2013 IL App (2d) 121268-U
No. 2-12-1268
Order filed August 2, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

HUMBERTO DIAZ, Plaintiff-Appellant, v. ANCO STEEL COMPANY, INC., Defendant-Appellee.	)))))))))	Appeal from the Circuit Court of Kane County. No. 11-L-612 Honorable James R. Murphy, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in granting defendant summary judgment on plaintiff's negligence claim: the court erred in striking an affidavit in its entirety when certain paragraphs were within the affiant's personal knowledge; with those paragraphs included, the evidence raised factual issues as to whether plaintiff fell near his truck and thus a trail of ice and as to whether the ice was an unnatural accumulation.

¶ 2 Plaintiff, Humberto Diaz, sued defendant, Anco Steel Company, Inc., for damages resulting from injuries that he sustained when he slipped and fell on ice while walking in the parking lot of defendant's premises. The trial court granted summary judgment for defendant. Following the denial of his motion for reconsideration, plaintiff timely appealed. Plaintiff argues: (1) that the trial

court erred in striking in its entirety an affidavit submitted by plaintiff in response to defendant's motion for summary judgment; and (2) that there were genuine issues of fact as to whether plaintiff slipped on an unnatural accumulation of ice sufficient to preclude summary judgment. For the reasons that follow, we reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 On February 24, 2010, plaintiff slipped and fell in a parking lot located on defendant's premises. Plaintiff alleged in his complaint that the cause of his fall was an unnatural accumulation of ice. According to plaintiff, defendant negligently created snow piles on an elevated portion of its parking lot and the ice formed as a result of water runoff from the snow piles. Plaintiff further alleged that defendant negligently failed to remove the unnatural accumulation.

¶ 5 During his deposition, plaintiff testified (through an interpreter) that, on the day of the accident, he went to Anco Steel to pick up about 8 to 10 steel rods, which were about five feet long and about three-eighths of an inch thick. As he carried them on his right shoulder to his truck, he fell. Plaintiff testified that he had parked his vehicle along the west wall of defendant's building. Using a photograph marked plaintiff's exhibit No. 1, plaintiff was asked several questions by defense counsel in an effort to determine the location of his fall. The photograph depicted several vehicles parked perpendicular to the west wall of the building. The west wall of the building contained three large bay doors and two smaller pedestrian doors. Going from the left to the right in the photograph, the parked vehicles were: a white truck, a white jeep, a black truck, and a red truck. There was an empty space between the white truck and the white jeep. One pedestrian door can be seen to the right of the white truck, and one bay door is located in front of the red truck. On the day of the accident, plaintiff parked his truck in the area where the white truck was located in the photograph;

there were other cars parked along the west wall. He entered the building through one of the two pedestrian doors on the west wall and exited through the bay door that can be seen on the right in the photograph.

¶ 6 When asked where he fell, plaintiff pointed to "what is sort of behind in back of the black truck" in the photograph. He was "20, 30 feet" from his own truck when he fell. He did not fall between two parked vehicles. When asked how many feet from the building he fell, he responded, "I wouldn't know." When pressed further and asked if he fell more than 10 feet away from the building, he responded: "I don't recall but there was a truck there and it was around there. With the pain I don't even remember what the distance was or how close it was." He stated that he was about three feet away from a vehicle when he fell. When asked how many feet he was from the bay door when he fell, he responded, "I don't know." When pressed further, he stated: "With the pain I was going through, I wasn't going to be thinking about how many feet there were." When defense counsel pressed further, he stated: "Well, it was the distance of a car and another car." When defense counsel again insisted on an exact distance, plaintiff's counsel instructed him not to answer and a lengthy argument between counsel ensued. Thereafter, defense counsel again asked plaintiff to clarify what he meant by " 'a car plus a car' " and plaintiff said that it was "a long car and a shorter one." He further stated, "Like the back area of the car. The bigger car is going to be longer than the other one." When defense counsel pressed on, stating: "you have no ability to give me any kind of estimate as to how many feet you traveled from the point you left the building until the point you slipped[,]" plaintiff responded, "It must have been maybe 30 feet."

¶ 7 Plaintiff further testified that, on the day of his accident, "[i]t was a little bit sunny, but there was some ice on the ground and snow on top." There was snow on top of ice in the area where he

fell. He had no idea how the ice got there. He did not know if the entire parking lot was covered in ice. After he fell, he used his cell phone to call Gerardo Nevarez, one of defendant's employees, to come help him. Nevarez came outside along with another of defendant's employees, Eleazar Carbajal. Nevarez and Carbajal lifted plaintiff, and he fainted. According to plaintiff, the men dragged him to his truck. When he woke up he was next to his truck. He asked the men to call April Diaz (his wife) and an ambulance. April arrived before the ambulance.

