2017 IL App (5th) 160214-U

NO. 5-16-0214

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

MILTON MCDANIEL,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Jackson County.
	)	
v.	)	No. 13-L-22
	)	
RONALD SEVERS,	)	Honorable
	)	Christy W. Solverson,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE BARBERIS delivered the judgment of the court.
Justices Welch and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's order granting summary judgment is reversed where a genuine issue of material fact exists.

¶ 2 The appellant, Milton McDaniel (McDaniel), appeals the circuit court's order granting summary judgment in favor of the appellee, Ronald Severs (Severs). McDaniel filed a personal injury action to recover for an injury he sustained as a result of tripping and subsequently falling on Severs' property.

¶ 3 BACKGROUND

¶ 4 On March 5, 2011, McDaniel was driving his vehicle when he stopped at a two-unit rental home owned by Severs. Upon exiting his vehicle, McDaniel tripped and fell

in Severs' yard and sustained multiple injuries. Immediately after the fall, McDaniel returned to his vehicle and drove home. Shortly thereafter, McDaniel returned to the property. Upon inspection, he located a metal stake protruding from the ground in the area where he fell.

¶ 5 On March 30, 2011, McDaniel mailed a claim to Consolidated Insurance Company, Severs' local insurance agency, alleging that he "tripped over a piece of metal pipe protruding out of the ground adjacent to his home and severely injured [his] right leg causing a tare [*sic*] which require[d] surgery ***." McDaniel attached two letters to the insurance claim, one from Lyndro McGary (McGary),[1] a tenant in the first floor unit on Severs' property, and another from Keith Delmore (Delmore), who claimed to have witnessed McDaniel's fall on March 5, 2011. Delmore's letter, dated March 28, 2011, stated the following:

> "I, Mr. Keith Delmore, witnessed Mr. Milton McDaniel's accidental fall that took place on Saturday, March 5, 2011, at approximately 5 p.m., when he visited Mr. Lyndro McGary's place of residence located at 403 S. Logan Avenue, Carbondale, Illinois. I witnessed the accident which took place when Mr. McDaniel was walking on the premises then subsequently tripped on a metal object that was protruding several inches from the ground. He then fell into the arms of Mr. McGary."

[1]McGary's letter is not contained in the record on appeal.

¶ 6 On October 23, 2012, McDaniel mailed a demand letter to Western World Insurance (Western World), Severs' insurance agency for the rental home, requesting a settlement within 10 days for his injuries sustained on March 5, 2011. The letter indicated that Western World had previously offered McDaniel a settlement amount of $35,000, but that McDaniel had submitted a counteroffer for $169,123.40.

¶ 7 On February 27, 2013, McDaniel filed a complaint titled "Personal Injury" against Severs and Western World. McDaniel alleged that he "tripped over a foreign object protruding about four inches (4") above the ground causing plaintiff to fall forward, resulting in multiple injuries," which included a "torn Achilles tendon in right leg; tear in inner left knee; tendon sheath injuries on left wrist; visible, permanent inflammation/disfiguration and scarring on left wrist from surgeries; drastically delayed dental operation injuries; and mental harm, including mental and emotional distress arising from physical limitations and said injuries, and from a loss of consortium, as well as compromised quality of life and loss of enjoyment in social activities ***." McDaniel alleged that his medical expenses exceeded $62,000.

¶ 8 On April 8, 2013, Severs filed a motion to dismiss. Severs argued that McDaniel had failed to allege sufficient facts to plead the essential elements for a claim of negligence. Severs argued that dismissal was proper where McDaniel failed to file separate causes of action against himself and Western World. Additionally, Western World filed a motion to quash service of summons for insufficiency of service of process, arguing that McDaniel had failed to obtain proper service on Western World's registered officer or agent.

¶ 9 On May 31, 2013, Severs requested McDaniel's response to interrogatories. On June 27, 2013, McDaniel filed answers to Severs' interrogatories where he indicated that only three individuals–McGary, Cliff Simon (Simon), and Nicholas Kulas (Kulas)–were present on the day he fell. McDaniel also stated that he returned to the property on March 10, 2011, five days following the fall, to inspect the area where he fell. McDaniel took photographs of the metal stake at that time.

