2014 IL App (1st) 123659-U

FIRST DIVISION
March 31, 2014

No. 1-12-3659

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CARRIE LYNNE, Plaintiff-Appellant, v. DUKE REALTY LIMITED PARTNERSHIP and ABBEY PAVING & SEALCOATING CO., Defendants-Appellees, and DAS TRUCKING, INC. and JACEK BARCIKOWSKI, Defendants.	)	Appeal from the Circuit Court of Cook County. No. 10 L 001134 Honorable Drella C. Savage, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Connors and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 ***Held:*** The trial court did not err in granting defendants' motions for summary judgment on the plaintiff's premises liability, construction negligence, and general negligence claims. As to the premises liability claim, the plaintiff failed to establish that the defendants owned, occupied, or possessed the land at issue, or that the defendants had actual or constructive notice of the dangerous condition.

> As to the construction negligence claim, the plaintiff failed to establish that the defendants retained control over the operative details of the subcontractor's work and that the defendants had actual or constructive notice of the unsafe condition. As to the general negligence claim, the defendants neither owed a duty to the plaintiff nor breached that duty, and the plaintiff's injuries were not proximately caused by an unsafe work condition.

¶ 2 Plaintiff Carrie Lynne (Lynne) sued defendants Duke Realty Limited Partnership (Duke Realty), Abbey Paving & Sealcoating Company (Abbey Paving) and a host of other companies for injuries she sustained in an automobile accident. In her first amended complaint, Lynne alleged claims against defendants sounding in premises liability, construction negligence, and general negligence. Duke Realty and Abbey Paving moved for summary judgment on these three claims, which the trial court granted. We affirm.

¶ 3 BACKGROUND

¶ 4 I. The Accident

¶ 5 The facts presented in this case are taken from deposition testimony and other evidentiary materials, which we construe in the light most favorable to Lynne. This case arises out of a motor vehicle accident that took place near the Butterfield Infrastructure project (Butterfield project) located in the vicinity of the intersection of Ferry Road and Frieder Lane in Aurora, Illinois on July 16, 2008. The Butterfield project, which began a few months earlier, was a commercial development that included the following items of work: (1) construction of Duke Parkway; (2) partial construction of Frieder Lane; (3) construction of a sanitary lift station at Frieder Lane; (4) construction of building pads and sewer work north of Ferry Road; and (5) construction of the left turn lane on Ferry Road at Duke Parkway. The project did not, however, involve any work on Ferry Road at or near its intersection with Frieder Lane.

¶ 6 On the morning of July 16, 2008, Jacek Barcikowski, an employee of DAS Trucking, Inc. (DAS), picked up a load of gravel or stone from Vulcan Materials (Vulcan) in Joliet, Illinois for

delivery to the Butterfield project. Vulcan instructed Barcikowski where to deliver the gravel, and he made three deliveries of gravel to the construction site located at or near the Ferry Road and Frieder Lane intersection. When Barcikowski accessed the construction site, a man approached him and directed him where to drop the load of gravel. As with the two prior deliveries, someone from the construction site signed off that the gravel was received. No one at the site advised Barcikowski how to operate his truck or what to do after dumping off the load of gravel. Rafel Polanowski, one of Barcikowski's co-workers, also made three other deliveries of stone to the construction site that day.

¶ 7 After delivering the gravel to the construction site, Barcikowski exited it on Frieder Lane and pulled into the right lane of eastbound Ferry Road. Barcikowski then stopped his truck on Frieder Lane about twenty to thirty feet from the entrance of the construction site, activated his hazard lights, and cleaned out the remaining stone from the rear gate area of his truck for about thirty seconds to one minute. After cleaning the rear gate, Barcikowski returned to the cab of his truck. Polanowski, who was driving another DAS truck, was parked on Ferry Road directly in front of Barcikowski's truck, and entered the cab of Barcikowski's truck, where they talked for a few minutes and completed paperwork. Polanowski had also parked on Ferry Road to brush the gravel off the rear gate of his own truck after making his gravel delivery. Barcikowski himself made the decision to pull out and park on Ferry Road stating that no one at the construction site told him where to park his truck after making the delivery.

¶ 8 Lynne lived near the intersection of Ferry Road and Frieder Lane. She often traveled eastbound on Ferry Road for work and, for one to two months before the accident, she knew that there was construction near the Ferry Road and Frieder Lane intersection. As Lynne approached the construction site, she passed over a hill or elevated bridge on Ferry Road before she would

reach the Frieder Lane intersection. She had observed that there was an orange "Flagger" sign placed further down the bridge on eastbound Ferry Road and that the sign remained present for the duration of the construction project. However, during the course of the construction project, Lynne had only seen an actual flagger on one prior occasion. She stated that she never saw any signs that read "Trucks Entering and Leaving Highway."

¶ 9 About the same time Barcikowski had finished delivering his load of gravel, Lynne drove her automobile east on Ferry Road approaching the construction site. As she passed over the high point of the bridge traveling eastbound and following a white municipally-owned vehicle on Ferry Road, she observed vehicles in the construction site. In particular, she noticed one truck pulling out from Frieder Lane that stopped in her lane while waiting to make a left turn onto westbound Ferry Road, which obstructed her view beyond the truck. By the time the truck completed its turn and cleared the intersection, Lynne was no longer on the elevated portion of the bridge and could not see as far ahead. Thereafter, Lynne saw the white vehicle that she had been following swerve into the left eastbound lane. It was then she saw Barcikowski's truck parked in the right lane of Ferry Road. Lynne could not stop her automobile in time to avoid colliding into the rear of Barcikowski's parked truck, which was located on Ferry Road just east of Frieder Lane. Lynne never saw the white vehicle's brake lights go on at any time and it was not until the white vehicle swerved into the left eastbound lane that she was able to see Barcikowski's truck. The collision occurred less than five minutes from the time Barcikowski had stopped and parked his car on Ferry Road.

¶ 10 A construction worker named "John" heard the collision from the construction site and ran to assist Lynne. Lynne's injuries included multiple bone fractures and torn ligaments. She

was unable to work again until about February 2009, but later needed to take additional time off from work for surgery related to the collision.

