlete's Shoe, never received a report of an accident on the premises involving "any portion of its fencing or railing," and never saw any children playing on or about the piece of movable rail depicted in the photograph at any time before the date of the incident in question.

¶ 7 Also by way of affidavit, William Switalski averred he is a licensed professional engineer in Illinois. He was retained in this case by Athlete's Shoe and asked to opine as to the weight of the movable railing that was configured by Bierman and depicted in photographs marked as deposition exhibits in this case, as well as the weight of a railing five feet in length, with the assumption that the railing was configured of like materials as the one configured by Bierman. He was further asked to calculate the amount of force needed to move both railing configurations. He reviewed the depositions and exhibits in question, as well as a description of the materials used by Bierman in configuring the railing depicted in the deposition exhibits, and certain specifications relative to those materials.

¶ 8 Mr. Switalski further averred as to the following opinions to a reasonable degree of engineering certainty. The movable railing fabricated by Bierman and depicted in the deposition exhibit photographs is 21 feet in length with a total weight of 163.93 pounds.

The smallest amount of force required to move the railing from its upright position to a position where the railing rests on the ground is 22.88 pounds of force. A 5-foot railing constructed of similar materials and of a similar design to the 21-foot railing constructed by Bierman would weigh 68.88 pounds, and the smallest force exerted on it to move the top portion of the railing to the ground is 9.6 pounds of force. Mr. Switalski concluded neither railing would physically move from an upright position toward the ground without the requisite amount of force based on his calculations.

¶ 9 By way of discovery deposition conducted on January 18, 2016, Malekia Chairs testified as follows. On the date of the incident in question, her family was going on a vacation from their home in Detroit, Michigan, to Scottsdale, Arizona. They planned to stay there for the summer with an aunt and uncle. Ms. Chairs, her husband Vincent Graham, her oldest daughter Alliyah, her younger son Amir, and Anton were traveling together at this time. Anton, born October 21, 2002, had just finished his third grade year at a Detroit school and planned to go back to that school the following fall for fourth grade. She never saw Anton doing cartwheels or any type of tumbling.

¶ 10 Ms. Chairs testified that, on the date in question, the family was traveling in a 2001 Chevrolet van and pulling a U-Haul cargo trailer. They stopped at the Days Inn around 9 p.m. Ms. Chairs identified a series of photographs depicting the parking lot of the Days Inn. In Exhibit 10 to the deposition, Ms. Chairs identified the place where the Days Inn staff instructed them to park their van, which is parallel to a long railing and so close to the railing that Ms. Chairs was unable to exit the van through the passenger's side of the van. Ms. Chairs testified Anton got out of the van first from the passenger's

side sliding door and her daughter Alliyah got out of the driver's side and walked around to where Anton had exited. Ms. Chairs testified she also exited the driver's side, by crawling over her husband, and walked around to the passenger's side of the van, where the following occurred:

> "When I got around to it, Anton was—you can tell something happened because he—it was like dirt right here. Dirt on the back and so I'm asking what's wrong? He said it fell on me. I said what fell on you? I said, Alliyah, what happened? She said I don't know, but I picked—I had to pick that thing up off of him. I said pick what up? It was laying on the ground. It wasn't that long. It was from about here to here. It was laying on the ground, and so I asked him, I said are you okay? I asked him if he was okay. He said—he's dusting himself off. He's like, you know, I'm okay and everything like that."

¶ 11 Defense counsel placed a green arrow on Exhibit 10 to point to a portion of the railing, insinuating this is where the van had parked, and Ms. Chairs answered a line of questions by pointing to the picture and making references to where along the railing her passenger's side door would have hit had she opened it, ending in the following colloquy:

> "DEFENSE COUNSEL: that is not the piece of railing you would have hit, rather there was a different piece of railing—
>
> MS. CHAIRS: Yes.
>
> DEFENSE COUNSEL: that is—would have been closer to where that individual [in the photograph a few feet to the left of the arrow] is standing?

MS. CHAIRS: Exactly like this it was all right here, so I would have hit that.

DEFENSE COUNSEL: Gotcha.

MS. CHAIRS: So I would have hit it, but the railing was right here.

DEFENSE COUNSEL: Ok.

ANTON'S COUNSEL: In other words, the railing that you would have hit is no longer shown in these photographs?

