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FIRST DIVISION
June 29, 2015

Nos. 1-14-2374 & 1-14-3016 (cons.)
2015 IL App (1st) 142374-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SUSAN JOHNSON, Individually and as Special Representative of the Estate of MALCOM JOHNSON, deceased, Plaintiff-Appellant, v. THE UNIVERSITY OF CHICAGO, BULLEY AND ANDREWS MASONRY RESTORATION, LLC, and BRAND ENERGY SERVICES, LLC, Defendants-Appellees.	Appeal from the Circuit Court of Cook County. No. 12 L 7808 Honorable John H. Ehrlich, Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort concurred in the judgment and Justice Harris specially concurred in the judgment.

ORDER

Held: Trial court's grant of summary judgment in favor of defendants was improper where genuine issues of material fact existed as to whether defendants proximately caused victim's fall and resulting injuries.

¶ 1 Plaintiff, Susan Johnson (plaintiff), individually and as special representative of the Estate of Malcolm Johnson (Johnson) appeals from the trial court's grant of summary judgment in favor of defendants the University of Chicago (U of C), Bulley and Andrews Masonry Restoration, LLC (Bulley), and Brand Energy Services, LLC (Brand) (collectively, defendants). On appeal, plaintiff contends that there was a question of fact as to whether defendants proximately caused Johnson's fall. For the following reasons, we reverse the trial court's grant of summary judgment in favor of defendants.

¶ 2 BACKGROUND

¶ 3 On September 7, 2010, Johnson was injured while exiting a job site on the U of C campus. Johnson was installing a new roof as an employee of Knickerbocker Roofing Company (Knickerbocker). Bulley served as the general contractor for the project, and Brand was the scaffolding subcontractor at the job site. Knickerbocker was the roofing subcontractor.

¶ 4 Plaintiff filed her original complaint, on behalf of her deceased husband Johnson (who died from unrelated causes on June 6, 2012), on July 12, 2012, against U of C and Bulley. In her complaint, plaintiff alleged that there was scaffolding placed at the exterior of the building in question, which contained an opening from which workers could enter and exit. Plaintiff alleged that the opening was positioned more than 19 inches above the ground, which violated an Occupational Safety and Health Administration (OSHA) regulation (29 C.F.R. 1926.1051(a) (West 2012)) because there was no stairway or ladder provided where a break in elevation of 19 inches existed. Plaintiff alleged that as a result, workers had to jump down to exit the scaffold, and that Johnson fell to the ground while attempting to exit the scaffold through its opening, which caused him permanent injury.

¶ 5 On August 13, 2012, plaintiff filed a first amended complaint that contained similar allegations of negligence against U of C and Bulley. On September 6, 2012, plaintiff filed a second amended complaint adding Brand as a defendant. Plaintiff alleged that Brand created a dangerous condition by failing to provide a safe mode of exit from the scaffold. On September 7, 2012, plaintiff filed a third amended complaint adding Inspec, Inc. (Inspec) as a defendant. Plaintiff claimed that Inspec was negligent in creating a dangerous condition for persons working on the job site by failing to provide a safe mode of exit from the scaffold.[1]

¶ 6 Discovery ensued, and on March 12, 2014, defendants Bulley and U of C filed a motion for summary judgment. In their motion, they noted that Johnson passed away before he could be deposed, and that no one witnessed Johnson's fall. Defendants argued that the only person within close proximity of Johnson at the time of his fall was Dennis Perez, the roofing foreman for Knickerbocker, and that Perez did not see Johnson fall. Defendants attached a copy of Perez's discovery deposition transcript to their motion. In his deposition, Perez stated that his crew accessed a stair tower located on the west side of the project through a debris curtain opening, which was located above a 2 ½ foot wall. Perez testified that on the day in question, he and his crew finished work for the day and exited their work area through the debris curtain opening. Perez was the last in line of the employees leaving the area, and he was walking directly behind Johnson as they walked towards the curtain. However, he then passed Johnson and exited through the debris curtain opening. Perez testified that he saw Johnson "motion" as if he was intending to sit down, but he did not actually see him sit on the wall. Perez then stepped off the wall onto the sidewalk, at which point he heard a large "thump" from behind him. When he turned around, Perez saw Johnson lying on the sidewalk. Defendants argued that Perez did

[1] Inspec settled with plaintiff and is not a party to this appeal.

not actually see Johnson fall, and did not know how or why Johnson fell, and therefore could not establish proximate cause.