¶ 11 An officer from the Aurora Police Department was in charge of the accident investigation. He prepared a report in which he noted that Barcikowski stated that he was parked in the eastbound lane of Ferry Road with his hazard lights on. Lynne reported that, as she was driving eastbound on Ferry Road and saw Barcikowski's truck, she was watching another truck moving toward Ferry Road from the construction site on Frieder Lane to see if that truck was going to pull out in front of her, when she looked forward and realized that Barcikowski's truck was stopped and she could not stop without hitting the truck.

¶ 12 The officer noted that on the date of the accident, the eastbound lanes of Ferry Road were completely open to traffic. He noted that when a driver is traveling eastbound on Ferry Road and reaches the top of the hill west of the accident site (at the Ferry Road and Frieder Lane intersection), a driver has a clear view of traffic on Frieder Lane and of traffic ahead on Ferry Road, and there was sufficient space to stop a vehicle prior to reaching the Ferry Road and Frieder Lane intersection. Also, according to his report, from the vantage point of the bridge on Ferry Road, which was west of Frieder Lane and the accident site, there were posted traffic signs stating "Flagger" and "Trucks Entering and Leaving the Highway." The officer indicated those signs were present on the date of the accident.

¶ 13 II. Construction Project

¶ 14 Duke Realty Limited Partnership (Duke Realty) was the general contractor for the Butterfield project and Paul Bojan was Duke Realty's superintendent of the project from the time it began up to and including the date of the accident. Bojan, the highest ranking Duke Realty employee on the project site, was responsible for overseeing the project, which included

scheduling, coordinating, and supervising subcontractors' work, and ensuring that the project site was safe. When Bojan became aware of unsafe situations or conditions, he was authorized to correct them.

¶ 15 Duke Realty's project manual for the Butterfield project indicated that each subcontractor was to develop a site-specific safety plan outlining those hazards associated with the subcontractor's activities and how the subcontractor would address them. The manual obligated all project employees to "perform their work in a safe manner for prevention of accidents to . . . fellow workers, the general public and property of all concerned." Subcontractors were expected to appoint safety representatives and were required to take all precautions needed "to protect against any conditions created during the progress of [a] contractor's activities which involve any risk of bodily harm to persons."

¶ 16 Duke Realty hired Abbey Paving and Sealcoating Company (Abbey Paving) as a subcontractor for asphalt paving and cement services. The scope of subcontract between Duke Realty and Abbey Paving, called for, in relevant part:

- "Supply[ing], [i]nstall[ing], and maintain[ing] personnel and traffic control barricades as required for concrete pours and during stone and pavement operations;
- Providing necessary manpower and equipment for all asphalt and site concrete work for Phase 1 work including Duke Parkway, Frieder [Lane] and Ferry Road and [the] [l]ift [s]tation;
- Provid[ing] barricades and traffic control as required during asphalt and site concrete work;

- Provid[ing] asphalt and stone sub-base . . . [i]ncluding asphalt work associated with the lift station and Duke [P]arkway.
- [P]aving for westbound right turn lane and eastbound left turn lanes on [F]erry [R]oad at Duke Parkway.
- [D]emo[lishing], excavat[ing], paving and site concrete work for the right/left turn lanes on Ferry Road into Duke Parkway, as well as extending Ferry Road at the [l]ift [s]tation.
- Provid[ing] striping, pavement markings, signage and traffic signs."

¶ 17 Abbey Paving as the subcontractor was responsible for "all supervision, labor, materials, supplies, tools, equipment, machinery . . . and all other items and services necessary for the construction and completion of the [w]ork." The general conditions provided that Abbey Paving would be responsible for "all construction means, methods, techniques, sequences and procedures" and for "its employees, laborers, material suppliers, equipment lessors, agents and representatives." On the day of the accident, Abbey Paving did not perform any work on Ferry Road; instead, Abbey Paving's work was limited to spreading stone at or near Frieder Lane.

¶ 18 Duke Parkway was a new road being built as part of the Butterfield project, which intersected with Ferry Road about one half a mile from Frieder Lane. Abbey Paving's work at Duke Parkway entailed "some work on Ferry Road." Bojan had multiple conversations with Abbey Paving about "road signs for the entire project" stating that "[w]hen you are working on a roadway, road signs are necessary." However, Bojan had "no opinion" as to what "as required" meant for purposes of the Duke Realty and Abbey Paving agreement.

¶ 19 J&S Sewer and Water (J&S) was the subcontractor which constructed the sanitary lift station at Frieder Lane. J&S was responsible for placing the "Flagger" and "Trucks Entering and

Leaving Highway" signs on Ferry Road about three months before the accident. The signs were placed in those locations because Bojan had identified the high volume of trucks entering and leaving the lift station at Frieder Lane near the intersection of Ferry Road as an unsafe condition. Bojan believed that "a lot of trucks" entering and exiting the construction site, could significantly impact traffic on Ferry Road, so warning signs were required to convey that information to motorists. In Bojan's opinion, "a lot of trucks" meant "[t]en to twenty in an hour." According to Bojan, signs were placed on both eastbound and westbound lanes on Ferry Road, and were always left up even though there might not always be a high volume of trucks entering and leaving the site.

¶ 20 On the day of the accident, construction was proceeding at various locations at the Butterfield project. Bojan had probably visited each area under construction "several times" before 11:00 a.m. When the accident occurred, Bojan was holding a coordination meeting on the site. A foreman called Bojan to tell him about the accident. Bojan left the meeting, went to the scene where the police were still present, and took various photographs. Bojan also completed a report noting that there was an accident on Ferry Road involving stone trucks that had just dumped their loads at the lift station. Additionally, Bojan sent an email indicating that the truck involved in the incident and the other truck parked on the road "did not have a flagger, or cones, but were sitting there with their hazards on." Bojan did not believe that a flagger was necessary on the day of the accident because fewer than ten trucks had made deliveries to the site that morning and the trucks that were parked had their hazard lights activated.