MS. CHAIRS: Thank you. Yes.

DEFENSE COUNSEL: The railing that doesn't show in the photographs. There we go.

ANTON'S COUNSEL: The phantom piece of railing.

DEFENSE COUNSEL: Phantom railing. There we go."

¶ 12 Ms. Chairs testified that, by the time she got around to the passenger's side of the van, Anton was standing up. She asked Alliyah what happened and she said she did not know but she had picked the railing up off of him. Counsel then asked Ms. Chairs if she looked at the railing. Ms. Chairs answered in the affirmative and counsel asked the size of the railing, after which the following exchange occurred:

"MS. CHAIRS: Matter of fact here. The railing was about this long from here to here. It had legs on it.

COUNSEL: Ok. Hold on. You're demonstrating at the table.

MS. CHAIRS: Yes.

COUNSEL: About how tall of a person are you?

MS. CHAIRS: I'm thinking about 5 feet.

COUNSEL: You're about 5 feet. Did you know the person's wingspan is the same as their height?

MS. CHAIRS: No.

COUNSEL: Most people's wingspan is the same as their height, and you just spread your arms out on the table, and you extended them about as far as they would go?

MS. CHAIRS: Uh-huh.

COUNSEL: If you're 5 feet and I'm correct it was about 5 feet that is an estimate on your part?

MS. CHAIRS: Yeah."

¶ 13 Counsel then asked Ms. Chairs to draw "what the piece of pipe looked like once [she] got to take a look at it [her]self." Ms. Chairs did so and this was marked as Exhibit 12 to her deposition. She drew a horizontal line with smaller vertical lines on each end of it with still smaller horizontal lines on the end of each vertical line. She answered in the affirmative when asked whether she "believe[ed] it was 'that' section of pipe that fell on Anton." At the time, Alliyah was 12 years old and weighed around 150 pounds. Anton weighed around 70 pounds. Alliyah picked the "pipe" off Anton enough so he could slide out from underneath it. Anton told her the "rail" had just fallen on him and he had not touched it. When she saw the "railing," it was on the "dirt side" of the parking lot. Ms. Chairs tried to pick it up to see how heavy it was. She testified it was heavy, made of concrete or cement, and red in color.

¶ 14 The following line of questioning then occurred:

"COUNSEL: Now, in Exhibit No. 11 it shows a rail as it does in Exhibit No. 10. Is that the rail you believe fell on Anton?

MS. CHAIRS: No. That rail too big.

COUNSEL: It was smaller than that?

MS. CHAIRS: Yes.

COUNSEL: Okay. Do you know of any photographs of the rail—have you seen any photographs of the rail that fell on Anton?

MS. CHAIRS: No. All the pictures that you all have is the pictures that I have, and I can't say if that is the rail but it was red.

COUNSEL: Okay. It was a red rail. What is it about the rail in Exhibit No. 10 that makes you believe that is not the one that fell on Anton?

MS. CHAIRS: Because it's too big and if that would have fell on him, he wouldn't be here today. That's spoken from doctor's words itself. The rail is too long. The rail that fell—that fell on Anton was a lot smaller.

COUNSEL: And when you say smaller, smaller in length?

MS. CHAIRS: Yes, in length.

COUNSEL: Okay.

MS. CHAIRS: Yes, it was smaller. No, that's not the rail. No."

¶ 15 Finally, Ms. Chairs answered questions about whether the rail extended past the posts, as she initially drew the diagram on Exhibit 12 as if the rail stopped at the posts. After reviewing Exhibit 13, she answered in the negative when asked, "So Exhibit 12 is

an accurate depiction of what you saw that evening when you went out to inspect and try to lift it up, correct?" She then corrected her drawing to show the horizontal line extending a bit past the vertical lines at each end. She testified the small horizontal lines at the bottom of the vertical lines in her drawing were meant to represent "feet" similar to what is depicted at the bottom of the railing in Exhibit 13.

¶ 16 Ms. Chairs testified that around noon the next day, the family "got back on the road." Shortly thereafter, Anton began throwing up and then began to shake. The family pulled off of the interstate and drove to Anderson Hospital. Anton's body went limp in the parking lot and she thought he had stopped breathing. The staff at Anderson got him breathing again and then he was taken to Cardinal Glennon hospital in St. Louis by helicopter. Due to a ruptured stomach and colon, Anton suffered debilitating and permanent injuries.