¶ 7 Plaintiff filed a response to defendants' motion for summary judgment, arguing that Johnson would not have fallen and sustained injuries if he had not been forced to encounter the unprotected drop-off that violated OSHA standards. Plaintiff contended that Johnson's injuries were a proximate cause of defendants' negligence in maintaining the unsafe drop-off, which was supported by direct evidence and could also be inferred by circumstantial evidence. Namely, plaintiff argued that Johnson's treating physician, Dr. Leonard Ostrowski testified in his deposition that Johnson "injured his left shoulder when he was going from one level to the next," and that Perez testified that he "was a couple feet in front of [Johnson] off the landing and basically heard a thump. I turned around and there he was." Plaintiff asserted that her husband came home from work on the date in question and stated that he was injured when attempting to jump down from the wall. Plaintiff further argued that the Illinois Worker's Compensation Commission form, entitled "Illinois Form 45: Employer's First Report of Injury," prepared on September 5, 2012, provided that "[Johnson] fell from opening in scaffold." Plaintiff attached the incident report completed by Perez on the day after the incident, which stated that Johnson was "stepping down off aprox. 2 ½' curb missed footing and fell on his shoulder."

¶ 8 In reply, defendants maintained that when viewed in a light most favorable to plaintiff, the admissible evidence cited by her was insufficient to establish that defendants' conduct was a proximate cause of Johnson's injuries. They argued that there was no admissible evidence that established with "reasonable certainty" that Johnson fell because he was not provided with a step stool or ladder. Defendants contended that plaintiff's deposition testimony that her husband "jumped" down from the wall was hearsay and was therefore inadmissible. They argued that

plaintiff's reliance on the Worker's Compensation report, which indicated that it was prepared by Patricia Hogan, the attorney representing defendants, two years after the incident, was inadmissible hearsay. Defendants attached an affidavit signed by Hogan that stated that Hogan did not create the form and did not participate in its creation by providing any of the information recorded within the form. Defendants also argued that the incident report created by Perez that describes the accident was irrelevant as Perez later testified in his deposition that did not see the accident and did not why Johnson fell. Perez testified that his description in the report was based on assumption rather than personal knowledge. Defendants further argued that a violation of OSHA in and of itself did not constitute proximate cause of Johnson's injuries.

¶ 9 A hearing was held on defendants' motion for summary judgment. The trial court stated that it would not address plaintiff's arguments as they related to duty or breach since defendants' motion for summary judgment was based solely on the proximate cause issue. The trial court then stated that "on summary judgment, the court can only consider evidence which would also be admissible at trial. So that is one of the things that I'll be looking at when I'm addressing this evidence as to whether it would be admissible at all." Regarding Dr. Ostrovsky's medical records, the trial court stated, "I think [the] medical record would be admissible at trial. It is a business record." The trial court stated that it believed Perez's incident report would be admissible evidence as a business record. The trial court stated that the report by Hogan "would not be admissible if it wasn't made at or near the time [of the incident]. It is certainly hearsay. I don't think it would be admissible at trial, so I'm not considering that." The trial court also noted that the testimony from Johnson's wife about what Johnson told her after work on the date in question would likely be inadmissible hearsay, but that "I would leave that to a trial judge to determine."

¶ 10 The trial court then found that the "problem we have is we just don't know how [Johnson] fell. It's not clear to me whether he, for example, maybe tripped on the debris curtain. He may have misstepped before he even got to the debris curtain." The trial court continued that it did not know, based on Perez's testimony whether "[Johnson] sat down on the parapet, turned 180 degrees to throw his legs over near the sidewalk and sort of scooted off." The trial court noted that it did not know whether there was "something missing from under the parapet wall that caused his foot to go out from under him," or if he stood on top of the parapet wall and "sort of jumped off in some dramatic fashion." The trial court further stated that it did know whether "he actually successfully got off the wall, but then once his foot landed on the sidewalk, whether his foot gave away at that point." The trial court concluded that "[b]ased upon the little evidence that I have *** I don't see that proximate causation can be established in the case." The trial court granted defendants' motion for summary judgment with prejudice. Plaintiff now appeals.

