

2012 IL App (2d) 111046-U
No. 2-11-1046
Order filed June 13, 2012

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

CYNTHIA JACOBSON and PHIL JACOBSON,)	Appeal from the Circuit Court of Boone County.
)	
Plaintiffs-Appellants,)	
)	
v.)	No. 06-L-27
)	
RESIDENTIAL DESIGNS BY MK MORLEY, INC.,)	
)	
Defendant)	
)	
(Absolute Concrete, Inc., Defendant and Counterdefendant; Timber Ridge, Inc., Defendant and Counterplaintiff-Appellant; Brad Betke, Individually and d/b/a Absolute Concrete, Inc., Counterdefendants).)	Honorable Brendan A. Maher, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

Held: The trial court properly granted defendant summary judgment on plaintiffs' negligence claim, as plaintiffs could not establish that defendant's conduct was a proximate cause of their injuries: although defendant created the hole through which one of the plaintiffs fell, defendant left the hole securely covered and could not have reasonably foreseen that some other party would replace that covering with Styrofoam.

¶ 1 Plaintiffs, Cynthia Jacobson and Phil Jacobson, sued defendants, Residential Designs by MK Morley, Inc., Absolute Concrete Inc., and Timber Ridge Homes, Inc., for injuries sustained by Cynthia while she was walking in a home that was under construction. The trial court granted Timber Ridge’s motion for summary judgment, and plaintiffs timely appealed. For the reasons that follow, we find that the trial court properly found that there were no genuine issues of material fact concerning whether Timber Ridge’s conduct was a proximate cause of Cynthia’s fall, and thus we affirm summary judgment for Timber Ridge.

¶ 2 I. BACKGROUND

¶ 3 Plaintiffs sued defendants for injuries sustained by Cynthia on December 18, 2004, while she was walking in the future home of her friends, John and Jennifer Folvig. The home was under construction at the time, and the Folvigs had invited plaintiffs to see the home. According to the complaint, while Cynthia was walking through the home, “a section of the floor gave way and [Cynthia] fell through to the concrete-covered basement level of the home.” Plaintiffs alleged that defendants breached the duty of reasonable care by failing, *inter alia*, “to erect a safe, suitable and proper temporary support for the protection of the Plaintiff and others like her while walking on the floors of the home under construction.” According to plaintiffs’ depositions, neither plaintiff saw the hole before Cynthia fell. However, according to Phil, after Cynthia fell to the basement, he saw pieces of Styrofoam on the floor next to Cynthia. John Folvig saw Cynthia fall. He lowered himself through the hole into the basement and described the material on the floor around Cynthia as “a thick sort of foam-insulation-type board.”

¶ 4 Timber Ridge filed a motion for summary judgment, arguing that there was no genuine issue of fact concerning whether Timber Ridge’s actions were a proximate cause of Cynthia’s injuries.

Timber Ridge attached several depositions to its motion, including those of plaintiffs, the Folvigs, Kevin Carpenter, Michael Morley, Terry Hughart, Brad Betke, and Jonathon Wade. In support of its argument, Timber Ridge relied primarily on the deposition testimony of Carpenter, its employee. Carpenter testified that he installed the plywood subfloor in the home and created an opening in the subfloor to install a staircase to the basement. When he left the site on the day that he created the hole, he covered the hole with “2-by-12 boards” and nailed them to the subfloor. Carpenter’s next step, after installing the sub-floor, was to erect interior walls, using prefabricated wall panels. According to Carpenter, the wall panels were delivered on either Friday, December 10, 2004, or Monday, December 13, 2004. When the wall panels were delivered, Carpenter removed the boards that covered the hole and placed a stack of wall panels over the hole. Carpenter stated that Timber Ridge had begun to erect the wall panels but that, when Carpenter learned that the delivery of some additional materials was going to be delayed for about a week, he stopped working and went to another job site. According to Carpenter, when he left the site for the day on December 13, 2004, the stack of wall panels that covered the hole stood about 4 to 5 feet high, covered the entire hole, and would have supported the weight of 10 to 15 people. It would have taken two workers about 15 to 20 minutes to remove the panels. Carpenter had no reason to believe that another subcontractor would be working at the site until Timber Ridge finished its portion of the construction or that another subcontractor would move the stack.

¶ 5 Hughart, an employee of Residential Designs, testified that he had seen the stack of panels over the hole and estimated that it weighed about 1,000 pounds. Hughart was present at the construction site on the morning of December 17, 2004, the day that the basement concrete was going to be poured, and he saw the stack of panels over the hole. According to Hughart, the stack

was about four feet high. Hughart spoke with Betke about the necessity of insulating the hole to keep the basement heated for the concrete pour. Hughart told Betke that, if Betke removed the panels, Betke should insulate the hole using two-by-six boards and plywood.

¶ 6 In response to Timber Ridge’s motion, plaintiffs argued that “Carpenter’s claim that when he left the job site there was a stack of wall panels over the hole is subject to dispute.” In support, plaintiffs relied on testimony from Wade, an employee of Absolute Concrete. Wade testified that (at some point prior to December 18) he went to the job site to wait for a delivery of heaters, which were going to be used to heat the basement prior to the installation of the concrete floor. When Wade arrived at the site, he saw some prefabricated wall panels partially covering the hole in the floor. There were three at the most. Most of the walls had already been erected. Wade moved the panels off of the hole and laid a couple of four-by-eight sheets of plywood over the hole to contain the heat in the basement. Wade did not testify as to the exact date that he covered the hole. However, he stated that he covered the hole on one day, that they heated the basement over the next couple of days (possibly two or three), that they next installed the gravel, and that they poured the cement the next day or within the next couple of days. Other testimony established that the concrete floor was poured on December 17.