¶ 17 Ms. Chairs was asked about medical records from Anderson Hospital, which state, "patient was doing cartwheels at home late last night when he injured his abdomen against a metal bar. Complained of his stomach hurting and went to sleep," and "patient was doing flips off bed last night and struck his ABD. Continued to play like normal." Ms. Chairs testified she did not have any idea where this information came from and she does not believe her husband would have said anything of this sort. Ms. Chairs was also asked about a record from a social worker at Cardinal Glennon which states she "was told to park along a rail that the parents described as 3 feet high, 3 or 4 feet high. Parents were still in the car. When Anton got out of the car and flipped over the rail with the rail

breaking and falling on his abdomen." Ms. Chairs testified she did not recall giving the social worker this statement. To her understanding, Anton had not flipped over "the rail."

¶ 18 Defense counsel asked Ms. Chairs if she told personnel in the pediatric unit of Cardinal Glennon, "Anton is a 10 year old male who was playing last night flipping on a rail. As he flipped backwards, railing gave way and fell on top of him hitting him over the abdominal area. He complained of abdominal pain, but otherwise appeared well." Ms. Chairs testified she never told anyone Anton was flipping on a rail.

¶ 19 Alliyah Chairs testified via discovery deposition taken on January 18, 2016, as follows. She was 14 years old at the time of her deposition and was in ninth grade, which she was in the process of completing online as a homeschooler. She testified Ms. Chairs would not allow any of the kids to do tumbling or cartwheels "or anything like that." Alliyah testified that, on the night in question, the family stopped at the Days Inn, and she identified the "red fencing" from Exhibit 9 and stated they had "parked close to it." Alliyah described what transpired as follows:

> "Park the van, my brother got out first. His door, the van door slides open, so I guess he went under the railing, and I got out next, and I went—I went—I got off on the driver's side, and I went around the cargo, and I saw the—the thing going up, the pole or whatever you want to—"

At this point, defense counsel asked Alliyah whether she was referring to "the railing," to which Alliyah responded, "Yeah, the rail." Counsel showed Alliyah the diagram Ms. Chairs drew, which was marked as Exhibit 12, and Alliyah recollected the railing was "thicker" than was depicted by Ms. Chairs. Alliyah testified that, by the time she got all

the way around to the other side of the van, she saw the railing was on top of Anton's stomach. She lifted it up enough so he could get out from under it. Anton stood up and told Alliyah he was ok. He had dirt on his back. Defense counsel made a drawing, marked as Exhibit 15, which showed Alliyah's recollection of where Anton was lying in relation to the van and the "top rail," with the following exchange:

"Q. All right. So, we have your brother oriented correctly to the car, correct?

A. Yes.

Q. All right. And was he—is this the approximate correct place in relation to the top of the hill, or was it closer to one of these ends?

A. It was probably closer to the top rail.

Q. Well, the—the top rail was on him.

A. Yes.

Q. Okay. But as the top rail was on him, was he closer to one of these posts?

A. No.

Q. About the same?

A. I don't recall."

¶ 20 Alliyah testified she did not recall Anton's ever saying how the rail got on top of him, and she did not see him playing on the rail, flipping on the rail, or doing anything like that. She testified they went inside and stayed relaxed until they left the Days Inn the next day around 11 a.m. or 12 p.m. She stated the van was parked near where the truck is

parked on Exhibit 10. She agreed the rail in that exhibit with an arrow pointing to it, as well as the rail depicted in Exhibit 13, is not the rail that fell on Anton. However, she testified the rail that fell on Anton had feet similar to the one in Exhibit 13. She then gave an account of Anton becoming ill in the van the next day. Finally, Alliyah testified she did not know whether Anton went underneath the rail or how the rail came to fall upon Anton.

¶ 21 Vincent Graham's discovery deposition, taken on January 18, 2016, contains the following relevant testimony. On the day in question, he was told by staff at the Days Inn to pull his van along the rail depicted in Exhibit 9. By the time he made it out of the van and around to the other side, he saw Alliyah lifting "the rail," or "partially holding the rail up." Anton got up and they dusted him off. Anton told him "the pole fell on him." Anton did not say how "the pole fell on him." Anton indicated his stomach hurt but he was okay. Contrary to Ms. Chairs, Mr. Graham indicated neither he nor Ms. Chairs, to his knowledge, ever tried to lift the rail.

