2017 IL App (2d) 170241-U
No. 2-17-0241
Order filed December 19, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

STEVEN HICKS,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 12-L-0388
	)	
WIESE USA, INC., and WIESE, INC.,	)	Honorable
	)	James R. Murphy,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted summary judgment in defendant's favor.

¶ 2 I. BACKGROUND

¶ 3 On October 1, 2012, plaintiff, Steven Hicks, filed an amended complaint alleging that, in May 2011, he was employed as a welder for Caterpillar, Inc., at its Aurora plant. Plaintiff alleged that he was working on a stand-up truck (also referred to as a fork cart) when one of its hydraulic tanks fell, causing the truck to stop abruptly and causing him injury. He alleged that defendant, Wiese USA, Inc., was engaged by Caterpillar to provide service, maintenance, and repairs of certain equipment, including the type of truck he had used, and that it had a duty to

undertake those responsibilities in a safe and careful manner.[1] As such, plaintiff alleged that defendant committed the following careless and negligent acts or omissions:

"a. Failed to repair the fork cart Plaintiff was required to use to fulfill his work duties;

b. Failed to remove the fork cart from service when Defendant knew, or should have known, the cart could malfunction during use;

c. Failed to warn Plaintiff and others like him that the hydraulic tank for the fork cart was not properly serviced; and

d. Failed to properly and adequately service the hydraulic tank for the fork cart."

Plaintiff concluded that the aforementioned acts or omissions directly and proximately caused his injuries.

¶ 4 On February 25, 2014, defendant moved for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2012)), arguing that there were no genuine issues of material fact, and that there existed insufficient evidence to support plaintiff's claims that defendant owed plaintiff a duty, that it breached a duty, or that a breach of

[1] Plaintiff initially sued two defendants, Wiese USA, Inc., and Wiese, Inc. Only Wiese USA, Inc., participated in the litigation, and the court's judgment was entered only as to it. Accordingly, in 2015, this court determined that plaintiff's initial appeal was premature, as the claim against Wiese, Inc., remained pending. *Hicks v. Wiese USA, Inc.*, 2015 IL App (2d) 140514-U. In March 2017, however, plaintiff moved the trial court to voluntarily dismiss Wiese, Inc., as a defendant, and the court granted the motion. As no claims against any parties remain pending below, our jurisdiction over plaintiff's instant appeal is now proper.

duty proximately caused plaintiff's alleged injury. The evidence presented at summary judgment included the following.

¶ 5 At his deposition, plaintiff testified that he had worked for Caterpillar for 24 years. On May 27, 2011, plaintiff was working at Caterpillar's Aurora plant. Plaintiff's job description was "base frame tack," which involved tack welding, *i.e.*, putting together two tracks and a car body to form a base frame for an excavator. Plaintiff worked in building G, on line number 2613. His direct supervisor was Brandon Krueger. Plaintiff's shift that day commenced at 7:30 a.m., and he was the only day-shift employee working in his section. Between 9:30 and 11 a.m., plaintiff retrieved a stand-up fork truck and drove it to his work station. When positioning the stand-up truck to lift part of a track, the truck crossed without incident tracks (similar to a trolley or rail tracks that are imbedded in the floor) in a forward motion. However, when plaintiff was reversing the truck over a track, it stopped abruptly. "The cylinder that was broke wedged itself in those tracks causing me to come to a very abrupt stop and threw me off." Plaintiff was holding onto a handle with one hand and tried to catch himself, but his body twisted and he was thrown off the back of the truck, suffering injury to his right shoulder.

¶ 6 According to plaintiff, defendant was located in its own building on Caterpillar's property (not in building G). Plaintiff did not know who (*i.e.*, defendant or Caterpillar) owned the stand-up truck he was driving. He did not know the number of the truck he was driving, but he assumed that defendant would know that information. Plaintiff did not know whether defendant was obliged to service the type of truck he was driving, or whether it was tasked with maintaining or servicing hydraulic cylinders on stand-up trucks. When asked the basis for his complaint allegation that defendant failed to properly service the hydraulic tank, plaintiff answered that he did not know. Plaintiff was familiar with defendant's responsibilities as

including changing batteries, keeping trucks in working order, and fixing trucks if there was a problem. Plaintiff did not have any familiarity with the service history of the stand-up truck that he used at the time of the accident.

