THIRD DIVISION
December 27, 2017

No. 1-17-0509

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARIA RUIZ,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 16 L 927
	)	
NAJAH MOHAMMED,	)	Honorable
	)	Kathy M. Flanagan,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the order of the trial court granting defendant's motion for summary judgment; plaintiff failed to present evidence the defendant homeowner had notice of a dangerous condition on her property; we reject plaintiff's argument that defendant's alleged employee created the hazard because evidence the alleged employee created the hazard was speculative.

¶ 2 Plaintiff, Maria Ruiz, slipped and fell on a puddle of soapy water in defendant's garage

on June 5, 2015. She subsequently filed a claim against defendant, Najah Mohammed, arguing defendant was negligent for causing the puddle, not cleaning the puddle, and not warning plaintiff of the puddle. Plaintiff did not present evidence to show defendant had actual notice of the puddle or of water pooling in the garage generally. Instead, plaintiff argued defendant employed a handyman whose duties included cleaning the garage, and the handyman negligently left a puddle of soapy water in the garage. Plaintiff argued that because defendant's employee created the hazard, proof of notice was not required. Defendant moved for summary judgment, arguing she had no actual or constructive knowledge of the puddle and that plaintiff failed to prove defendant proximately caused the puddle. The circuit court granted defendant's motion for summary judgment, finding plaintiff's circumstantial evidence the handyman caused the hazard was too speculative. For the reasons that follow we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 Prior to her accident on June 5, 2015, plaintiff performed housecleaning services for defendant for some 17 years. Defendant hired plaintiff to come clean her home five days a week from 10:00 a.m. till 1:00 or 1:30 p.m. Plaintiff would clean defendant's house, but did not do defendant's laundry or clean defendant's garage. Before her accident, plaintiff would come to clean defendant's home two or three days a week.

¶ 5 Defendant would also have a handyman, George Jelk, come and perform other tasks around her house. In summer months Jelk came to defendant's home five days a week. Jelk would water plants, pull weeds, clean the deck, clean the garage, and restock the garage refrigerator with beverages. Defendant provided Jelk with equipment and supplies to perform his tasks.

"Q. Where would George get the equipment for this kind of stuff?

A. I used to give it to him.

Q. Okay. Where did you store the equipment?

A. In the garage.

Q. Did George know where it was that he could just get it himself?

A. Yes."

Defendant did not require Jelk to perform tasks in a specific manner and did not supervise him while he was performing his tasks. Jelk himself decided which tasks he performed on any given day without defendant requiring him to perform specific tasks on any day. Defendant stated in her reply in support of her motion for summary judgment that Jelk's work required minimal skill. She did not set a work schedule or hours for Jelk, nor did she keep track of what time he would come around. She did not set a rate of pay or schedule for paying him. She did not set any disciplinary rules or procedures. Defendant did not provide Jelk with an employment classification, job duties, or benefits.

¶ 6 Defendant's home has an attached garage with a painted cement floor. Plaintiff observed Jelk wash the garage floor a variety of times, stating he cleaned the garage about once every week.

"Q. Before June 5 of 2015 -- at any time before that date had you ever noticed any water or moisture on the floor in the area of the refrigerator?

A. A variety of times.

Q. When was the last time prior to June of 2015 that you had noticed water or moisture on the floor?

A. Always the days that they would wash it."

However, plaintiff also stated she had never before seen puddles in the garage like the one she fell on.

> "Q. In -- prior to June 5 of 2015 had you ever seen puddles of water like that on the floor?
>
> A. No, no."

In contrast, defendant stated Jelk would "sweep" the floor of the garage, and noted the garage did not have a water connection for a hose, but did have an entrance to the laundry room.