¶ 22 Mr. Graham testified the rail that fell on Anton was not the one demarcated by the arrow on Exhibit 10. Rather, Mr. Graham testified, "The rail was, I believe, half this size and in this section right here where this pick-up truck is parked it's in front of this. It's supposed to be right here." Using Exhibit 11, Mr. Graham testified:

> "The rail was located before this boulder and maybe at the middle of this back rim-back tire. It was very short. It was made—it had—it wasn't cemented or bolted down. It was like some—it was made like this, but it had some metal pieces. So it could stand up like the base so it could stand up."

¶ 23 Mr. Graham testified he saw the rail standing when he drove up. Mr. Graham agreed Exhibit 12, the drawing by Ms. Chairs, was an accurate representation of the rail, but he could not guess its length. They left the railing lying on the ground that night. Mr. Graham testified the rail that was blocking the van door was the rail depicted in Exhibit 10 with the green arrow, with the trailer located closer to the boulder. When they left the following morning, he did not notice whether the rail was still tipped over because later the night before, he moved the van and cargo trailer to the back of the building where their room was located. When they left, they exited the rear of that building and did not go back up front. He did not report the fallen rail to anyone at the Days Inn or anyone else.

¶ 24 Mr. Graham testified he did not recall any staff at the first hospital ever asking him for any history of what happened to Anton. He denied ever telling anyone Anton had been doing flips or cartwheels the night before and testified records indicating such were inaccurate. Mr. Graham stated neither he nor his wife told a social worker at Cardinal Glennon Anton "had flipped over a rail in a parking lot."

¶ 25 On August 15, 2017, Bierman filed a motion for summary judgment as to count II of the complaint. In addition to the depositions of Ms. Chairs, Alliyah, and Mr. Graham, Bierman attached the deposition of Teresa Martinez to its motion. Ms. Martinez testified she is a former employee of the Children's Division of the Missouri Department of Social Services as a child abuse and neglect investigator. She investigated the incident in which Anton was injured. As part of her investigation, sometime between July 20 and July 27, 2012, which is two to three weeks after the alleged incident, she visited the Days Inn

parking lot in Effingham to inspect the scene and take photographs. She was accompanied by two other individuals from her agency. As part of her deposition, she reviewed 76 photographs, marked Group Exhibit 1, and testified she did not remember who took the photographs, but she remembered a lot of the photographs and they accurately and fairly represent the scene on the date of her investigation. She testified she believed they took pictures of every piece of railing she saw in the parking lot area. She looked at Exhibit 11 and testified she did not recall whether there was any railing present in the area where counsel indicated Ms. Chairs, Alliyah, and Mr. Graham testified the railing that fell on Anton was located. She could not recall whether she saw any other railing or movable gate other than those pictured in Exhibits 10 and 11. Her understanding of the incident was as follows:

> "As I remember, the family was traveling from Detroit, Michigan down to see a family member. I can't recall where they were going exactly. On their trip, that had a—I think it was a trailer on the back of their vehicle, that they had stopped in a hotel, the Days Inn in Effingham, Illinois. And Anton had gotten out of the car first and was playing on a railing, and by the time that mom and dad got out of the vehicle, there was a sibling that was trying to help pull a railing off of Anton, and dad had to help her—dad had to pull the railing off of him. The sibling was not able to."

¶ 26 Ms. Martinez testified that, during her visit to the scene, they went to the Athlete's Shoe store adjacent to the Days Inn lot to borrow a hunting scale. She could not recall if they asked anyone there any questions at that time. They borrowed the hunting scale to

weigh a movable railing on the parking lot they saw. She identified this railing as being depicted in photograph 63 of Group Exhibit 1, and stated the railing was already lying on the ground at the time they arrived in the area. She identified the same railing in photograph 55 of Group Exhibit 1, lying on the ground between a portion of the rail and a carport-type structure. Counsel described this "piece of rail" lying on the ground as a "single piece of rail that is laying between the fence of gate-type railing and the steel-hooded, garage-like area" on the Athlete's Shoe property. Ms. Martinez eventually identified this piece as one of the posts. Counsel and Ms. Martinez agreed this "piece of rail" appeared to have concrete in it. While counsel estimated it to be around "four feet or so" Ms. Martinez testified that, as depicted in photograph 30 of Group Exhibit 1, it was "a little over six feet long." Ms. Martinez testified the post weighed over 100 pounds.