¶ 21 Patrick Anchor, a skid steer operator for Abbey Paving, worked at the Butterfield project placing and grading stone so it would be ready for pavement. Abbey Paving's record showed that 1,276 tons of stone were delivered to the main building (located east of the lift station site on

Ferry Road) on July 16, 2008. In Anchor's experience, it would take approximately eight to ten trucks to bring that much material to the site. Anchor's work at the lift station that day consisted of grading piles of stone that had been dumped there earlier in the day. He estimated that 200 tons of stone had been delivered to the lift station in the morning. Anchor explained that Abbey Paving laborers were responsible for working with truck drivers to facilitate deliveries to the site. In addition to telling a truck driver where to dump a load, an Abbey laborer could conduct traffic control by using a flag "to slow down traffic to allow trucks to get in and out of the construction site."

¶ 22 Javier Munoz, a laborer, was the only Abbey Paving employee at the lift station on the morning when the stone was delivered. He was responsible for instructing the truck drivers where to dump the loads. Although he had performed traffic control and flagging functions on other jobsites for Abbey Paving, no one had assigned him to do so on this project.

¶ 23 In May 2010, Lynne filed a first amended complaint naming Duke Realty and Abbey Paving as defendants. She asserted causes of action against each defendant for premises liability, construction negligence, and general negligence, pertaining to her July 16, 2008 accident at the intersection of Ferry Road and Frieder Lane. The defendants answered the first amended complaint denying all claims of negligence and proximate cause.

¶ 24 Duke Realty moved for summary judgment on count III (construction negligence), count IV (premises liability), and count V (general negligence) of the first amended complaint. Abbey Paving likewise moved for summary judgment on count XXI (construction negligence), count XXII (premises liability), and XXIII (general negligence) of the first amended complaint. In August 2012, the trial court granted summary judgment in favor of the defendants on the premises liability counts but denied the motions as to the construction negligence and general

negligence counts. Defendants then filed motions for reconsideration as to the construction negligence and general negligence counts, which the trial court granted. The counts against defendants DAS and Barcikowski remain pending in the trial court but the rulings in favor of the appellants were made final and appealable under Supreme Court Rule 304(a). This appeal followed.

¶ 25 ANALYSIS

¶ 26 The purpose of summary judgment is to determine whether triable issues of fact exist and "is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, when viewed in the light most favorable to the nonmoving party, indicate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *O'Connell v. Turner Construction Co.*, 409 Ill. App. 3d 819, 822 (2011) (citing *Busch v. Graphic Color Corp.*, 169 Ill. 2d 325, 333 (1996)).

> "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. Although summary judgment is an expeditious method of disposing of a lawsuit, it is a drastic remedy and should be allowed only when the right of the moving party is free and clear from doubt."

Id. (citing *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill. 2d 17, 31 (1999)).

¶ 27 We review the circuit court's grant of summary judgment *de novo* and are "limited to deciding whether the circuit court correctly concluded that no genuine issue of material fact had been raised and, if none was raised, whether judgment as a matter of law was appropriate."

Chicago Transit Authority v. Clear Channel Outdoor, Inc., 366 Ill. App. 3d 315, 323 (2006) (citing *William Blair & Co. v. FI Liquidation Corp*., 358 Ill. App. 3d 324, 333 (2005)). An issue is "genuine" only if there is evidence to support the position of the non-moving party. *N.W. v. Amalgamated Trust & Savings Bank*, 196 Ill. App. 3d 1066, 1075 (1990). To determine whether a genuine issue of material fact exists, we "must construe the evidence strictly against the movant and liberally in favor of the opponent." *Chicago Transit Authority*, 366 Ill. App. 3d at 323 (citing *William Blair & Co*, 358 Ill. App. 3d at 333)). Furthermore, while a plaintiff is not required to prove her case on summary judgment, she must present some factual basis that would entitle her to judgment under the relevant law. *Kimbrough v. Jewel Companies*, Inc., 92 Ill. App. 3d 813, 819 (1981); see also *Gregory v. Beazer East*, 384 Ill. App. 3d 178, 185 (2008) (a plaintiff "must present some evidentiary facts to support the elements of her cause of action"). With these principles in mind, we examine each of Lynne's three theories in turn.

¶ 28 I. Premises Liability

¶ 29 Lynne argues that the trial court erred in granting summary judgment in favor of defendants on the issue of premises liability because a material issue of fact exists as to whether defendants occupied or controlled the land at issue so as to give rise to a duty of care under a premises liability theory. Here, Lynne asserts that, because the point of impact of the accident occurred on Ferry Road slightly east of its intersection with Frieder Lane, which is part of the construction site, defendants were in control of the site. She further explains that defendants controlled the land and site where the accident occurred because they were responsible for regulating the flow of traffic in and out of it. Lynne points out that traffic control was within the scope of the contract between Duke Realty and Abbey Paving, which obligated defendants to provide barricades, signs, and make determinations about closing lanes to vehicles that were not

involved in the construction. Furthermore, while she contends that defendants may not have had actual notice of Barcikowski's truck being parked on Ferry Road at the time of the collision, they would have had constructive notice that the construction site would bring a high volume of traffic within the vicinity, raising safety concerns for motorists on Ferry Road.

¶ 30 Section 343 of the Restatement (Second) of Torts sets out the circumstances under which a possessor of land is liable for the physical harm to persons on his land. *O'Connell*, 409 Ill. App. 3d at 824 (citing Restatement Torts (Second) of Torts § 343 (1965)). Specifically, this section provides that "[a] possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger."

Restatement (Second) of Torts § 343 (1965). Our supreme court has adopted this section of the Restatement. To determine whether a defendant owes a plaintiff a duty of care, a court must consider the following factors: (1) foreseeability; (2) the likelihood of injury; (3) the magnitude of the burden on the defendant to guard against the injury; and (4) the consequences of placing the burden on the defendant. *LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 389 (1998) (citing *Ward v. K mart Corp.*, 136 Ill. 2d 132, 140-41 (1990)).