¶ 7 On June 5, 2015, plaintiff came to defendant's home to clean. After she finished washing the floors in the house using a mop and cleaning solution, plaintiff went into the garage to get a bottle of water from the refrigerator. When plaintiff went to the garage she was wearing the same slippers she wore when she had been mopping the floor. Plaintiff had her own key to the house and defendant explicitly permitted her to go to the garage to take a soda or water from the refrigerator there. The refrigerator was approximately 15 years old, but did not make ice and had no previous problems with leakage. The car defendant sometimes parks in the garage is a relatively new SUV purchased within the last few years, and also has had no known problems with leaks. When plaintiff crossed the garage to go to the refrigerator, she slipped and fell on her side injuring her arm. Due to her fall in a soapy puddle of water, plaintiff testified in a deposition her "whole side got wet." Plaintiff saw Jelk watering the plants outside the home earlier that day, though she did not see him clean the garage that day. When defendant was being deposed, she was asked whether she thought Jelk was on her property on June 5, 2015. Defendant replied: "I honestly don't recall if he was there. Sometimes he comes in the morning. Sometimes he comes in the afternoon. So I don't recall if he was there."

¶ 8 Plaintiff subsequently filed her claim against defendant alleging negligence and premises

liability on January 27, 2016. Defendant moved for summary judgment, and the trial court granted defendant's motion for summary judgment on January 27, 2017. The court found defendant was not negligent under a theory of premises liability and plaintiff failed to prove proximate cause because she could not show it was probable that Jelk directly caused the puddle on the garage floor. Plaintiff timely filed her appeal from the trial court's order granting defendant's motion for summary judgment.

¶ 9 ANALYSIS

¶ 10 This appeal concerns an action for negligence proceeding under a theory of premises liability. Plaintiff has not shown defendant had actual notice of the hazard. Rather, plaintiff argues defendant's employee directly caused a puddle of soapy water to be left on the floor of defendant's garage under a theory of liability applying the doctrine of *respondeat superior*. Plaintiff argues defendant employed a handyman to clean the garage and perform yard work, that the handyman was working at defendant's residence the day of the accident, and that it is probable the handyman negligently failed to clean up a puddle of water after cleaning the garage. The trial court found plaintiff's claim that Jelk caused the puddle was too speculative, and plaintiff must prove proximate cause to maintain her negligence action. Plaintiff maintains on appeal there remain contested issues of material fact about whether defendant's handyman created the hazard in the garage and allowed it to remain.

¶ 11 We review appeals from orders granting motions for summary judgment *de novo*. *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 163 (2007). "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.' " *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002) (quoting 735

ILCS 5/2-1005(c) (West 1998)). The burden of persuasion is on the party moving for summary judgment, though "the burden of production can shift to the nonmovant. Once the movant has met its initial burden of production, the burden shifts to the nonmovant. At this point, the nonmovant cannot rest on its pleadings to raise genuine issues of material fact." *Triple R Develeopment, LLC v. Golfview Apartments I, L.P.*, 2012 IL App (4th) 100956, ¶ 12. For a plaintiff to survive a motion for summary judgment, the "nonmoving party must present a factual basis that would arguably entitle the party to a judgment." *Robidoux*, 201 Ill. 2d at 335.

¶ 12 Negligence

¶ 13 Plaintiff argues defendant was negligent for not cleaning the puddle of water, she was harmed due to this negligence, and defendant owed her a duty of reasonable care as the owner of the premises and under a theory of common law negligence. An action for negligence turns on whether the relationship between the parties imposed some legal obligation that was breached.

> "In order to succeed in a negligence action, the plaintiff must prove a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately resulting from that breach. [Citation.] Whether a duty exists is a question of law for the court to decide. [Citation.] In resolving whether a duty exists, a court must determine whether there is a relationship between the parties requiring that a legal obligation be imposed upon one for the benefit of the other. [Citation.]" *Rhodes v. Illinois Central Gulf R.R.*, 172 Ill. 2d 213, 227 (1996).

Under a "theory of premises liability, an owner or occupier of land (hereafter landowner) owes a duty of reasonable care under the circumstances to all entrants upon the premises except to trespassers." *Choate v. Indiana Harbor Belt R.R. Co.*, 2012 IL 112948, ¶ 24. Here plaintiff was not a trespasser: she was hired to clean the home, had her own key to the residence, and was

explicitly permitted to go to the garage to take a soft drink from the refrigerator during her working hours. Thus defendant owed plaintiff a duty of reasonable care. The issue, then, is whether defendant violated this duty of reasonable care.