¶ 10 On December 19, 2013, the circuit court heard arguments on Severs' motion to dismiss and Western World's motion to quash service. The court granted both motions but provided McDaniel with 30 days to refile amended complaints against Severs and Western World.[2] McDaniel failed to timely refile an amended complaint against Western World. However, he did file an amended complaint against Severs, alleging that he was lawfully on Severs' property, that Severs owed a duty to those lawfully on his property, and that Severs breached said duty in the following ways:

> "a. failing to maintain the property so as to prevent injury to those lawfully and rightfully upon the property, including Plaintiff, by allowing a hazardous surface and/or other condition to exist on said premises, and in particular the location where Plaintiff fell;

[2]The record on appeal does not contain the transcripts of the hearing or the circuit court's order. However, the court's order granting the motions is referenced in the common law record at C5-C6, as well as in paragraphs 7-8 of McDaniel's January 31, 2014, motion for enlargement of time.

b. failing to maintain the property, including the property's accessible routes and/or walkway areas, so as to prevent injury to those lawfully and rightfully upon the property, including Plaintiff;

c. failing to properly warn Plaintiff of a dangerous condition existing on said property when the Defendant (or his agents or employees) was aware or should have been aware of said conditions;

d. failing to exercise reasonable care to protect those persons, including Plaintiff, from a dangerous condition on the premises, when Defendant realized or should have realized that said dangerous condition involved an unreasonable risk of danger to those lawfully and rightfully on the property; and

e. failing to exercise reasonable care to protect those persons, including Plaintiff, from a dangerous condition on the premise, when Defendant knew or should have known those lawfully and rightfully on the Property would not have been likely to discover or realize the danger or be able to protect themselves from it."

As such, McDaniel alleged that he incurred injuries as a direct and proximate result of Severs' breach. McDaniel requested judgment against Severs in a sum in excess of $50,000.

¶ 11 On January 31, 2014, McDaniel filed a *pro se* motion for enlargement of time to refile his complaint against Western World. McDaniel argued that he "was not able to make contact with attorney Turk prior to the expiration of the 30 day time period that the court gave to the Plaintiff to re-file Plaintiff's Complaint" but believed his attorney would refile the complaint. McDaniel requested an additional 30 days to refile an amended

complaint against Western World. Based on the record, it does not appear that the circuit court ruled on this specific motion.

¶ 12 Milton McDaniel: On December 19, 2014, a discovery deposition of McDaniel was taken. The following facts were adduced. McDaniel testified that he was driving his vehicle when he stopped at Severs' property to talk with McGary, a tenant residing in Severs' first floor unit, and Simon, a longtime acquaintance. McDaniel stated that Delmore was not present when he fell. The following discussion occurred:

> "Q: Okay. Sir, Mr. Keith Delmore, was he present at the time of the accident?
>
> A: No.
>
> * * *
>
> A: Oh, now, and–and my only–um, my only thing I can say is that unless it was Mr. Delmore Mr. McGarry [*sic*] was talking to instead of Mr. Simon. They're both about the same height and they look alike. They're both African Americans. But, um, I'm almost sure–I–I don't know if–if Mr.–I have not talked to Mr. Delmore."

¶ 13 McDaniel testified that after he exited his vehicle in the driveway, he "got maybe five steps into the grass, and that was it." McDaniel indicated that McGary broke his fall, but he was unsure whether or not any portion of his body struck the ground. McDaniel returned to his vehicle, left the premises without further communication, and immediately drove home. McDaniel was in pain and believed he had pulled his groin or suffered a

blood clot. It is undisputed that McDaniel was unaware of what caused him to fall until he returned to Severs' property at a later date. The following colloquy occurred:

"Q: Okay. So on that day you had no idea why you fell and you couldn't say whether it was a condition on the property or this blood clot, correct?

A: That's correct.

Q: All right. Since that time it sounds like you have an opinion that some condition in the property caused or contributed to your fall, correct?

A: That's correct."