¶ 31 However, a prerequisite to § 343 liability is that a defendant must be a possessor of the land at issue. *O'Connell,* 409 Ill. App. 3d at 824 (citing *Madden v. F.H. Paschen/S.N. Nielson, Inc*., 395 Ill. App. 3d 362, 375 (2009)). A "possessor of land" is defined as "a person who is in occupation of the land with intent to control it." *Id.* (citing Restatement (Second) of Torts § 328E (1965)). "Occupation" means:

> "The act, state, or condition of holding, possessing, or residing in or on something; actual possession, residence, or tenancy, esp. of a dwelling or land. In this sense, the term denotes whatever acts are done on the land to manifest a claim of *exclusive control* and to indicate to the public that the actor has appropriated the land." (Emphasis added.) *Id.* (citing Black's Law Dictionary 1184 (9th ed. 2009)).

"Possession" in turn is defined as "[t]he fact of having or holding property in one's power; the *exercise of dominion* over property." (Emphasis added.) *Id.* (citing Black's Law Dictionary at 1281)).

¶ 32 "A defendant does not owe a duty to a plaintiff if the defendant does not control or intend to control the land." *Simpson v. Byron Dragway, Inc.*, 210 Ill. App. 3d 639, 645 (1991) (citing *Collins v. Mid-America Bag Co*., 179 Ill. App. 3d 792, 794 (1989); *Stedman v. Spiros*, 23 Ill. App. 2d 69, 86 (1959)). Thus, the ability to control property often includes the ability to exclude people from the property or to direct how the property is used. *Williams v. Sebert Landscape Co*., 407 Ill. App. 3d 753, 756 (2011).

¶ 33 Two of our recent cases, *O'Connell* and *Madden*, are instructive on the issue of what constitutes possession. In *O'Connell*, we affirmed the grant of summary judgment in favor of

the defendant construction manager because there was no evidence that the defendant possessed the land as contemplated by § 343 in order to be held liable under a premises liability theory. Although the plaintiff alleged that defendant had general responsibility for safety on the project and coordination of the contractors and activities on the construction site, the court found that plaintiff failed to establish that such authority equated to a right or intent to control the premises. 409 Ill. App. 3d at 824-26 ("one who controls the land on behalf of another is not the possessor and that limited control of the land does not equate [to] possession"). The court also noted that there was no allegation or evidence that the defendant could "exclude anyone from the premises or that it could even alter what was built where, all of which could denote dominion over the construction site." *Id.* at 825. Therefore, the court found that the plaintiff failed to show that the defendant either exercised or intended to exercise such authority over the construction site because "that control of people or activities on the premises [did not] denote[] dominion over the land." *Id.*

¶ 34 In *Madden*, we held that a defendant cannot be held liable under § 343 unless it is the possessor of land at the time of the accident. In *Madden*, the court affirmed summary judgment in favor of a general contractor and design contractor on premises liability claims. The court held that neither defendant was a "possessor" of land because they did not possess or exercise control over the jobsite. *Id.* at 376. The court also noted that the design consultant did not have the power to exclude others from the site or direct events on the jobsite.

¶ 35 The undisputed facts show that the accident occurred on Ferry Road just east of the intersection of Frieder Lane and Ferry Road. While Lynne claims that the site where the accident occurred is somehow part of Duke Realty's construction site, she offers no evidence to

support this contention. Lynne testified that she collided into a truck standing in the far eastbound lane of Ferry Road, which is a public roadway and not part of the construction site.

¶ 36 Next, Lynne has failed to produce evidence that, on the day of the accident, Duke Realty and Abbey Paving were in possession or had control of the site at issue as contemplated by § 343. In fact, the evidence shows the opposite. On the day of the accident, Duke Realty was not performing any work on Ferry Road at the intersection of Frieder Lane and the Butterfield infrastructure project did not call for any construction work on Ferry Road or near its intersection with Frieder Lane. Nor was Abbey Paving performing work on Ferry Road and Abbey Paving had never performed any work on Ferry Road in the vicinity of where the accident occurred. Lynne verified through her testimony that both eastbound and westbound lanes of traffic on Ferry Road were open for vehicle use, and she was unaware of any actual ongoing construction work on Ferry Road. Barcikowski testified that the construction site was not on Ferry Road and when Lynne collided into the back of his truck, there was no construction on Ferry Road and all four lanes were open to traffic. Officer Kelly also testified that, on the day of Lynne's accident, the eastbound lanes of Ferry Road were completely open to traffic.

¶ 37 Lynne's contention that defendants had control over Ferry Road at the intersection with Frieder Lane because they had the ability to regulate traffic flowing in and out of the construction site also lacks merit. Here, Lynne focuses on the provision of Duke Realty's and Abbey Paving's contract regarding traffic control, including the placement of traffic signs, the use of occasional flaggers, and the closing of lanes, to assert that defendants' ability to control traffic on Ferry Road gave rise to a duty of care under § 343. But here Lynne's contention is unavailing because Ferry Road was not under construction at the point where the accident occurred. Even if Bojan had determined that personnel and barricades were necessary on the

date of the accident, they would have only been required for that portion of the road being worked on, which was Frieder Lane, not Ferry Road.

¶ 38 Lynne further asserts that because there was construction activity on Ferry Road one-half mile away from Frieder Lane that the entire stretch of Ferry Road from Frieder Lane to the Duke Parkway construction site is all part of Duke Realty construction site. But Lynne cites no evidence that Duke Realty was conducting any construction activity on Ferry Road except at Duke Parkway, which was half a mile away from the site of Lynne's collision at the intersection of Frieder Lane and Ferry Road. Thus, the stretch of Ferry Road from the intersection with Frieder Lane to Duke Parkway was not part of any construction activity.

¶ 39 In sum, Lynne has presented no evidence that Duke Realty or Abbey Paving owned, occupied, or otherwise possessed that portion of Ferry Road where the collision occurred. Thus, she has failed to establish that defendants exercised dominion over Ferry Road where she collided with the truck. Nor did Lynne present any evidence showing that defendants manifested exclusive control over the collision site. *O'Connell*, 409 Ill. App. 3d at 824. Because Lynne has failed to make out a claim under § 343, defendants do not owe her a duty of care. *Simpson*, 210 Ill. App. 3d at 645.