¶ 27 Ms. Martinez testified they did not assume this piece of rail was involved in the incident. Rather, they assumed Anton had been "playing on" the portion of standing rail also depicted in photograph 55, not realizing it was not connected to the ground. However, Ms. Martinez agreed they did not know whether Anton was playing on the railing or whether he simply got out of the van and bumped the railing. According to Ms. Martinez, the entire length of movable rail was over 19 feet, extending out over several support posts, and they weighed it between 105 and 111 pounds. Ms. Martinez testified the railing was not secure, and could be lifted off of the posts. She believed this to be a dangerous condition, but does not recall whether they spoke to any business owners. The notes from the investigation may have been expunged. They concluded their investigation by finding no fault on the part of the family and opined the railing could have caused

Anton's injuries as the family asserted. She does not have any expertise in the fabrication of movable fencing.

¶ 28 By way of affidavit, Mark Bierman testified he is part owner of Bierman. According to Mr. Bierman, Bierman has received numerous orders for work for Athlete's Shoe's store located in Effingham, and has fabricated and built shelving, permanent fencing, and railing at that location. Prior to July 6, 2012, Mr. Bierman personally fabricated and built a 21-foot movable railing, which is depicted in the photographs marked as Exhibits 10 and 11 of Ms. Chairs' deposition. Mr. Bierman testified this is the only moveable railing ever ordered by or built on the property of Athlete's Shoe by Bierman. Bierman has never received an order from, or built, a moveable railing similar to the railing depicted in those photographs, but shorter in length, on the property of Athlete's Shoe. Athlete's Shoe never requested Bierman to build a five-foot length of moveable railing.

¶ 29 In response to the motions for summary judgment, Anton submitted the discovery deposition of Michael Borries, taken on October 4, 2017. He testified he is the president of Athlete's Shoe. He owns the property where Athlete's Shoe is located and some adjacent property. He does not own the Days Inn. Prior to 2012, the boundary between the parking lots of Athlete's Shoe and Days Inn was open, as Days Inn had an easement. However, there was a disagreement about whether Days Inn would help pay for concrete, and Days Inn vacated the easement and installed parking blocks all along the area between the two lots. There was a railing protecting the building on Athlete's Shoe's property, and on Memorial Day weekend in 2012, a semi hit the railing and tore up the

corner of the building. On June 1, 2012, Bierman came to the property to cut loose pipe off that railing so repairs to the building could begin. Mr. Borries then negotiated with Days Inn for removal of the parking blocks because they "were getting disseminated [*sic*] by trucks that would drive over them." The semi driver that hit the building did not want to drive over them for fear of getting his tires punctured and tried to turn around, hitting the building. At that time, Athlete's Shoe moved several "giant rocks" where the parking blocks were "to protect the building" so that semis could not attempt to turn around when pulling in to make deliveries.

¶ 30 Mr. Borries testified he has "a handful of different railings around the property." He further answered in the affirmative when asked, "Did Bierman do these railings?" These included railings in the front and railings in the back of the property. Mr. Borries testified that Exhibit 7 depicted a movable railing he had Bierman construct in June of 2012. The purpose of the railing was to allow semi trucks driving to the warehouse on the Athlete's Shoe property to move the railing in order to turn around and get back out. Bierman constructed the railing by recycling some railing Athlete's Shoe had on its property. He did not give Bierman any instruction on how to construct the railing. They got rid of the railing because a couple of trucks ran into it and knocked it over, and they would have to reset it. He testified that when they reset the railing, "it seemed pretty sturdy." According to Mr. Borries, they never put a sign up warning the rail was not secured because:

"The only people that were ever back there were myself and a couple of the other

> employees that would park there or if we were unloading a truck or truckers that would walk across there from a truck stop. There were never any kids or anybody playing out there. The motel had another playground for kids with swings and stuff up between the two buildings."