¶ 7 Plaintiff agreed that he wrote in a report that, prior to the accident, defendant had been notified that the truck had an oil leak, but that it did not tag-out the machine (*i.e.*, a manner of signifying that the machine should not be used). However, plaintiff did not know whether Caterpillar or defendant was responsible for tagging-out machinery when repairs were necessary. Plaintiff also did not know who had previously "called in" the truck. When asked where he received the information that, before the incident, defendant had been notified of a leak, plaintiff explained that, immediately after the accident, he spoke with Krueger about what had happened. He and Krueger looked below the truck and saw the cylinder wedged in the track. Krueger telephoned defendant. Plaintiff overheard the individual who answered the phone ask Krueger, "why in the hell was your man on the truck, it had been called in and it should have been tagged out inoperable." Plaintiff had not seen any oil leaking from the truck before the accident, but, afterwards, he saw droplets of oil running in a trail from the pickup location to where the incident occurred. He did not know what happened to the stand-up truck after the incident, but he assumed that defendant came to retrieve it because, when he returned from his lunch break, it was gone.

¶ 8 Krueger testified that, on May 27, 2011, plaintiff notified him about the incident. Krueger climbed onto the truck and maneuvered it, finding that the truck would reverse about one foot before coming to a sharp stop. Krueger noticed a small, approximately six-inch puddle of oil had leaked from the truck's hydraulic cylinder. Krueger had never before examined or repaired cylinders on stand-up trucks, nor did he know the process for repairing a cylinder or

hydraulic system on a stand-up truck. Krueger noticed, however, that the cylinder was sitting too low because "that's what was catching when he backed up. It was like a pin or something came out. It wasn't resting in the proper place." He testified that the "pin wasn't where it should be. As to why it wasn't, I don't know." Krueger did not, however, in his note made directly after the incident, reference the cylinder. Krueger testified that anyone could put a hold tag or do-not-use tag on a vehicle. "So that nobody else would hop on it and receive injury," Krueger tagged-out the truck plaintiff had used by putting a piece of masking tape across the controls and writing on it that the truck should not be operated.

¶ 9 Krueger testified that service requests could be made by computer or by phone, in which case defendant would help create the ticket. After the accident, Krueger called defendant and reported to "who[m]ever answered the phone" the vehicle number, pole location (a reference to location within the building), and description of what was wrong, mentioning that the cylinder seemed low. Krueger did not have the phone on a speaker setting. He did not recall plaintiff being present for the call. Someone standing near him probably would not have heard the conversation. When asked whether defendant responded that the machine had previously been called in and should have been tagged out, Krueger replied, "I don't remember anything of that nature."

¶ 10 Krueger did not recall the vehicle number. He testified that, to find the exact vehicle number of the truck that was involved in the accident, he "would recommend getting ahold of [defendant] and having them pull up all their – if they have records of what they work on each day through work order tickets. *** [T]hey should have some type of documentation as to what they did to repair maintenance[-]schedule[-]wise." Krueger testified that one of defendant's employees eventually returned the truck and told him it was ready for use. Krueger agreed that a

form plaintiff filled out stated that, on the date of his injury, the truck he was using had been reported to defendant, earlier in the shift, as experiencing an oil leak. When asked where that information came from, Krueger replied that, "I believe we heard that from people in checkout [*i.e.*, where plaintiff had initially picked up the truck] after the injury." Krueger remembered one of the people in the checkout area saying, "yeah, it had a leak[,]" but that comment was made after the accident.

¶ 11 Ryan Hess testified that he was Krueger's supervisor. Hess testified that there were two methods for reporting to defendant a maintenance request: computer or phone. If a phone call was made, the employee (plaintiff) would not be the person to make the call; rather, the section manager (Krueger) would make the call. Hess was asked whether it was his understanding that, if a phone call was made to defendant regarding the need for maintenance, defendant would create a document ticket or other record reflecting the information in that phone call. Hess replied, "I can't guarantee that, but likely." Hess further testified that, when a repair required that a vehicle be removed from the section floor, his employees would not move the vehicle; rather, defendant's employees would come to the section to remove it. Hess agreed that it was possible that, if someone called in a problem with a stand-up truck, there might be no formal documentation of that call. He further agreed that, although there is a documentation process, the typical procedures were not always followed.

¶ 12 Colonel Eiten testified that he works for defendant as a fleet manager, where he operates defendant's repair shop at Caterpillar. Defendant has three shifts of technicians that service daily Caterpillar's material-handling equipment, including forklifts and other lifting devices, that require repairs, have broken down, or require preventative maintenance. If a repair is required, defendant's technicians remove the machine from the Caterpillar plant and bring it to the shop.