¶ 40 Even assuming *arguendo* that defendants owned, controlled, occupied, or possessed the land at issue, Lynne must show that defendants had notice of the dangerous condition or, in other words, knew that Barcikowski's truck was parked on Ferry Road at the time of the collision. Here, Lynne acknowledges that defendants may not have known about the truck specifically being parked on Ferry Road, but they would know that construction project would bring high volumes of traffic to the vicinity, which would raise safety concerns for motorists. Thus, according to Lynne, it was foreseeable that there would be large amounts of stone and gravel

delivered to the construction site, resulting in many trucks entering and leaving the site and providing defendants with ample notice of a dangerous condition.

¶ 41 Pursuant to § 343, a possessor of land can be liable for physical harm caused to his invitees by a dangerous condition on the land if the defendant knew or should have know that the condition involved a reasonable risk of harm. Restatement (Second) of Torts § 343 (1965). Where the possessor has no actual or constructive knowledge of the unsafe condition, there can be no liability. *Cochran v. George Sollitt Construction Co*., 358 Ill. App. 3d 865, 873 (2005). In order to prove constructive notice of a dangerous condition, Lynne must establish that the defect or condition existed for a sufficient amount of time so that defendants should have discovered the condition by the exercise of reasonable care. *Chapman v. Foggy*, 59 Ill. App. 3d 552, 556 (1978) (citing *Guenther v. Hawthorn Mellody, Inc*., 27 Ill. App. 3d 214, 218 (1975)).

¶ 42 Here, after leaving the site, Barcikowski parked on Ferry Road for approximately five minutes before the collision to clean off the rear gate of his truck. But Lynne has produced no evidence that defendants knew Barcikowski had stopped on the roadway and would have expected that he would create the dangerous condition that led to the accident Lynne's accident.

¶ 43 While Lynne attempts to rely on *Clifford v. Wharton Business Group*, L.L.C., 353 Ill. App. 3d 34 (2004), to establish that defendants had constructive notice of a dangerous condition, her reliance is misplaced. In *Clifford,* the plaintiff was injured when a newly built wall collapsed on top of him and, as a result, he fell or was thrown into a nearby stairwell opening in the floor. The court expressly held that it did not need to determine whether the defendant "kn[ew] [of] or by the exercise of reasonable care would discover" the hazard in order to be subject to liability under § 343 because the stairwell openings were made at the defendant's direction and in accordance with building plans. *Id*. at 45-46. Instead, the court based its decision on § 343A of

the Restatement (Second) of Torts, which provides the following "known or obvious" exception to the liability of a possessor of land under § 343:

> "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness."

Restatement (Second) of Torts § 343A(1) (1965).

¶ 44 *Clifford* is distinguishable from this case because the court never reached the question of whether the defendant had constructive knowledge of the stairwell openings. Instead, the court found that despite the "obvious and normal hazard" of a hole in a floor under construction, an owner or possessor of premises is under a duty to use reasonable care to protect construction workers from the dangers of such a hazard. *Id.* at 47. Here, there is no evidence that the hazard created by Barcikowski parking his truck on Ferry Road was the result of defendants' instructions or was part of the ongoing construction project. Therefore, the *Clifford* case is inapposite here.

¶ 45 Because there is no genuine issue of material fact with respect to Lynne's premises liability claim brought under § 343 as the evidence in the case establishes that defendants did not own, possess, or otherwise control that portion of the roadway where Lynne's accident occurred, defendants are entitled to summary judgment on this issue.

¶ 46 II. Construction Negligence

¶ 47 Lynne next argues that the trial court erred in granting summary judgment in favor of defendants on the issue of construction negligence because they retained sufficient control over Barcikowski's work to invoke liability. With respect to Abbey Paving, Lynne claims that Abbey

Paving not only entrusted work to DAS but also retained control over Barcikowski's work even though it did not subcontract with DAS or select DAS for delivery of the gravel to the sanitary lift station at the Frieder Lane construction site. Thus, according to Lynne, the fact that Abbey Paving decided to hire another entity, Vulcan, who then hired Casey Trucking to deliver the stone, and that Casey Trucking, in turn, hired DAS to carry out the work establishes that DAS's involvement in the gravel delivery is directly traceable to Abbey Paving's decision to entrust part of its own work to others. Furthermore, Lynne argues that defendants had notice of a dangerous work condition as they "appreciated the reality" that the ongoing construction activity could have a detrimental effect on traffic passing through the area. Additionally, she claims that defendants had constructive notice of Barcikowski's dangerous work method because he made three gravel deliveries to the construction site and parked on Ferry Road each time to brush gravel off the rear gate of his truck.

¶ 48 Under Illinois law, a construction negligence claim is addressed under § 414 of the Restatement (Second) of Torts. *Bokadi v. Foster Wheeler Robbins, Inc*., 312 Ill. App. 3d 1051, 1057-59 (2000). In order to succeed on a claim for negligence, "a plaintiff must show that the defendant owed a duty to him, that the defendant breached that duty, and that this breach was the proximate cause of the plaintiff's resulting injuries." *Bermudez v. Martinez Trucking*, 343 Ill. App. 3d 25, 29 (2003) (citing *Barham v. Knickrehm*, 227 Ill. App. 3d 1034, 1037 (1996); *Salinas v. Werton*, 161 Ill. App. 3d 510, 514 (1987)). Whether or not a duty exists is a question of law for the court to determine. *Ward*, 136 Ill. 2d at 140.

¶ 49 As a general rule, "one who employs an independent contractor is not liable for the latter's acts or omissions." *Joyce v. Mastri*, 371 Ill. App. 3d 64, 73 (2007) (citing *Downs v. Steel & Craft Builders, Inc*., 358 Ill. App. 3d 201, 204-05 (2005)). Section 414 of the Restatement

(Second) of Torts (1965), "which has long been recognized as an expression of law in Illinois," provides an exception to the general rule, referred to as the "retained control" exception. *Cochran v. George Sollitt Construction Co*., 358 Ill. App. 3d 865, 873-74 (2005) (citing *Larson v. Commonwealth Edison Co*., 33 Ill. 2d 316, 325 (1965)); *see also Calloway v. Bovis Lend Lease, Inc*., 2013 IL App (1st) 112746, ¶ 47. Section 414 provides:

> "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care."