Mr. Borries testified it was fair to say kids frequent his store and the property. However, he saw no reason for children to be back in the area of his property where the movable rail was located.

¶ 31 Mark Bierman testified via discovery deposition on October 4, 2017. He testified Bierman was started by his grandmother and he works there as a welder. He is also a 25% owner. He learned to weld by on-the-job experience. He did not go to school for welding or have union training. He has no engineering background or training. Mr. Bierman testified Bierman has completed work on the property of Athlete's Shoe on several occasions. He constructed a movable railing for Athlete's Shoe on June 18, 2012, which was described on his invoice as, "[c]ut pipe out of railing behind building. Make moveable guards. Cut off pipe ballard. Install post in middle of rail." He testified "moveable guard" meant "movable railing." He testified the movable railing on Exhibit 7 to his deposition had two support posts and a pipe across the top. The support posts were 3 feet long and the pipe across the top was about 20 feet. All three of these pieces came from other railing on Athlete's Shoe's site. He does not remember how many pieces he actually cut to make the railing. He testified a ballard, as depicted in Exhibit 5 to his deposition, is a post set in concrete. The steel pipe also had concrete in the middle.

¶ 32 Mr. Bierman testified he also did work to the "other railing." This consisted of attaching a railing to the pipe ballard that was already installed in the ground and removing a pipe ballard from the railing. He does not know where the red ballard lying on the ground in the photographs came from or whether it was the one he cut off. There were several different invoices discussed during the deposition, but there are no exhibits to Mr. Bierman's deposition in the record on appeal.

¶ 33 There are dozens of photographs present in the record and attached to the various depositions. These photographs depict the permanent and moveable railings from different angles, a concrete post, or possibly a ballard as Mr. Bierman referred to it, on the ground, and a place in the concrete that it looks like a concrete post had been in place but no longer existed. All of the railing and posts in the photographs are red in color. The permanent and moveable railings are positioned so close together that they could appear to be one railing system.

¶ 34 On March 1, 2018, the circuit court conducted a hearing on the motions for summary judgment filed by Bierman and Athlete's Shoe. After hearing arguments of counsel, the circuit court took the motions under advisement. On March 20, 2018, the circuit court issued a detailed order granting both motions and dismissing Anton's complaint. On April 9, 2018, Anton filed a notice of appeal.

¶ 35 ANALYSIS

¶ 36 We begin our analysis with a statement of the standards governing proceedings on a motion for summary judgment, as well as this court's standard of review. Our supreme court recently set forth these standards as follows:

> "On appeal of an order granting summary judgment, a reviewing court must determine whether '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.' [Citation.] The purpose of summary judgment is not to try an issue of fact but to determine whether one exists. [Citation.] 'A genuine issue of material fact precluding summary judgment exists where the material facts are disputed, or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts.' [Citation.] Although summary judgment is encouraged in order to aid the expeditious disposition of a lawsuit, it is a drastic means of disposing of litigation. [Citation.] Consequently, a court must construe the evidence in the record strictly against the movant and should grant summary judgment only if the movant's right to a judgment is clear and free from doubt. [Citation.] On appeal from an order granting summary judgment, a reviewing court must consider whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether summary judgment is proper as a matter of law. [Citation.] We review the trial court's summary judgment ruling *de novo*. [Citation.]" *Monson v. City of Danville*, 2018 IL 122486, ¶ 12.

¶ 37 Based on these clearly enunciated standards, we find genuine issues of material fact appear from the record and the circuit court erred as a matter of law in granting the motions for summary judgment on the basis that the defendants had no duty to Anton.