¶ 7 After considering Timber Ridge’s motion and plaintiffs’ response, the trial court agreed with Timber Ridge and found that there were no disputed material facts that, if resolved in plaintiffs’ favor, would permit a trier of fact to conclude that Timber Ridge’s creation and covering of the hole was a proximate cause of plaintiffs’ injuries. This appeal followed.

¶ 8

II. ANALYSIS

¶ 9 Plaintiffs argue that the trial court erred in granting summary judgment for Timber Ridge, because the “undisputed evidence in this case established that plaintiff’s fall was caused, not solely by someone placing a Styrofoam sheet over the hole, but by Timber Ridge’s creation of the hole, removal of the original fixed and secured guard, and failure to subsequently provide adequate fixed guarding, thereby rendering it foreseeable that someone could fall through the unsafely protected hole.”

¶ 10 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). A reviewing court’s function is to determine whether a genuine issue of fact was raised and, if none was raised, whether judgment as a matter of law was proper. *American Family Mutual Insurance Co. v. Page*, 366 Ill. App. 3d 1112, 1115 (2006). The entry of summary judgment is subject to *de novo* review. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 11 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. *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 225 (2010). Proximate cause is ordinarily an issue of fact for the jury to decide; however, “it is well settled that it may be determined as a matter of law by the court where the facts as alleged show that the plaintiff would never be entitled to recover.” *Abrams v. City of Chicago*, 211 Ill. 2d 251, 257-58 (2004).

¶ 12 Proximate cause is comprised of two distinct requirements: cause in fact and legal cause. *Id.* at 258. “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.* Further, a defendant’s

conduct constitutes a material element and a substantial factor in causing the injury if, absent the conduct, the injury would not have occurred. *Id.* Legal cause raises a question of foreseeability. *Id.* “The relevant inquiry is whether the ‘injury is of a type that a reasonable person would see *as a likely result* of his or her conduct.’ ” (Emphasis in original.) *Id.* (quoting *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 260 (1999)). A determination as to legal cause is “ ‘a policy decision that limits how far a defendant’s legal responsibility should be extended for conduct that, in fact, caused harm.’ ” *Simmons v. Garces*, 198 Ill. 2d 541, 558 (2002) (quoting *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 455 (1992)).

¶ 13 We reject plaintiffs’ argument that questions of fact exist concerning whether Timber Ridge was a legal cause of Cynthia’s injury. Contrary to plaintiffs’ contention, it is undisputed that, when Timber Ridge left the site on December 13, 2004, it left the hole covered by a four-to-five-foot-high stack of wall panels. Although Wade testified that, when he arrived at the site to receive delivery of the heaters, he observed the hole covered by only three wall panels, he did not specify exactly when this occurred. Plaintiffs assert in their brief that this took place “several days before December 15.” Even if that is the case, we fail to see how this contradicts Carpenter’s testimony concerning how he left the hole when he completed work on December 13 or Hughart’s testimony that he observed the stack on the morning of December 17. We also note that, in their response to Timber Ridge’s motion for summary judgment, plaintiffs stated that “[e]ven if Carpenter [placed a stack of wall panels over the hole], by the time Wade went to cover the hole *a couple [of] days later*, there were only a couple [of] unsecured panels which he scooted aside.” (Emphasis added.) Nevertheless, unless Wade can testify that his observations concerning the covering of the hole took place on

December 13, when Carpenter left for the day (or shortly thereafter), then his testimony about the covering of the hole does not contradict Carpenter's testimony.

¶ 14 Given the undisputed testimony that Timber Ridge covered the hole with a stack of prefabricated wall panels about four-to-five-feet high—and indeed, even if it covered the hole with only three panels—plaintiffs cannot prove that Timber Ridge's actions proximately caused Cynthia's injury, because the subsequent removal of the panels and replacement with Styrofoam was not reasonably foreseeable. In cases where the plaintiff's injury results not from the defendant's negligence directly but from the subsequent, independent act of a third person, "the test 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.' [Citations.]" *Abrams*, 211 Ill. 2d at 259. "If 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.* Here, Cynthia's injury resulted not from the negligence of Timber Ridge, but rather from the alleged negligence of a second wrongdoer, *i.e.*, the individual who covered the opening in the floor with Styrofoam. Although Timber Ridge, by covering the hole with a movable stack of panels, arguably furnished a condition that made Cynthia's injury possible, it was the Styrofoam over the hole that caused the injury. It was not reasonably foreseeable to Timber Ridge that someone would move the stack of panels and then place Styrofoam over the hole.

¶ 15 In conclusion, when Timber Ridge left the opening covered with a stack of wall panels, it was not reasonably foreseeable that someone would remove that covering and replace it with a material that would conceal the hole and allow someone to fall through.

III. CONCLUSION

¶ 16 In light of the foregoing, the judgment of the circuit court of Boone County is affirmed.

¶ 17 Affirmed.