Restatement (Second) of Torts § 414 (1965). Thus, "retained control" of the injured plaintiff's work is required in order for the exception to the general rule to apply and for a court to find a duty. The concept of "retained control" is further explained in comment c to § 414 as follows:

> "In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail.

> There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way."

Restatement (Second) of Torts § 414, cmt. c (1965).

¶ 50 Negligence and the existence of a duty under section 414 "turn[] on whether the defendant controls the work in such a manner that he should be held liable." *Martens v. MCL Construction Corp.*, 347 Ill. App. 3d 303, 315 (2004). A principal contractor who is not knowledgeable about the details of a task typically delegates that work to an independent contractor. *Id.* at 313. Because the principal contractor does not supervise the details of an independent contractor's work, it "is not in a good position to prevent negligent performance." *Id.* at 314. However, under § 414:

> "When a principal contractor entrusts a part of the work to subcontractors but superintends the entire job through a foreman, the principal contractor is subject to liability if he (1) fails to prevent the subcontractors from doing even the details of the work in a way unreasonably dangerous to others, (2) knows or should know the work was being so done, and (3) has the opportunity to prevent it by exercising his retained power of control."

Id. at 314-15 (citing Restatement (Second) of Torts § 414, cmt b. (1965)); *see also Calloway*, 2013 Ill App (1st) 112746, ¶ 48.

¶ 51 Here, even if defendants did entrust work to DAS, they did not retain the requisite control over the operative details of Barcikowski's work necessary to invoke liability for his independent acts. There is no evidence in the record that defendants retained sufficient control over Barcikowski when he either delivered his load of gravel to the construction site or exited the site

and parked his truck on Ferry Road. Instead, the evidence indicates that, on July 16, 2008, Munoz, an Abbey Paving employee, simply instructed Barcikowski where he should dump his load of gravel once he entered the construction site. Thus, this lone contact hardly constitutes retained control as contemplated by § 414.

¶ 52 The record also indicates that Barcikowski made the decision himself to park his truck on Ferry Road after he exited the construction site. In fact, he did not receive instructions or directions from any one at Duke Realty or Abbey Paving to illegally park his truck in the eastbound lane of Ferry Road for the purpose of wiping off the excess gravel from the rear gate of his truck. It was his own personal decision to pull the truck over and park on Ferry Road. Barcikowski only received direction from DAS, Casey Trucking and Vulcan regarding his work at the construction site on the day of the accident. Accordingly, defendants did not retain control over the operative details of Barcikowski's conduct either inside or outside and away from the construction site as to give rise to § 414 liability. *Bieruta v. Klein Creek Corp.*, 331 Ill. App. 3d 269, 276 (2002) (general contractor did not do anything more than tell the subcontractor which lots to excavate and for what purpose).

¶ 53 Lynne next argues that the agreement between Duke Realty and Abbey Paving establishes that defendants retained control over Barcikowski's and/or DAS's work because defendants, particularly, Abbey Paving had a duty to provide safety measures to control traffic flowing in and out of the construction site by the use of barricades or flaggers. But Lynne merely cites to several general, blanket conditions and provisions contained in the agreement which fail to establish that either Duke Realty or Abbey Paving retained control over the means and methods of DAS's or Barcikowski's work on the day of the accident. Furthermore, Bojan did not request any personnel or barricades because he determined that they were not necessary

on Ferry Road because Frieder Lane, not Ferry Road, was the road being worked on. Accordingly, the provisions of the agreement on which Lynne relies are irrelevant in determining whether defendants owe her a duty under § 414. *Rangel v. Brookhaven Constructors, Inc*., 307 Ill. App. 3d 835, 839 (1999) (the general contractor's reservation of the right of supervision over the subcontractor's work did not translate into a right to control the details of the subcontractor's work necessary to expose the general contractor to liability).

¶ 54 Even if defendants had retained sufficient control over Barcikowski's and/or DAS's work so as to give rise to a duty of care, that duty only requires reasonable care. Restatement (Second) of Torts § 414, cmt b. (1965)); *see also Calloway*, 2013 Ill App (1st) 112746, ¶ 48. However, that duty cannot be met when there is no reasonable notice that an unsafe activity is taking place. *Bieruta*, 331 Ill. App. 3d at 276.

¶ 55 While Lynne claims that defendants had notice of the hazardous or unsafe condition created by Barcikowski when he unilaterally decided to stop his truck on the public roadway outside of the construction site at the intersection of Ferry Road and Frieder Lane, there is no direct evidence supporting her contention. Instead, she generally claims that defendants had constructive notice of the unsafe condition because Barcikowski made three gravel deliveries to the construction site that day and each time he made a delivery he pulled his truck out onto Ferry Road to clean gravel from the rear of his truck. But there is no evidence that defendants' employees should have known that Barcikowski or Polanowski, the other truck driver who delivered gravel on the day of the accident, parked their trucks on Ferry Road earlier in the day.

¶ 56 Lynne also argues that because Bojan stopped by the construction site earlier that day, he would have had constructive notice of a truck illegally parked on Ferry Road. However, Bojan

testified that, prior to the accident, he had never seen a truck stopped along Ferry Road near the intersection of Frieder Lane and was unaware of it happening prior to Lynne's accident.

¶ 57 In *Cochran*, the court noted that the unsafe ladder setup created by the defendant's subcontractor was in existence for an hour at the most before the injury, which occurred in a fairly remote location in the sub-basement of the hospital. None of the defendant's "competent persons" had observed the unsafe setup during that short time period. The court reasoned that the general contractor was not liable because there was nothing to suggest that it knew about or had notice of the unsafe condition. *Cochran*, 358 Ill. App. 3d at 879-80. Similarly, Barcikowski left the construction site, stopped his truck on Ferry Road, and less than five minutes later Lynne collided with the truck. Because defendants had no notice that Barcikowski stopped his truck in one of the eastbound lanes of Ferry Road to clean travel from the back of his truck, they cannot be held liable for his independent acts.