Following a negative screening for a blood clot, McDaniel returned to Severs' property to inspect the grassy area where he fell. When asked by counsel what he believed caused his fall, he stated that he located a "small piece of metal sticking up in the grass" that "my foot would have caught *** and that's what caused my trip." He indicated that he was unable to enjoy the same activities as before, such as running and playing basketball, and that he had limited strength in his left hand.

¶ 14 Lyndro McGary: On September 1, 2015, a discovery deposition of McGary was taken. The following facts were adduced. McGary testified that he was a tenant in Severs' first floor unit, and that Delmore was present when McDaniel fell because Severs had hired him to perform maintenance on the home. McGary stated that he was standing around his porch area when McDaniel pulled into the driveway, exited his vehicle, and fell. McGary testified that he "kind of ran and kind of caught [McDaniel] *** but he stumbled. He might have been maybe two feet, three feet away from me." McGary stated that he made an effort to break McDaniel's fall but "he was on the ground. *** I

just had a little bit of the upper part of his body." McGary believed that Kulas was working on his vehicle in the driveway when McDaniel fell, but could not say with certainty.

¶ 15 McGary further testified that he was unsure how McDaniel tripped but that he was in pain and noticeably upset following the fall. He indicated that prior to McDaniel's fall he had never seen the metal stake in the yard due to an overgrowth of grass. However, following the incident, McGary confirmed that he saw a metal stake in the same vicinity where McDaniel fell, and that his girlfriend was present when an insurance agent from Western World and Severs' property maintenance man pulled out a metal stake in that same area. Moreover, having lived in the rental home for 20 plus years, McGary testified to the existence and use of metal stakes in the yard as parking block apparatuses in past years.

¶ 16 Keith Delmore: On February 4, 2016, a discovery deposition of Delmore was taken. The following facts were adduced. Delmore testified that he was performing maintenance in McGary's bathroom on the date of McDaniel's fall. Delmore indicated that as soon as McDaniel arrived, he saw him exit his vehicle and then "fall down to the ground and holler" on the gravel portion of the driveway. Delmore was approximately six feet from McDaniel when he fell, and he testified that neither he nor McGary broke his fall. Delmore stated that after McDaniel fell, he stood up on his own, walked to his truck, and left the premises. Following McDaniel's departure, Delmore testified that he and McGary walked over to the area where McDaniel fell and both noticed a piece of metal in that vicinity. Additionally, Delmore testified that he did not draft the March 28,

201l, witness statement, although he signed it, because he was not in agreement with the fact that McGary caught McDaniel as he fell.

¶ 17 On November 19, 2015, Severs filed a motion for summary judgment and accompanying memorandum in support of summary judgment. Severs argued that McDaniel failed to prove that there was a hazard on his property, and that even if a hazard did exist, McDaniel had failed to establish that a hazard was the proximate cause of his fall. In response, McDaniel argued that Severs failed to take into consideration his testimony and Delmore's witness statement confirming "that he was present when [McDaniel] tripped over the metal stake in the yard." Severs then filed a motion in response arguing that McDaniel lacked evidence to support a causal connection, but "assumes it was piece of metal on defendant's property arguing that this metal must have been the reason for this fall, otherwise he would not have fallen."

¶ 18 On March 10, 2016, the circuit court granted Severs' motion for summary judgment. The court determined that McDaniel's case was based on pure speculation and there was not sufficient evidence to overcome summary judgment. The court stated the following:

> "Neither Plaintiff nor any witness actually observed plaintiff fall on or near the stake. The fact that the stake was found in the yard the following day is not enough to defeat summary judgment. Even the witness who saw the Plaintiff fall, could not state why the plaintiff fell."

The court concluded that McDaniel had failed to establish the cause of his injury. On April 8, 2016, McDaniel filed a motion to reconsider arguing that there remained issues

of material fact and law which precluded an entry of summary judgment. On April 26, 2016, the court denied McDaniel's motion to reconsider. McDaniel filed a timely notice of appeal.