¶ 11 ANALYSIS

¶ 12 On appeal, plaintiff contends that the trial court erred in granting summary judgment in favor of defendants because a question of fact exists as to whether defendants' negligence caused Johnson to fall. Defendants respond that the trial court properly granted summary judgment in their favor because no direct or circumstantial evidence established how or why Johnson fell. We find that the question of proximate cause in this case is one for the trier of fact, as we cannot say that the facts alleged show that plaintiff would never be entitled to recover.

¶ 13 Summary judgment is properly granted if the pleadings, depositions, and admissions on file, together with any affidavits, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Leavitt v. Farwell Tower Ltd. Partnership*, 252 Ill. App. 3d 260, 264 (1993). The purpose of the summary judgment procedure

is not to decide the facts but to ascertain whether a factual dispute exists. *Radtke v. Shal-Bovis, Inc.*, 328 Ill. App. 3d 51, 55 (2002). We review the trial court's ruling on a motion for summary judgment *de novo*. *Id.*

¶ 14 In pleading negligence, a plaintiff must allege facts showing: (1) the defendant owed him or her a duty of due care; (2) the defendant breached that duty; and (3) that the breach was the proximate cause of his or her injuries. *Wilfong v. L.J. Dodd Construction*, 401 Ill. App. 3d 1044, 1051 (2010). Generally, proximate cause is an issue of material fact to be determined by the trier of fact. *Abrams v. City of Chicago*, 211 Ill. 2d 251, 257 (2004). But proximate cause may be determined as a matter of law where the facts show that the plaintiff would never be entitled to recover. *Id.* at 257-58. Proximate cause consists of two requirements: cause in fact and legal cause. *Id.* at 258. For a defendant's conduct to be a "cause in fact" of the plaintiff's injury, the conduct must constitute "a material element and a substantial factor in bringing about the injury." *Id.* If the plaintiff's injury would not have occurred absent the defendant's conduct, then the conduct forms a material element and substantial factor in bringing about the injury. *Id.* On the other hand, "legal cause" involves an assessment of foreseeability and the court must consider whether the injury is of the type that a reasonable person would see as a likely result of his or her conduct. *Id.*

¶ 15 To establish proximate cause, the plaintiff bears the burden of "affirmatively and positively show[ing]" that the defendant's alleged negligence cause the injuries for which the plaintiff seeks to recover. *Bermudez v. Martinez Trucking*, 343 Ill. App. 3d 25, 29 (2003). Liability against a defendant cannot be predicated on speculation, surmise, or conjecture. *Mann v. Producer's Chemical Co.*, 356 Ill. App. 3d 967, 974 (2005). Thus, the plaintiff must establish with "reasonable certainty" that the defendant's acts or omissions caused the injury. *Id.*

¶ 16 The plaintiff may establish proximate cause through circumstantial evidence. *Mann*, 356 Ill. App. 3d at 974. Thus, causation may be established by facts and circumstances which, in light of ordinary experience, reasonably suggest that the defendant's negligence operated to produce the injury. *Id.* It is not necessary that only one conclusion follow from the evidence. *Id.* But a fact cannot be established through circumstantial evidence unless the circumstances are so related to each other that it is the only probable, and not merely possible, conclusion that may be drawn. *Wiegman v. Hitch-Inn Post of Libertyville, Inc.*, 308 Ill. App. 3d 789, 795 (1999). Where the proven facts demonstrate that the nonexistence of the fact to be inferred appears to be just as probable as its existence, no inference may be made. *Mann*, 356 Ill. App. 3d at 974.

¶ 17 Plaintiff concedes that Johnson died before he had a chance to be deposed, but contends that circumstantial evidence, namely that Perez saw Johnson beginning to sit down while attempting to get off the ledge, and then immediately heard a fall and turned around to see Johnson on the ground in front of the ledge, establishes a genuine issue of material fact regarding proximate cause. In support, plaintiff relies on *Stojkovich v. Monadnock Building*, 281 Ill. App. 3d 733 (1996).