¶ 58 Furthermore, Lynne argues that defendants had constructive notice of a "potential danger" because of the ongoing construction near the Ferry Road and Frieder Lane intersection. Here, Lynne explains Bojan recognized traffic control as a safety issue and Duke Realty's project manual obligated everyone working on the site to perform their work in such a manner as to prevent accidents to the "general public." But Lynne's allegation of an unspecified potential danger and her suggestion that defendants should have constructive knowledge of traffic control for the project generally is not sufficient to put defendants on notice that an unsafe work activity was taking place.

¶ 59 Because there are no genuine issues of material fact with respect to Lynne's claims brought under § 414 as defendants did not direct, instruct, or retain control over DAS and/or Barcikowski's work as he entered and exited the construction site near the intersection of Frieder

Lane and Ferry Road on the day of the accident, defendants are entitled to summary judgment on this issue. Furthermore, defendants did not have actual or constructive notice that Barcikowski illegally parked his truck on Ferry Road on the date of the accident.

¶ 60 III. General Negligence

¶ 61 Lynne next argues that the trial court erred in granting summary judgment in favor of defendants on her general negligence claim. She asserts that she had produced evidence showing that defendants owed her a duty of care because the Duke Realty and Abbey Paving agreement stipulated that Abbey Paving was to provide traffic control personnel and barricades "as required" during stone operations. Here, Lynne points out that Bojan testified that he never addressed this issue with Abbey Paving and he did not know what the phrase "as required" meant. Lynne next asserts that defendants breached their duty to provide appropriate traffic control because there was no flagger directing traffic on the day of the accident, and Anchor testified that Munoz should have been performing this function. She also explains that there were no barricades in place at the time even though stone operations were proceeding and gravel delivery trucks were sitting stationary in moving lanes of traffic on Ferry Road. Furthermore, Lynne claims that the accident and her resulting injuries were foreseeable and proximately caused by defendants' failure to ensure safe and controlled traffic flow at the construction site.

¶ 62 "To recover damages based upon a defendant's alleged negligence, a plaintiff must allege and prove that the defendant owed a duty to the plaintiff, that defendant breached that duty, and that the breach was the proximate cause of the plaintiff's injuries." *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 256 (1999) (citing *Thompson v. County of Cook*, 154 Ill. 2d 374, 382 (1993)). Thus, a plaintiff must come forth with evidence of negligence on the part of defendant, as well as evidence that defendant's negligence was the proximate cause of the

plaintiff's injuries. *Payne v. Mroz*, 259 Ill. App. 3d 399, 403 (1994). Thus, "proximate cause can only be established when there is a *reasonable certainty* that the defendant's acts caused the injury." (Emphasis added.) *Id.* (citing *Whitman v. Lopatkiewicz*, 152 Ill. App. 3d 332, 378 (1987)). The burden rests with the plaintiff to "affirmatively and positively show" that the defendant's alleged negligence caused the plaintiff's injuries. *Bermudez*, 343 Ill. App. 3d at 29.

¶ 63 Lynne claims that a question of material fact exists as to whether a flagger should have been directing traffic on the date of the accident or if barricades should have been placed near the construction site at the time of the accident. According to Lynne, a reasonable inference could be drawn that Abbey Paving breached its contractual duty to provide barricades and traffic control and Duke Realty knew or should have known of the alleged dangerous condition and failed to make sure Abbey Paving remedied the condition. Therefore, Lynne claims defendants breached their duty to keep the construction site reasonably safe.

¶ 64 Illinois recognizes a "well-settled principle of law that every person owes a duty to all others to exercise ordinary care to guard against injuries which naturally flow as a reasonably foreseeable consequence of an act." *O'Hara v. Holy Cross Hospital*, 137 Ill. 2d 332, 342 (1990) (citing *Scott & Fetzer Co. v. Montgomery Ward & Co.*, 112 Ill. 2d 378, 390 (1986), *Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69, 86 (1964)). In particular, "[a] general contractor owes a duty to persons who might reasonably be expected to come upon the premises *or be in the vicinity* of the construction site to keep it safe and to see that adequate safeguards are furnished to protect against foreseeable injuries." (Emphasis added.) *Unger v. Eichleay Corp.*, 244 Ill. App. 3d 445, 450 (1995) (citing *Ross v. Aryan International, Inc.*, 219 Ill.App.3d 634, 646 (1991)). "[T]he scope of the defendant's duty is dependent on the terms of the contract." *Id.* (citing *Perkaus v. Chicago Catholic High School*, 140 Ill. App. 3d 127, 134 (1986)); *Melchers v. Total*

Electric Construction, 311 Ill. App. 3d 224, 228 (1999) ("when an allegation of negligence is based upon a contractual obligation, the scope of the duty is determined by the terms of the contract.").

¶ 65 Here, defendants did not breach any contractual duty to provide barricades and reasonable traffic control. While Lynne claims that Bojan, at his deposition, did not know what the phrase "as required" meant in Duke Realty's and Abbey Paving's agreement. When that question was clarified, Bojan testified that based on his role as superintendent that flaggers were not required for the work being done by Abbey Paving on the date of the accident. Rather, flaggers had been required at the construction site only when a large number of trucks would arrive in a short period of time. Bojan defined a large number of trucks as "[t]en to twenty in an hour." He explained that ten to twenty trucks entering and leaving the construction site in an hour could have a significant impact on traffic on Ferry Road. Bojan further explained that while signage, including a flagger sign, was present in the area, it was there because at one point they were moving a lot of material from the lift station site, which entailed the use of ten to twenty trucks an hour. In comparison, Bojan testified that no flagger was necessary on the morning of Lynne's accident because of the number of trucks making deliveries that day was not sufficient enough to create a significant impact on traffic on Ferry Road. Thus, the circumstances did not require Abbey Paving to post a flagger or use barricades; Abbey Paving did not breach its contractual duty to Duke Realty and Duke Realty had no condition to remedy.

¶ 66 Furthermore, as discussed above, defendants did not have actual or constructive knowledge of the dangerous condition—Barcikowski's illegally parked truck on Ferry Road. Thus, while Barcikowski and Polanowski made a total of three trips each to the construction site, the deliveries were spread out over approximately four hours. This was significantly less than

the ten to twenty trucks in an hour delivering material that prompted the use of a flagger a few months earlier. As such, the gravel deliveries were sporadic and insufficient for Bojan to deploy a flagger.