¶ 19 On appeal, McDaniel contends that a genuine issue of material fact exists as to whether the metal stake protruding from the ground caused his fall. Severs responds by asserting that while McDaniel established the possibility that the metal stake may have caused the fall, he failed to establish the probability that it did, given that he was unable to identify why he fell on the day of the occurrence and merely speculated as to what caused him to fall as a result.

¶ 20 ANALYSIS

¶ 21 Summary judgment is proper when the pleadings, depositions, and affidavits on file, construed in the light most favorable to the nonmoving party, establish there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Radtke v. Schal-Bovis, Inc.*, 328 Ill. App. 3d 51, 55 (2002). The purpose of a summary judgment procedure is not to decide the facts but to ascertain whether a factual dispute exists. *Id.* Summary judgment is a drastic means of ending litigation and should be granted only when the right of the moving party is free from doubt. *Bellerive v. Hilton Hotels Corp.*, 245 Ill. App. 3d 933, 935 (1993). "While the court may draw inferences from undisputed facts, the court should not grant a motion for summary judgment unless those facts are susceptible of only a single inference, and, if the facts permit more than one conclusion or inference, including one unfavorable to the moving party, a summary

judgment should be denied." *Id.* at 936. A review of the circuit court's ruling on a motion for summary judgment is *de novo*. *Radtke*, 328 Ill. App. 3d at 55.

¶ 22 In pleading negligence, the plaintiff must establish that defendant owed a duty of care, that defendant breached that duty, and that defendant's breach was the proximate cause of the plaintiff's resulting injuries. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 430 (2006). Proximate cause need not be proven with direct evidence. *Hawkes v. Casino Queen, Inc.*, 336 Ill. App. 3d 994, 1000 (2003). Rather, causation may be established by facts and circumstances that reasonably suggest that the defendant's negligence produced the plaintiff's injury. *Id.* Proximate cause can only be established when there is reasonable certainty that defendant's acts caused the injury. *Vance v. Lucky Stores, Inc.*, 134 Ill. App. 3d 166, 168 (1985). Although a plaintiff need not prove his case at the summary judgment stage of the proceedings, if he fails to present sufficient evidentiary facts to support the elements of his cause of action, including the proximate cause element, then summary judgment in favor of the defendant is appropriate. *Nowak v. Coghill*, 296 Ill. App. 3d 886, 895 (1998).

¶ 23 While facts can be established with circumstantial evidence, a fact cannot be established by circumstantial evidence unless the circumstances are of such a nature and so related to each other that it is the only probable, not merely possible, conclusion that can be drawn. *Wiegman v. Hitch-Inn Post of Libertyville, Inc.*, 308 Ill. App. 3d 789, 796 (1999). Circumstantial evidence is the proof of facts and circumstances from which a jury may infer other connected facts that usually and reasonably follow. *Barker v. Eagle Food Centers, Inc.*, 261 Ill. App. 3d 1068, 1072 (1994). The inquiry here is whether

McDaniel presented sufficient circumstantial evidence to raise a genuine issue of material fact as to whether the metal stake caused his fall.

¶ 24 Here, we find the evidence sufficient to create an issue of fact concerning proximate cause. The circumstantial evidence presented by McDaniel is witness testimony presented by Delmore and McGary. In particular, this includes Delmore's deposition testimony that he saw McDaniel fall and then found a metal stake in the same area where he fell, combined with McGary's testimony that he, too, saw McDaniel fall and then noticed the metal stake in the same vicinity where McDaniel had traversed after he exited his vehicle.

¶ 25 Severs cites several cases to support his claim that summary judgment is appropriate, arguing that McDaniel was unaware of what caused him to fall on the date of the incident. However, in each of these cases, unlike here, plaintiff could not point to an identifiable defect to support a causal connection between the occurrence and defendants' breach. See *Vance*, 134 Ill. App. 3d at 167 (neither plaintiff nor any witness knew what caused her to fall and the substance near plaintiff was undisturbed following the fall, as it was not smeared and did not contain track marks, which would likely indicate contact); *Kimbrough v. Jewel Cos.*, 92 Ill. App. 3d 813, 817-18 (1981) (plaintiff saw a substance that looked like grease on the store's floor but "did not know whether it was grease, what kind it was, whether it was slippery, and most importantly, whether she had stepped on it," and none of the witnesses knew how she fell); *Monaghan v. DiPaulo Construction Co.*, 140 Ill. App. 3d 921, 924 (1986) (plaintiff had no memory of the motorcycle accident, and the only witness to the incident failed to see the motorcycle strike anything