¶ 18 In *Stojkovich*, the plaintiff and 11 other people got trapped in an elevator that stalled unexpectedly between the second and third floors of a building. One of the occupants opened both the elevator car door and the second floor shaftway door, which resulted in a five-foot unprotected opening to the elevator shaft below the stalled car. The occupants began jumping out of the stalled car down to the second floor landing. Nine of the occupants jumped out of the stalled car before the plaintiff, several sustaining minor injuries. None of the occupants remaining in the car, or the occupants who had already jumped, observed the plaintiff attempt to exit the elevator car. However, several of the individuals that had exited the car before the

plaintiff saw him as he was in the act of falling down the elevator shaft below the stalled car. The plaintiff was unable to recall anything about the occurrence due to his injuries. *Stojkovich*, 281 Ill. App. 3d at 736-37.

¶ 19 At trial, testimony was provided that indicated it was foreseeable that people trapped in a stalled elevator would try to escape and that they might be injured in their attempts. The court found that this testimony was sufficient to support a finding of legal causation. The court's analysis, therefore, focused on causation in fact. *Id.* at 738-39. The question was whether sufficient evidence was introduced at the trial to support a reasonable inference that the elevator company's negligence was a cause in fact of the plaintiff's fall. The court found that under the known facts and circumstances of the case, even in the absence of an eyewitness to plaintiff's attempt to exit the elevator car, the inference that he fell down the unprotected elevator shaft while attempting to exit the stalled car was both reasonable and probable, and could have been drawn by the jury. *Id.* at 740. "The total absence of any other inference that might be drawn from the known facts which is just as probable as the one drawn by the jury, and the fact that the inference drawn was not in itself a matter of pure speculation, distinguishes this case from the cases cited by [the elevator company] in support of its arguments on appeal." *Id.* The court ultimately found that the proximate causal relationship between the negligence of the elevator company and the plaintiff's fall and resulting injuries was supported by circumstantial evidence and the reasonable inference that might be drawn therefrom. *Id.*

¶ 20 Likewise, in the case at bar, we find that the proximate causal relationship between defendants' negligence and Johnson's fall and his resulting injuries, was supported by circumstantial evidence and the reasonable inference that might be drawn therefrom. When viewing the evidence in the light most favorable to plaintiff, it shows that there was an over two-

foot drop-off between levels at the point where Johnson and his coworkers exited the workplace on a daily basis, and there was no ladder or stool to facilitate getting down. Johnson was the last person to exit the workplace on the date in question. Perez saw him making a motion to sit down, but then walked past him and did not see him actually sit or fall. He heard a loud thump and turned to see Johnson on the ground. Johnson's treating physician completed a report which indicated that Johnson fell "when going from one level to the next."

¶ 21 Accordingly, while there is not a "total absence of any other inference that might be drawn from the known facts which is just as probable" as the one urged by plaintiff, the case before us was dismissed on the pleadings, and was not permitted to go to trial on the issue of proximate cause. We find that it should have gone to trial because in light of ordinary experience, the facts and circumstances of this case reasonably suggest that defendant's negligence in maintaining the parapet caused Johnson's fall and resulting injuries. *Mann*, 356 Ill. App. 3d at 974. While the trier of fact is free to draw its own conclusion, we find that this is a case where proximate cause should be decided by the finder of fact, and not on the pleadings.