¶ 67 Even if defendants owed a duty of care to Lynne and breached that duty, she has failed to establish that her collision into Barcikowski's truck was the proximate cause of defendants' failure to control traffic on Ferry Road. The term "proximate cause" contains two distinct requirements: cause in fact and legal cause. *First Springfield Bank & Trust*, 188 Ill. 2d at 257-58. "Cause in fact exists where there is a reasonable certainty that a defendant's acts caused the injury or damage." *Id*. at 258. Thus, "[a] defendant's conduct is a cause in fact of the plaintiff's injury only if that conduct is a material element and a substantial factor in bringing about the injury." *Id.* Therefore, "[a] defendant's conduct is a material element and a substantial factor in bringing about an injury if, absent that conduct, the injury would not have occurred." *Id.* In contrast, with "legal cause" the relevant inquiry is whether it was reasonably foreseeable that the injury would result from the defendant's actions. *Id.* Thus, the court considers whether "the injury is of a type that a reasonable person would see as a likely result of his or her conduct." *Id.*

¶ 68 When a plaintiff's injury results not from the defendant's negligence directly, but from the subsequent, independent act of a third person, Illinois courts recognize a distinction between a "cause" and a "condition." *First Springfield Bank & Trust*, 188 Ill. 2d at 257. "[I]f the negligence charged does nothing more than furnish a condition by which the injury is made possible, and that condition causes an injury by the subsequent, independent act of a third person, the creation of the condition is not the proximate cause of the injury." *Id*. (citing *Briske v. Village Burnham*, 379 Ill. 193, 199 (1942); *Merlo v. Public Service Co*., 381 Ill. 300, 316 (1942)). Thus, "[a] defendant's negligence is not the legal cause of an injury if it merely created

a condition which made the relevant injury possible by the subsequent, independent acts of a third person." *McDonald v. Northeast Illinois Regional Commuter Railroad Corp*., 2011 IL App (1st) 102766, ¶ 33.

¶ 69 In *Merlo*, the Illinios Supreme Court explained the concepts of proximate cause and condition as follows: "The cause of an injury is that which actually produces it, while the occasion is that which provides the opportunity for the causal agencies to act." 381 Ill. at 316-17. Thus, when a court considers whether a plaintiff's injury results not from the defendant's negligence directly, but from the subsequent independent act of a third party, it evaluates whether the defendant's conduct was a cause of the injury or simply furnished a condition by which the injury was made possible. *First Springfield Bank & Trust*, 188 Ill. 2d at 259. So, in other words, the court is in effect asking whether the defendant's conduct was a material and substantial element in bringing about the injury. *Id.* Similarly, when a court asks whether the defendant might have reasonably anticipated the intervening efficient cause as a natural and probable result of his or her own negligence, it is in effect asking whether the intervening efficient cause was such that a reasonable person would see as a likely result of his or her conduct. *Id.* Therefore, the "test that should be applied in all proximate cause cases is whether the first wrongdoer reasonably might have anticipated the intervening efficient cause as a natural and probable result of the first party's own negligence." *Id.* at 257 (citing *Merlo*, 381 Ill. at 317).

¶ 70 *First Springfield Bank & Trust* is instructive here. In that case, an 18-year old pedestrian was struck and killed while crossing a four lane roadway. The decedent chose not to cross at the marked crosswalk, instead walking out into the street from in front of an illegally parked tractor-trailer truck. 188 Ill. 2d at 254. At issue was whether the driver of the illegally parked truck and

his employer's negligence were the proximate cause of the fatal injuries. The Illinois Supreme Court held they were not.

¶ 71 The Supreme Court held that the illegally parked truck was a cause in fact of the fatal injuries. 188 Ill. 2d at 259. Had the defendant not illegally parked his truck on the roadway, decedent's injuries almost certainly would not have occurred. *Id.* at 260. The question for the court, however, was whether the illegally parked truck was the *legal* cause of the injuries. The court focused on whether the injury is of a type that a reasonable person would see as a likely result of his conduct. *Id.* at 261. In particular, the court looked at whether it was reasonably foreseeable that violating a "no parking" sign at mid-block would likely result in a pedestrian ignoring a marked crosswalk at the corner, walking to mid-block, and attempting to cross a designated truck route blindly and in clear violation of the law. The Court held that "clearly it would not" and the decedent's decision to do so was clearly her own. Defendants did not cause decedent to make that decision, nor could they reasonably have anticipated that decision as a likely consequence of their conduct. Therefore, the Court held that the illegally parked truck was not a proximate cause of decedent's injuries. *Id.* at 262.

¶ 72 In this case, the accident would not have happened if Barcikowski had not illegally parked his truck on Ferry Road. As such, Barcikowski's illegal parking of his truck was the cause in fact of Lynne's accident. However, it was not reasonably foreseeable to defendants that Barcikowski's parking of the truck on Ferry Road would result in Lynne colliding into his truck. Lynne was familiar with the area and was aware for some time of the ongoing construction near the intersection. She had previously seen a "flagger" sign and knew it mean to proceed using extra caution. Lynne had also observed trucks pulling out of the construction site on Frieder Lane. On the day of the accident, from the top of the hill, Lynne was able to observe

construction site; she could see the white vehicle ahead of her; and she watched as a truck left the site and proceeded north across Ferry Road. Thus, there was nothing that stopped her from slowing her vehicle or from changing from the right lane of traffic to the left lane. The investigating officer indicated she had sufficient space between the top of the hill and the accident site to stop her vehicle.

¶ 73 Because there are no genuine issues of material fact with respect to Lynne's general negligence claims, defendants are entitled to summary judgment on this issue. Here, defendants did not breach a contractual duty to provide traffic control or barricades and Lynne's accident and injuries were not foreseeable or proximately caused by defendants' alleged failure to control traffic at the construction site.

¶ 74 CONCLUSION

¶ 75 Accordingly, we affirm the judgment of the court below.

¶ 76 Affirmed.