¶ 8 Nevarez testified that, on the day of the accident, he arrived at work at about 6 a.m. He did not recall there being any snow or ice on the parking lot, with the exception of a little bit of snow that had fallen. Defendant did not hire people to remove snow from its parking lot; defendant's employees removed snow when necessary. If a large amount of snow had fallen, one person would drive a truck with a plow on the front and a few other employees would use shovels to clear the snow by the doorways. If cars were parked along the west side of the building, the employees shoveled the snow from between the cars and pushed it into the open area of the lot for the plow to clear it away to the north area of the lot. They never piled snow along the building; it was always piled on the north side of the lot. On the day of the accident, it was snowing "[v]ery, very little." There were no snow piles on the west face of the building; he did not see any ice on the ground. Nevarez saw plaintiff when plaintiff arrived. After plaintiff left, Nevarez received a call from plaintiff. Plaintiff told him that he had fallen and needed help to get up. Plaintiff was about "1 foot, 2 feet" away from his truck. He was behind and to the side of his truck. Nevarez was unable to lift plaintiff, because plaintiff was too heavy, so Nevarez went inside to ask Carbajal for help. Nevarez and Carbajal "lifted [plaintiff] up, helped him get up, and [they sat] [plaintiff] on a chair." They did not carry him anywhere; they moved him about two feet. He saw a little snow on the ground. Plaintiff never told

him that he slipped on ice. April arrived after plaintiff had been placed on the chair but before the ambulance arrived.

¶ 9 Carbajal testified that he was one of about four men who were responsible for snow removal. On the day of the accident, there was a little bit of snow on the ground but not enough to plow. There were no piles of snow and there was no ice in the parking lot. Plaintiff arrived and asked Carbajal for some sample materials. After Carbajal gave him the samples, plaintiff left. Shortly thereafter, Nevarez told Carbajal that he needed Carbajal's help with plaintiff, because plaintiff was hurt and Nevarez could not lift him. When Carbajal went outside, he saw plaintiff kneeling on the ground. Carbajal ran inside to get a chair and they lifted plaintiff onto the chair. Carbajal put the chair where plaintiff had fallen. Carbajal testified that plaintiff was about three to four feet behind his truck and about two feet to the side of his truck.

¶ 10 Suzette Sterba, defendant's human resources manager, testified that defendant's employees removed snow from the premises, as needed, using a plow on the front of a truck. Sterba had never observed snow piled up against the west side of the building. She had never observed water flowing from any snow piles and then refreezing. Sterba recalled there being a significant snowfall in the days prior to plaintiff's fall. The parking lot had been plowed and cleared. On the day plaintiff fell, the temperature was extremely cold and there was a light dusting of snow. There was some ice between cars.

¶ 11 Dan Marcolini, defendant's warehouse supervisor, testified that three or four of defendant's employees performed snow removal on the premises. When it snows overnight, the parking lot is plowed before the other employees arrive for work. Plowing is done using a plow blade on a truck. The area along the building is plowed first. Snow is plowed away from the building to the north side

of the parking lot. Snow is never piled up against the building. On the day plaintiff fell, the parking lot was clear of snow and ice. Marcolini saw Nevarez and Carbajal helping plaintiff after his fall. He did not recall seeing anything on the ground. He never saw any melting of snow that created a flow of water.

¶ 12 Deposition testimony was also provided by three paramedics who were called to the scene to treat plaintiff. David Heinke testified that, when he arrived, plaintiff was sitting on a chair between two cars. He did not know if that was where plaintiff had fallen. There was snow and ice by plaintiff. There was ice between the cars. He did not know where the ice had come from. Christopher John Temes testified that, when he arrived, plaintiff was sitting on a chair between the bumper areas of two cars. There was ice between the cars. Temes saw snow piles in the northwest corner of the parking lot; he did not recall seeing snow piles anywhere else. Nicholas Joseph Handell testified that, when he arrived, plaintiff was sitting on a chair between two parked cars. He remembered plaintiff stating that he may have lost consciousness. He was told that plaintiff fell in the area where they found him. Handell did not recall anyone telling him that plaintiff had been carried. There was snow and ice on the ground. He did not recall whether there were any snow piles.