Eiten was aware that plaintiff's accident occurred while operating a low-lift platform truck that would have been subject to a regularly-scheduled, factory-specified maintenance program. Technicians could plug a computer into the vehicle to obtain diagnostic information for that vehicle, but repair history was kept elsewhere. If there is a problem with a machine, Caterpillar operators can use a computerized ticket system or telephone call to request a repair. The operator must provide defendant with certain information. "First and foremost, we don't accept repair tickets or requests without a vehicle number, building, and location." As to who creates a work ticket when a repair is requested by phone, Eiten explained, "If the employee didn't do his job and make the ticket [via computer], which is required by Caterpillar, then our people will put that ticket in [the computer] using the phone call." Even if there is a phone request, Eiten would expect the Caterpillar employee to type the request into the system so there would be a record for both defendant and Caterpillar. However, there are occasions where that does not happen and defendant types in the information.

¶ 13 Defendant monitors the computer system around every 30 minutes for computer-submitted repair requests. There is no established time frame by which defendant's technicians inspect a machine after a ticket is entered into the system; rather, repairs are done in order of priority based on the type of machine at issue. The truck plaintiff was operating is considered a medium priority. Defendant charges Caterpillar for repairs and, so, for each repair ticket Caterpillar creates, defendant creates a corresponding work order and invoice. Every machine has a vehicle identification number on it, so, any time a specific vehicle is serviced or maintained, a work order and invoice for that vehicle is generated and kept in defendant's system "forever." Eiten was asked whether he had looked in the computer system to find any records related to the machine plaintiff claimed he was using when he was injured. Eiten explained that,

he could not look up anything without a vehicle identification number and that "the whole Caterpillar system revolves around that vehicle number." The vehicle identification number is "key" to looking up and determining whether and when safety checks have been performed on a vehicle. Here, neither plaintiff nor any witnesses had identified the vehicle identification number. Eiten further testified that he did not believe that the industry applied lockout procedures to the type of truck plaintiff was using. He testified that, instead of lockout, when there is an incident, Caterpillar requires that security be called and then security puts a safety tag on the machine that will not let anybody operate that truck until defendant does a complete analysis of it. "[T]hat did not happen."

¶ 14 On April 24, 2014, after hearing argument, the trial court granted defendant's summary-judgment motion. The court agreed that plaintiff failed to produce any evidence reflecting that defendant had any prior knowledge that the truck plaintiff used had a hydraulic cylinder needing repair. Plaintiff responded that such evidence could be found in the statement that he overheard (*i.e.*, that the truck had been called in and it should have been tagged out as inoperable). However, the court found that, even if it admitted that statement at trial under a hearsay exception, evidence did not exist that defendant knew or should have known about the problem that caused the incident. Therefore, even with the statement, there was no evidence, other than defendant's general duty to repair and maintain all of Caterpillar's machines, that defendant owed a specific duty to plaintiff. The court did not find the statement sufficient to create a genuine issue of material fact on duty, breach of duty, or proximate cause, where it did not "zero in on time or notice or what the nature of the notice was or what the nature of the tagging was that should have been done or the removal or why. We just are left with still questions why." The court also explained:

"[B]eyond the statement, *** there is no other evidence other than the general duty to service the vehicles that [defendant] has. And defendant points out that there is no duty to plaintiff alleged as far as a duty to warn plaintiff. And other than this possibly hearsay statement, there has been no evidence developed of a breach of the general duty to service the vehicles, no proximate cause or connection of defendant's breach of some duty to repair or maintain these vehicles or take them out of service or warn plaintiff other than speculation as to since it was their duty to repair things and this cylinder was falling off, it must have been something they did. I think the plaintiff has more of an obligation to come up with something than what is almost equivalent to a *res ipsa loquitur* theory[.]

So on this there's just speculation as to what the cause was. The pin could have fallen out from a repair that was made, maybe. We don't have any evidence of that. The pin or the cylinder could have fallen from normal use. The pin or the cylinder could have fallen as a result of the impact or the abrupt stop. We're just speculating as to some bad repair by defendant or lack of repair that they knew they had [to make].

So other than this hearsay statement, there is no notice, no knowledge by defendant of any problem with this until after the accident, and that's when it's called in."

¶ 15 Plaintiff appeals.