to precipitate the accident); *Koukoulomatis v. Disco Wheels, Inc.*, 127 Ill. App. 3d 95, 101 (1984) (plaintiff could only surmise that the carpet "[m]ust have gone up a little bit that I tripped over it"; she had not seen or felt anything wrong with the carpet; and no evidence of a bulge in the carpet existed); *Barker*, 261 Ill. App. 3d at 1070 (neither plaintiff nor witness noticed a wet floor before or after fall, and plaintiff testified that she did not notice whether her clothing was wet after she fell on what she claimed was a wet floor); *Brett v. F.W. Woolworth Co.*, 8 Ill. App. 3d 334, 336-37 (1972) (plaintiff did not see or feel what caused the fall; no witnesses were present; and no identifiable defect was present in rug); *Pedersen v. Joliet Park District*, 136 Ill. App. 3d 172, 176 (1985) (court was not persuaded where plaintiff attempted to create an issue of fact by stating in his deposition that floor was not dusty and slippery on day of fall and then contradicted himself in later affidavit).

¶ 26 More on point is *Radtke v. Schal-Bovis*, in which the court found that while plaintiff was unaware of what caused her to fall, the circumstantial evidence was sufficient to preclude summary judgment. 328 Ill. App. 3d at 55. In *Radtke*, plaintiff was initially unaware of the cause of her fall when she tripped and fell while walking on scaffolding at a work construction site. *Id.* at 51. Two witnesses in relatively close proximity testified that "while they did not see plaintiff's foot make contact with the jack handle, they saw her fall and that nothing else could have caused the fall," given that no other trip hazards were in plaintiff's path. *Id.* at 56. The court determined that the witnesses' testimony provided circumstantial evidence that not only was a jack handle in

the walkway immediately after plaintiff fell, but that the presence of jack handles on the scaffolding was a problem throughout the construction site. *Id.* at 57.

¶ 27 The distinction we find in each of the cases cited by Severs, unlike in the case at bar, is a lack of an identifiable defect. Although McDaniel could not state what caused him to fall on the day he fell, similar to *Radtke,* circumstantial evidence demonstrates the existence of a tripping hazard in the area he traversed before he fell. Although neither McGary nor Delmore saw McDaniel's foot make actual contact with the metal stake, similar to *Radtke,* their testimonies confirm that they saw him fall and then observed a metal object in the area where he fell on the date of the incident–an important fact that the circuit court's order overlooked. Assuming we do not consider Delmore's testimony, given McDaniel's contradiction regarding Delmore's presence on the date of the incident, McGary's testimony, alone, permits an inference that reasonably suggests that a metal stake was in McDaniel's walkway. This determination is supported by McGary's testimony regarding the presence and use of metal stakes as parking block apparatuses in Severs' yard; his knowledge of the location of McDaniel's fall, given his efforts to catch him; and his observation of a metal stake in the same vicinity where he saw McDaniel fall.

¶ 28 Moreover, McDaniel testified that he eliminated another possible conclusion–a potential blood clot–before he returned to Severs' property and discovered a defect, a metal stake, which was positioned in the path he had traversed after he exited his vehicle. Although it is undisputed that McDaniel was initially unaware of what caused him to fall, testimony concerning the location of McDaniel's fall, coupled with observations of a

metal stake in Severs' yard in the area where he traversed before he fell, permit a reasonable inference that a metal stake caused his fall. This is enough to avoid summary judgment. Therefore, we conclude that the motion for summary judgment should not have been granted where a genuine issue of material fact exists.

¶ 29 CONCLUSION

¶ 30 As such, we find that an issue of fact exists concerning proximate cause. We reverse the circuit court's order and remand the cause for further proceedings.

¶ 31 Reversed; cause remanded.