¶ 13 Defendant moved for summary judgment, arguing that there was no evidence presented that the ice on which plaintiff allegedly slipped was formed by an unnatural accumulation caused by defendant or that there was a defective slope in the parking lot.

¶ 14 On July 19, 2012, plaintiff filed a response to defendant's motion for summary judgment and attached thereto an affidavit from April and four photographs of defendant's parking lot. In the affidavit, April averred as follows:

"4. That shortly after the fall, I arrived at the area of where my husband *** fell.

5. That when I arrived at the Anco Steel parking lot, I observed a large snow pile on the north portion of the parking lot.

6. That I also observed a snow pile which had been pushed up against the building and which was near the area where my husband fell.

7. That I observed ice in the area where my husband fell.

8. That I observed a trail of ice which emanated from the snow pile which was pushed up against the building and which came to the area where my husband fell."

Plaintiff argued that April's affidavit provided the requisite nexus between the snow piled up against the west face of the building and the ice that caused plaintiff's fall. Plaintiff further argued that the photographs established that the pitch or slope of the parking lot goes down away from the building. Plaintiff also pointed to testimony from the three paramedics who arrived on the scene immediately after plaintiff's fall and who each testified that there was ice in the area of plaintiff's fall.

¶ 15 On August 9, 2012, defendant filed a reply and also a motion to strike April's affidavit and the photographs. In its motion to strike, defendant argued that the affidavit violated Illinois Supreme Court Rule 191(a) (eff. July 1, 2002) in that it was not based on her personal knowledge. According to defendant, because April was not present when plaintiff fell, it was impossible for her to have personal knowledge of where he fell and thus all the information that she possessed regarding where he fell came through out-of-court statements made by others. With respect to the photographs, defendant argued that they should be stricken because plaintiff failed to lay a proper foundation, they contained hearsay, and they were otherwise unreliable.

¶ 16 On August 16, 2012, the court held a hearing on the motion for summary judgment and on plaintiff's motion to strike. At the conclusion of the hearing, the court held that the affidavit contained inadmissible hearsay and failed to comply with supreme court Rule 191(a). However, the court gave plaintiff leave to amend the affidavit. The court indicated that it would rule on the motion for summary judgment by September 13.

¶ 17 On August 23, 2012, plaintiff filed a second affidavit from April. The second affidavit read as follows:

"1. That my husband is the Plaintiff, Humberto Diaz.

2. That on February 24, 2010, my husband *** called me from his cell phone.

3. That my husband informed me that he had slipped and fell on ice at the Anco Steel facility.

4. That my husband handed his cell phone to his cousin, Geraldo Navarez, who provided me with directions on how to get to the facility.

5. I immediately left work in Aurora, Illinois and traveled to the Anco Steel facility, which is in Aurora, Illinois.

6. When I arrived, I observed my husband laying on the ground by the passenger side of his pickup truck.

7. His pickup truck was parked perpendicular to the west face of the building.

8. If you are facing the building, he was parked near the second large bay door from the right.

9. That when I arrived, I observed my husband laying on ice by the passenger side of his pickup truck.

10. I observed a snow pile which had been pushed up against the building near where my husband's pickup truck was parked.

11. I observed a trail of ice that stretched from the aforementioned snow pile towards the drain that was approximately forty (40) feet behind his truck and slightly south of his truck.

12. The paramedics had not yet arrived when I first arrived.

13. Geraldo Nevarez and Eleazar Carbajal were with my husband when I arrived.

14. I walked to the area where the three men were.

15. My husband informed me that he slipped and fell behind the passenger side of his truck while he was transporting steel rods from the building to his truck.

16. I observed ice in the area behind the passenger side of his truck where he said he fell.

17. There was an ice trail from the aforementioned snow pile that led past the area where my husband told me he fell.

18. The ice trail followed the slope of the parking lot towards the drain.

19. Mr. Navarez and Mr. Carbajal told me that once my husband had been helped up, he slipped and fell again on ice that was next to his vehicle.

20. That I almost fell on ice while I was at the facility."

¶ 18 On August 31, 2012, defendant moved to strike April's second affidavit. Defendant argued that the second affidavit was replete with hearsay, irrelevant statements, self-serving opinions, and conclusions. Defendant objected specifically to paragraphs 2, 3, 4, 11, 13, 14, 15, 16, 17, 18, 19, and 20. Defendant further argued that, even if the court considered the affidavit, it failed to raise a genuine issue of material fact.