" ' "[W]ithout a showing from which the court could infer the existence of a duty, no recovery by a plaintiff is possible as a matter of law and summary judgment in favor of the defendant is proper." ' " *Nunez v. Diaz*, 2017 IL App (1st) 170607, ¶ 41 (quoting *Bourgonje v. Machev*, 362 Ill. App. 3d 984, 995 (2005), quoting *Haupt v. Sharkey*, 358 Ill. App. 3d 212, 216 (2005)). " 'However, though a question of law, if there is a dispute of material fact affecting the existence of an undertaking of a duty, summary judgment is improper.' " *Id.* (quoting *Bourgonje*, 362 Ill. App. 3d at 995). The first genuine issue of material fact affecting the defendants' duty to Anton is whether a post or railing from Athlete's Shoe's property fell on Anton, and whether such post or railing was manufactured or erected by Bierman. The circuit court found the record established the "post or rail" that fell on Anton was five feet long, and the affidavits set forth by the defendants, when compared to the deposition of Ms. Chairs, Alliyah, and Mr. Graham, make clear no such movable railing existed on Athlete's Shoe's property and/or was erected by Bierman. Our review of the evidence, as set forth above, reveals no such clarity. Rather, as the circuit court observed during the hearing on the motions for summary judgment, the thrust of the defendants' argument as to this point is "[t]hey are saying someone is lying is what they are saying." On a motion for summary judgment, the duty of the court is not to judge the strength of the evidence or to weigh the credentials, credibility, and testimony of one deponent against another. *McCullough v. Gallaher & Speck*, 254 Ill. App. 3d 941, 948 (1993) (citing *Gatlin v. Ruder*, 137 Ill. 2d 284, 293 (1990)).

¶ 38 The circuit court acknowledged the aforementioned principle in its order granting the motions for summary judgment, stating:

> "Had [the p]laintiff's witnesses equivocated in any way as to the size of the rail causing injury, the court would likely deny Bierman's motion. Witnesses are not expected to know precise measurements of things they observe. These factual issues are for the trier. In this case, however, all three of the people on the scene at the time of the alleged accident deny that the twenty-one foot gate on the property caused the injury. *** As Bierman[ ] constructed no other similar moveable rail, Bierman[ ] cannot have engaged in any act that caused Anton's injuries."

¶ 39 Based on our review of the deposition testimony and the various photographs of the area in question, we find the testimony is not unequivocal or free from doubt. The attorneys and parties used several different terms when speaking about the scene of the alleged accident in the depositions and affidavits, including "gate," "rail," and "pole." In addition, in the depositions of Ms. Chairs, Alliyah, and Mr. Graham, the questions often varied between references to the "rail" in describing exactly where the van was parked, and references to the "rail," "pole," or "gate" they contend actually fell on Anton. Also, a number of the photographs depict a "pole" on the ground near the scene of the alleged accident which would match the description of a "pole" that is red in color, "concrete-filled," and approximately five foot in length. It is not clear from the evidence where this "pole" or possibly "ballard" fits into the structure of the permanent or moveable railing, and Mr. Bierman testified he performed some work on both railings, including the cutting of "ballards." In sum, there is much for a trier of fact to determine regarding exactly what

happened to Anton on July 6, 2012, and whether the actions of Bierman in erecting the movable rail and/or making changes to the permanent rail right next to it, contributed to cause Anton's injuries.[2]

¶ 40 As to the liability of Athlete's Shoe, the circuit court found Anton was a trespasser, and applying the analysis enunciated in *Kahn v. James Burton Co.*, 5 Ill. 2d 614 (1955), concluded Athlete's Shoe was entitled to judgment as a matter of law because:

> "Assuming, arguendo, that Athlete's knew of frequent trespassers, child or otherwise, the court finds that the presence of a five foot rail is not an unreasonably dangerous condition. Likewise, the court cannot find that the twenty-one foot rail is an unreasonably dangerous condition. The court does not find that Anton, due to his age or immaturity, was unable to appreciate any alleged danger posed by any rail. The court cannot find that Athlete's owed a duty to Anton."

¶ 41 We find these conclusions on the part of the circuit court to be erroneous. The question of whether Anton was a trespasser presents a genuine issue of material fact.[3]

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[2]"It is well established in Illinois that a defendant who creates a dangerous condition on land on behalf of the possessor can be held liable for injuries caused to third parties, even if defendant is not himself an owner or possessor of the land." *Madden v. Paschen*, 395 Ill. App. 3d 362, 378 (2009) (citing *Corcoran v. Village of Libertyville*, 73 Ill. 2d 316, 324 (1978)). See also *Johnson v. Equipment Specialists, Inc.*, 58 Ill. App. 3d 133, 139 (1978) (" 'One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability to others upon or outside of the land for physical harm caused to them by the dangerous character of the structure or condition after his work has been accepted by the possessor ***.' " (quoting Restatement (Second) of Torts § 385)).