¶ 22 We find further support for our conclusion in *Block v. Lohan*, 269 Ill. App. 3d 745 (1993). In *Block*, the court found that there were "sufficient issues of fact as to proximate cause so as to avoid summary judgment." *Block*, at 757. The court noted that while no witnesses saw the plaintiff fall, a crane operator testified that he knew the plaintiff was intending to attach a boatswain's chair to a hook so that a worker could weld the columns cover connections. A coworker saw the plaintiff going to retrieve the chair and knew that it was intended that either he or the plaintiff would get into the chair. Another worker saw the plaintiff start up the ladder, and later heard the plaintiff say "hold it" before he saw him lying on the ground. A third worker saw

the plaintiff carrying the chair immediately prior to the accident and heard the plaintiff urgently say "hold it," from a level equal to the witness's when he was on his ladder. *Id.*

¶ 23 The court in *Block* found that the testimony made probable the fact that the plaintiff climbed the ladder intending to reach the hook to attach the chair so that a worker could use it to weld the outside connections of the column covers. There was also expert testimony that the chair should not have been employed on this project, and that the ladder was misused and misplaced. *Id.* The court found that the plaintiff had adequately demonstrated that a genuine issue of fact existed that defendant's alleged negligence was the proximate cause of the plaintiff's injuries. *Id.* at 759. In reaching this conclusion, the court noted that in negligence cases, proximate cause is generally an issue for the trier of fact, and that it "becomes a question of law only when the material facts are undisputed and there can be no difference in the judgment of reasonable persons as to the inferences to be drawn from them." *Id.* at 756.

¶ 24 Similarly here, the evidence makes probable the fact that Johnson fell while attempting to climb down off the ledge without assistance of a ladder or stool. We therefore find that plaintiff adequately demonstrated that a genuine issue of material fact existed as to whether defendants' negligence was the proximate cause of Johnson's injury.

¶ 25 Defendants rely heavily on *McInturff v. Chicago Title & Trust*, 102 Ill. App. 2d 39 (1968), in support of their proposition that there is no evidence in the record to indicate that defendants' negligence caused Johnson's injuries. In *McInturff*, the plaintiff alleged that the decedent died from falling down stairs as a result of defendants' failure to provide a handrail on the stairway. There were no eyewitnesses to the fall. The evidence presented at trial indicated that there were 13 steps on the stairway and that decedent used the stairway daily in his occupation as a janitor. There was no direct evidence as to what took place prior to and at the

time of the decedent's injury. There was no proof that the condition of the stairway or the failure to comply with the handrail ordinances caused the decedent's death. The court found that the burden was on the plaintiff at trial to establish by a preponderance of the evidence the causal relationship between the alleged negligence and the injury sustained by decedent. *McInturff*, 102 Ill. App. 2d at 49. The court found that damages could not be assessed on mere "surmise or conjecture as to what probably happened to cause [decedent's] injury and death." *Id.*

¶ 26 While there are some similarities between *McInturff* and the case at bar, we find it compelling to note that *McInturff* went to trial. The case was not dismissed on the pleadings on the issue of proximate cause. We note that "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 cannot say that defendants' right to judgment is clear and free from doubt in this case. Accordingly, we maintain that the case at bar was prematurely dismissed on the pleadings.

¶ 27 CONCLUSION

¶ 28 For the foregoing reasons, we reverse the trial court's grant of summary judgment in favor of defendants.

¶ 29 Reversed.

¶ 30 JUSTICE HARRIS, specially concurring.

¶ 31 Here, the trial court was perplexed about what it did not know with certainty, leading to the conclusion that proximate cause cannot be established and therefore entering summary judgment for defendant. The trial court should not have been guided by what it was unable to determine with certainty; rather, the determination is whether questions of material fact exist precluding summary judgment. See *Cochran v. George Sollitt Construction Company*, 358 Ill.

App. 3d 865, 872 (2005) (summary judgment is proper where the pleadings, depositions, admissions, and affidavits on file, viewed in the light most favorable to the nonmoving party, show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law). In fact, not knowing with certainty in and of itself should have been ample notice to the trial court that material fact questions exist.

¶ 32 Additionally I find that here, as too often occurs at summary judgment hearings, the trial court wrongly invaded the province of the jury in determining that proximate cause had not been shown. Proximate cause is an issue most appropriately decided by a jury unless the facts show that plaintiff would never be entitled to recover. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 395-6 (2004). Where either circumstantial or direct evidence exists which reasonably gives rise to the defendant's acts or omissions having caused the injury, it is error not to let the jury decide. *Holton v. Memorial Hospital*, 176 Ill. 2d 95, 107 (1997). Accordingly, I concur with my colleagues.