¶ 19 On September 14, 2012, the trial court granted defendant's motion to strike April's second affidavit, finding that it contained inadmissible hearsay. The court also granted defendant's motion for summary judgment. The court found that "there is no genuine issue of material fact that where

Plaintiff alleges he fell in the lot had an unreasonably dangerous slope or that there was an unnatural accumulation of ice in the lot in the area Plaintiff alleges he fell, and that therefore, Defendant is entitled to judgment as a matter of law."

¶ 20 Plaintiff filed a motion for reconsideration. Defendant filed a motion to strike plaintiff's motion and a motion for sanctions against plaintiff for filing a "frivolous and intentionally harassing" motion. The trial court denied plaintiff's motion for reconsideration and entered a finding that the order was appealable under Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010). The court continued the matter for a hearing on the motion for sanctions.

¶ 21 Plaintiff timely appealed from the denial of his motion for reconsideration.

¶ 22 II. ANALYSIS

¶ 23 Plaintiff argues that the court erred in granting summary judgment for defendant. According to plaintiff, there is a genuine issue of fact as to whether he slipped on an unnatural accumulation of ice caused by defendant. Specifically, plaintiff relies on certain paragraphs in April's affidavit, which, he argues, were improperly stricken by the trial court. According to plaintiff, the affidavit provided the requisite nexus between the snow pile observed by April and the ice upon which he fell. In response, defendant maintains that the trial court properly struck the affidavit. Further, defendant argues that, even if we were to consider the affidavit, plaintiff failed to present evidence of an unnatural accumulation of ice in the area where he claims to have fallen. In addition, defendant argues that plaintiff failed to present evidence of an unreasonably dangerous slope in defendant's parking lot.

¶ 24 Summary judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that

the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2010). In reviewing a grant of summary judgment, we construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the nonmoving party. *Lake County Grading Co., LLC v. Village of Antioch*, 2013 IL App (2d) 120474, ¶ 12. A triable issue precluding summary judgment exists where material facts are disputed or where the material facts are undisputed but reasonable persons might draw different inferences from the undisputed facts. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). To prevail in a negligence action, the plaintiff must prove that the defendant owed a duty to him, that the defendant breached that duty, and that the plaintiff's injury proximately resulted from that breach. *Tzakis v. Dominick's Finer Foods, Inc.*, 356 Ill. App. 3d 740, 745-46 (2005). If the plaintiff cannot establish an element to support his cause of action, summary judgment in favor of the defendant is proper. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). "Summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt." *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). We review *de novo* the entry of summary judgment. *Id.*

¶ 25 We first address plaintiff's argument that the trial court erred in striking April's second affidavit in its entirety. Illinois Supreme Court Rule 191(a) (eff. July 1, 2002) provides that:

> "[a]ffidavits in support of and in opposition to a motion for summary judgment *** shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of

> conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto."

We review *de novo* a trial court's ruling on a motion to strike an affidavit, when such ruling is made in conjunction with the court's ruling on a motion for summary judgment. *Jackson v. Graham,* 323 Ill. App. 3d 766, 773 (2001).

¶ 26 Plaintiff argues that, although some of the paragraphs contained in April's second affidavit may have violated Rule 191(a), paragraphs 1, 2, 5-14, 18, and 20 were statements made within April's personal knowledge and should not have been stricken. In support of his argument, plaintiff relies on *Murphy v. Urso*, 88 Ill. 2d 444, 462-63 (1982), wherein the supreme court stated that a court should strike only "tainted" portions of an affidavit for failing to comply with Rule 191. We agree with plaintiff that paragraphs 1, 2, 5-14, 18, and 20 were all statements within April's personal knowledge and thus did not violate Rule 191(a).[1] Defendant does not specifically disagree. Nevertheless, defendant argues that the court properly struck the second affidavit in its entirety given that this was plaintiff's second opportunity to present the court with a proper affidavit. However, the cases relied on by defendant do not support defendant's argument; rather, they support our conclusion that the court erred. In each case, the court refused to consider *only* that portion of the affidavit that failed to comply with Rule 191. See *Radtke v. Murphy*, 312 Ill. App. 3d 657, 663-64 (2000) (statement in affidavit found to be inadmissible hearsay improper under Rule 191); *Zonta v.*

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[1]We find that paragraphs 3, 4, 15, 16, 17, and 19 were properly stricken as they relate to hearsay statements made by others to April. See *Kalb v. Village of Oak Lawn*, 128 Ill. App. 3d 481, 485 (1984) (affirming the striking of certain paragraphs of an affidavit containing hearsay or conclusory statements).