[3]We recognize that the plaintiff did not, before the circuit court or on appeal, rebut Athlete's Shoe's argument that Anton was, as a matter of fact, a trespasser on Athlete Shoe's property. Accordingly, it could be said that the plaintiff has waived this issue on appeal. See *Sekerez v. Rush University Medical Center*, 2011 IL App (1st) 090889, ¶ 64; *A.J. Maggio Co. v. Willis*, 316 Ill. App. 3d 1043, 1048 (2000). However, waiver is a limitation on the parties and not on the courts, and despite waiver, this court may address an issue in order to carry out its responsibility to reach a result that is in

According to Mr. Borries' testimony, both the movable and permanent railings were located on the border between the property of Athlete's Shoe and that of the Days Inn. According to deposition testimony, immediately prior to the alleged incident, Anton's family had checked into the Days Inn, and according to instructions by the Days Inn staff, parked their van in what appears to be the Days Inn parking lot, parallel and in close proximity to the railings. Anton then exited the side of the van closest to the railings, and ended up on the ground with a red, concrete-filled object on top of him. According to the deposition testimony of Ms. Chairs, when she asked Anton what happened, he indicated he had not touched it, it just fell on him.[4] Although other evidence in the record, such as a history recorded in the Cardinal Glennon records, suggests Anton may have jumped on the railing or "flipped" on it, this it yet another factual question to be resolved by the trier of fact. If a trier of fact found Anton did not touch the railing and an object associated with the railing fell on Anton while he was on the property of the Days Inn, Anton would not be a trespasser at all.

¶ 42 As our supreme court explained in *Corcoran v. Village of Libertyville*, 73 Ill. 2d 316, 326 (1978), "[t]he essence of the *Kahn* principle is to impose a duty upon those owning or occupying land to remedy conditions which, although considered harmless to adults, are dangerous to children who foreseeably wander onto the premises." If the trier

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accordance with law. See *Sekerez*, 2011 Il App (1st) 090889, ¶ 64; *A.J. Maggio Co.*, 316 Ill. App. 3d at 1048. In addition, although the plaintiff's complaint makes reference to Anton having "rested (swung)" on the rail and "leaned" on the rail, this appears to be an effort to plead in the alternative, and pursuant to section 2-616(c) of the Code of Civil Procedure (735 ILCS 5/2-616(c) (West 2016)), the pleadings may be amended at any time to conform to the proofs.

[4]This is contrary to the circuit court's statement in its order that "[t]here is no evidence as to what exactly happened to Anton."

of fact finds Anton did not trespass, Athlete's Shoe's duty is defined by the general rule that an owner or possessor of property must use and maintain it in such a manner so as not to create an unreasonable risk of harm to others, including those outside the premises. See, *e.g.*, *Dealers Service & Supply Co. v. St. Louis National Stockyards Co.*, 155 Ill. App. 3d 1075, 1079-80 (1987) (citing Restatement (Second) of Torts § 364 (1975)). As a specific application of this doctrine, section 370 of the Restatement (Second) of Torts states as follows:

> "A possessor of land who creates or permits to remain on the land an excavation or other artificial condition so close to land in the possession of another that the possessor should realize that it involves an unreasonable risk of physical harm to others accidentally coming in contact therewith while lawfully using the adjacent land, is subject to liability of physical harm thereby caused to them, if the condition is one of which they neither know or should know and the possessor does not exercise reasonable care to warn them of it." Restatement (Second) of Torts § 370 (1965).

¶ 43 If the trier of fact were to find the incident took place as Ms. Chairs testified Anton told her it had, liability on the part of Athlete's Shoe may be established. If Anton's exit from the van resulted in his accidentally coming into contact with the railing, causing some part of the railing to fall upon him while he was lawfully on the Days Inn premises, the requirements for liability set forth above would apply. For all of these reasons, a summary judgment in favor of the defendants was improper.

¶ 44 CONCLUSION

¶ 45 For the foregoing reasons, the March 20, 2018, order of the circuit court of Effingham County, which granted a summary judgment in favor of the defendants on counts I and II of Anton's complaint, is reversed, and this cause is remanded for further proceedings not inconsistent with this order.

¶ 46 Reversed and remanded.