¶ 14 In order to show defendant violated this duty of reasonable care plaintiff must show defendant had actual or constructive knowledge of the hazard, or she must prove defendant or her employee directly created or caused the condition. "This court has held that for a plaintiff to recover in a slip-and-fall case involving ice, snow, or water, the plaintiff must show 'that the accumulation of ice, snow or water is due to unnatural causes and that the property owner had actual or constructive knowledge of the condition.' " *Hornacek v. 5th Avenue Property Management*, 2011 IL App (1st) 103502, ¶ 29 (quoting *Gilberg v. Toys "R" Us, Inc.*, 126 Ill. App. 3d 554, 557 (1984)). Plaintiff has not argued, and the record does not reveal, defendant had actual notice of a puddle in her garage. Instead, plaintiff argues she does not need to show defendant had actual or constructive notice if she can show defendant directly created the hazard through her own negligence. In a slip and fall case, "where a defendant created the condition through its own negligence, a plaintiff does not need to show constructive or actual notice." *Hornacek*, 2011 IL App (1st) 103502, ¶ 29.

¶ 15 Plaintiff contends defendant proximately caused her injury based on a theory that the handyman defendant employed left a puddle of soapy water on the garage floor after washing the floor. Proximate cause has two components: the cause in fact and the legal cause.

> "Cause in fact exists where there is a reasonable certainty that a defendant's acts caused the injury or damage. [Citation.] 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. [Citation.] 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. [Citation.] 'Legal cause,' by contrast, is essentially a question of foreseeability. [Citation.] The relevant inquiry here is whether the injury is of a type that a reasonable person would see as a likely result of his or her conduct." *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 258 (1999).

Plaintiff contends defendant was the cause in fact of her injury because she would not have slipped and injured herself on the painted concrete floor of the garage if not for a puddle of soapy water. Plaintiff contends defendant was the legal cause because it was reasonably foreseeable that someone could slip and fall on a puddle of soapy water when the garage floor is painted concrete. Plaintiff maintains defendant directly created the hazard by claiming defendant's handyman failed to clean up the puddle after cleaning the garage.

¶ 16 Plaintiff's argument for defendant directly causing her injury is reliant upon "[t]he doctrine of *respondeat superior*[, which] allows an injured party to hold a principal vicariously liable for the conduct of his or her agent." *Oliviera-Brooks v. Re/Max International, Inc.*, 372 Ill. App. 3d 127, 134 (2007). Plaintiff argues defendant's handyman was negligent by not cleaning up a puddle of soapy water in the garage he created when he cleaned the garage. Plaintiff claims Jelk must have left the puddle of water in the garage after cleaning it on the basis that she saw Jelk at defendant's home watering plants outside the morning she was injured.

¶ 17 Evidence that Defendant's Handyman Created the Hazard

¶ 18 The trial court found plaintiff could not support her inference that Jelk caused the water to be on the floor of the garage and plaintiff submitted no other evidence that defendant had notice of the puddle. Neither the direct nor the circumstantial evidence connected Jelk to the

puddle in the garage. Because plaintiff's proximate cause evidence was too speculative, the trial court granted defendant's motion for summary judgment.

¶ 19 In the absence of evidence that defendant had notice of the puddle, plaintiff had to present evidence defendant's handyman created the hazard so notice and his negligence is imputed to her. The trial court found plaintiff failed to support her theory that Jelk was the cause of the puddle in the garage because plaintiff was merely speculating. Plaintiff argues there was circumstantial evidence Jelk created the puddle. For plaintiff to maintain her negligence action she had to base it on more than mere speculation or conjecture. *Castro v. Brown's Chicken and Pasta, Inc.*, 314 Ill. App. 3d 542, 553 (2000).

> "Damages cannot be assessed upon mere surmise and conjecture as to what possibly happened to cause an injury. The law requires affirmative and positive proof of actionable negligence as the proximate cause of injuries suffered to warrant an assessment of damages. [Citation.] The causal relation between the alleged negligence and the injury must be established by a preponderance of the evidence and with reasonable certainty." *Withey v. Illinois Power Co.*, 32 Ill. App. 2d 163, 170 (1961).