Village of Bensenville, 167 Ill. App. 3d 354, 357 (1988) (where the plaintiff's reference in an affidavit to a statement by an unknown witness concerning an alleged defect in a window was inadmissible hearsay, it would not be considered to establish the defendant's knowledge of the defect to defeat a motion for summary judgment); *Kalb v. Village of Oak Lawn*, 128 Ill. App. 3d 481, 485 (1984) (affirming the striking of certain paragraphs of an affidavit containing hearsay or conclusory statements). In accordance with *Urso*, we find that, in ruling on defendant's motion for summary judgment, the court should have considered the portions of the affidavit that did not violate Rule 191(a). We will not fault plaintiff for submitting those portions only in a second affidavit; the court gave plaintiff that second chance, and defendant does not contend that it erred in doing so.

¶ 27 We next consider whether, taking the affidavit into consideration, the evidence was sufficient to preclude summary judgment. It is well established that, under the natural accumulation rule, a property owner has no duty to remove natural accumulations of snow and ice from his property. *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 227 (2010). However, a property owner who chooses to remove snow or ice from his property is charged with the duty of exercising ordinary care when doing so. *Webb v. Morgan*, 176 Ill. App. 3d 378, 382 (1988). "His duty is to prevent an unnatural accumulation on his property, whether that accumulation is the direct result of the owner's clearing of ice and snow, or is caused by design deficiencies that promote unnatural accumulations of ice and snow." *Id*. at 382-83. A mound of snow created by a snow plow is considered an unnatural accumulation (*Russell v. Village of Lake Villa*, 335 Ill. App. 3d 990, 994 (2002)), and where a plaintiff claims that an ice formation was caused by a pile of plowed snow, he or she "must either show a direct link between defendants' snow piles and the ice that caused [him or] her to slip,

or [he or] she must provide circumstantial evidence through an expert." *Madeo v. Tri-Land Properties, Inc.*, 239 Ill. App. 3d 288, 294 (1992).

¶ 28 We agree with plaintiff that the evidence was sufficient to preclude summary judgment. First, concerning the location of plaintiff's fall, we reject defendant's argument that, because plaintiff testified that he fell "20, 30 feet" from his truck, we must ignore other testimony suggesting that plaintiff fell one to two feet from his truck. The crux of defendant's argument is that, because plaintiff testified that he was 20 to 30 feet away from his truck when he fell, April's affidavit concerning the ice trail near the truck does not evince that plaintiff fell on an unnatural accumulation (because he was nowhere near the ice trail). Essentially, defendant wants us to ignore all the other deposition testimony that suggests that plaintiff fell near his truck; however, it is the existence of the other testimony that raises an issue of fact on the point. We note that a reading of plaintiff's deposition testimony reveals that plaintiff did not have a clear recollection of exactly where he fell. He stated that he was in pain and that he had fainted. Meanwhile, Nevarez testified clearly that, when he first saw plaintiff on the ground, plaintiff was one or two feet away from his truck. Thus, whether plaintiff fell near the ice trail is an issue of fact.

¶ 29 Second, concerning the presence of an unnatural accumulation of ice, defendant argues (and the trial court agreed) that plaintiff could not establish an unnatural accumulation without also establishing the existence of an unreasonably dangerous slope. This argument is without merit. Although evidence of a slope may be one manner of establishing the nexus between a snow pile and an unnatural accumulation of ice or water that causes an injury (see *Johnson v. National SuperMarkets, Inc.*, 257 Ill. App. 3d 1011, 1016 (1994)), evidence of a slope is not required where the nexus between a snow pile and an unnatural accumulation can be established in other ways (see

Russell v. Village of Lake Villa, 335 Ill. App. 3d 990, 996 (2002)). Here, according to April's affidavit, when she arrived at defendant's parking lot, she observed plaintiff lying on ice on the ground by the passenger side of his truck. She observed a pile of snow pushed up against the building near plaintiff's truck and a trail of ice that stretched from the snow pile, past the truck, to a drain in the parking lot about 40 feet behind the truck. This establishes a "direct link" between the snow pile and the trail. See *Madeo*, 239 Ill. App. 3d at 294. In addition, the paramedics testified that they observed ice near plaintiff. Thus, the evidence is sufficient to raise a genuine issue of material fact concerning the existence of an unnatural accumulation of ice on defendant's property.

¶ 30 In sum, we find that there are genuine issues of material fact as to whether plaintiff slipped and fell on an unnatural accumulation of ice caused by defendant. Thus, summary judgment for defendant was improperly granted.

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, we reverse summary judgment in favor of defendant and remand.

¶ 33 Reversed and remanded.