Here plaintiff claims she had circumstantial evidence supporting her theory that defendant's handyman proximately caused her injury. Circumstantial evidence may be sufficient for a plaintiff to survive a motion for summary judgment when

> "an inference may be reasonably drawn from it. Facts, however, will not be established from circumstantial evidence where more than one conclusion can be drawn. [Citation.] If plaintiff relies upon circumstantial evidence to establish proximate cause to defeat a motion for summary judgment, the circumstantial

> evidence must be of such a nature and so related as to make the conclusion more probable as opposed to merely possible." *Majetich v. P.T. Ferro Construction Co.*, 389 Ill. App. 3d 220, 224-25 (2009).

The evidence here was that one task Jelk performed for defendant was to clean her garage, and that plaintiff observed Jelk watering plants the morning of her injury. Plaintiff was mopping in the house, but did not clean in the garage at all. Plaintiff did not observe Jelk cleaning the garage the day of her injury, she only saw him watering plants outside. Plaintiff did not see Jelk in the garage that day. The garage does not have a connection for a hose, but is adjacent to the laundry room. The garage has a refrigerator but it has not been known to leak and does not make ice. The car defendant keeps in the garage is relatively new with no known problems with leakage. Plaintiff contends the only reasonable conclusion to be drawn from the facts is that Jelk must have left a puddle of water in the garage after cleaning it.

¶ 20 Plaintiff supports her argument that the circumstantial evidence was sufficient to withstand a motion for summary judgment by relying on *Bell ex rel. Street v. Bakus*, 2014 IL App (1st) 131043. However, we find *Bell* inapposite. In *Bell*, a minor was injured when his shirt caught fire after he walked past a stove, and his mother brought suit on his behalf against the owners and manager of the apartment. *Id*. ¶ 5. The defendants moved for summary judgment, arguing they did not proximately cause the minor's injuries. The trial court granted the motion for summary judgment, finding the plaintiff could not prove the defendants' placement of the stove was the proximate cause of the minor catching fire. *Id*. ¶ 18. We disagreed. In *Bell*, we concluded the plaintiff could withstand a motion for summary judgment because an expert testified that the placement of the stove was potentially hazardous. *Id*. ¶ 26 ("evidence shows the placement of the stove could have been the cause in fact of his injuries. Pictures of the kitchen

show the stove bordering the primary entry and exit from the kitchen. [An expert witness] confirmed the layout of the kitchen in his affidavit, and opined that the stove's placement was hazardous."). It was the injured minor's testimony *combined* with the expert testimony that led us to conclude a reasonable fact-finder could find that the stove's placement was a substantial factor in the minor catching fire. *Id*. The present case is factually distinguishable from *Bell*.

¶ 21 Here plaintiff's claim defendant's handyman left a puddle of water in defendant's garage is merely speculation. In *Bell* we found circumstantial evidence made the plaintiff's negligence claim more probable than merely possible because the expert testimony combined with the injured minor's testimony reasonably led to that conclusion. This created a question of fact for the jury to settle. "In this matter, reasonable minds could disagree on whether the stove's placement, with or without the burners being covered, was a substantial factor in Bell suffering burns as he walked in the kitchen." *Bell*, 2014 IL App (1st) 131043, ¶ 27. Unlike in *Bell*, no expert witness or other witness corroborated plaintiff's allegation Jelk created the hazard. Plaintiff contends that viewed in the light most favorable to the nonmoving party the circumstantial evidence supports her theory of defendant's negligence. Given that plaintiff never saw Jelk in the home or the garage the day of her injury, one can reasonably infer multiple conclusions from the evidence. Plaintiff has not shown the circumstantial evidence here is of such a nature as to make her conclusion probable rather than merely possible, and is therefore mere speculation.

¶ 22 Plaintiff had to prove there was some material dispute over the facts as to whether defendant was negligent. *Robidoux*, 201 Ill. 2d at 335; *Rhodes*, 172 Ill. 2d at 227. Plaintiff's claim Jelk caused the puddle to be on the garage floor was too speculative to support a theory he proximately caused her injury. Accordingly, we affirm the trial court's entry of summary

judgment on that basis.

¶ 23 Because we have found plaintiff's allegations that Jelk created the hazard are speculative, and there being no other viable theories of negligence alleged, it is unnecessary for us to resolve the remaining issue of whether Jelk was defendant's employee or an independent contractor.

¶ 24 CONCLUSION

¶ 25 For the foregoing reasons the judgment of the circuit court of Cook County is affirmed.

¶ 26 Affirmed.