¶ 16 II. ANALYSIS

¶ 17 Summary judgment is appropriate when the pleadings, depositions, and admissions on file, together with the affidavits, show an absence of any genuine issue of material fact and entitlement to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014); *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 305 (2005). The

trial court must strictly construe all evidence against the moving party and liberally in favor of the non-moving party. *Griffin v. Cohen*, 2015 IL App (5th) 140408, ¶ 20. If any material fact is in dispute, or if differing inferences reasonably arise from the undisputed material facts, then summary judgment is not proper. *Id.* Although the non-movant need not prove his or her case at the summary-judgment stage, he or she must come forth with *some evidence* that would arguably entitle recovery at trial. *Ross v. Dae Julie, Inc.*, 341 Ill. App. 3d 1065, 1069 (2003). Summary judgment is appropriate when the motion establishes that the plaintiff cannot prove a necessary element of the cause of action. See, *e.g.*, *Webber v. Armstrong World Industries, Inc.*, 235 Ill. App. 3d 790, 796 (1992) ("[A] defendant can obtain a summary judgment by establishing plaintiff cannot prove a necessary element of plaintiff's case"). We review *de novo* a trial court's summary-judgment decision. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 18 We note that, as the trial court alluded, plaintiff's complaint alleged a claim for negligence, but not under a *res ipsa loquitur* theory, whereby the accident itself would be proof of want of care. See, *e.g.*, *Heastie v. Roberts*, 226 Ill. 2d 515, 531 (2007).[2] Accordingly, to survive summary judgment, plaintiff must identify some evidence from which a factfinder could find satisfied all elements of a negligence cause of action; specifically, that: (1) defendant owed plaintiff a duty; (2) defendant breached that duty; and (3) defendant's breach proximately caused

[2] A plaintiff seeking to rely on the *res ipsa* doctrine must plead and prove that he or she was injured: (1) in an occurrence that ordinarily does not happen in the absence of negligence; and (2) by an agency or instrumentality within the defendant's exclusive control. *Heastie*, 226 Ill. 2d at 531-32.

plaintiff's damages. See, *e.g.*, *Hills v. Bridgeview Little League Association*, 195 Ill. 2d 210, 228 (2001).

¶ 19 Here, the court found no evidence to support duty, breach of duty, or proximate cause. On appeal, the parties' briefs focus on the elements of duty and proximate cause. In our view, even if we assume that defendant owed plaintiff a duty, we simply find no evidence creating a genuine issue of material fact as to whether defendant breached that duty. See, *e.g.*, *In re Estate of Case*, 2016 IL App (2d) 151147, ¶ 38 (summary judgment appropriate where the record contained insufficient evidence for a jury to find that the defendant breached a duty). Viewed in plaintiff's favor, there is no evidence reflecting that defendant failed to perform any specific task that plaintiff's complaint alleges defendant was duty-bound to perform. For example, no evidence reflects that, before the accident, defendant failed to maintain or ever improperly repaired the lift truck. Notably, this is apparently because the exact truck involved in the incident has not been identified and, therefore, no maintenance records that theoretically could reflect the work history for that truck exist in the record. Plaintiff asserts that the maintenance records are in defendant's possession and, therefore, that it should not be, essentially, rewarded for failing to locate records for the truck at issue. However, plaintiff does not assert any intentional malfeasance on defendant's behalf with respect to record keeping or discovery and, according to Eiten, there are approximately 144 lift trucks like the one plaintiff used at the facility. Eiten testified that the entire Caterpillar recordkeeping system is centered on the vehicle-identification number, which is "key" to searching for records. Further, according to Eiten, responsibility for identifying the vehicle fell upon *Caterpillar* employees and, here, no witness could provide the vehicle identification number for the truck. We acknowledge that Krueger testified that, when he telephoned defendant, he provided the vehicle identification

number. However, Eiten testified that, even when a phone call to defendant was made, he would still expect the Caterpillar employee to type the information into the system to create a record. Although, on *occasion*, defendant's employees would type up the information in response to a call if Caterpillar's employees failed to do so, apparently no such document has been recovered here. Consistent with Eiten, Hess testified that he could not guarantee that defendant's employees created a document reflecting the repair-request information conveyed in a telephone call, and he agreed that it was possible that, if someone called in a problem with a stand-up truck, there may be no formal documentation of that. Hess further agreed that, although there is a process for documentation, the typical procedures were not always followed.

¶ 20 Plaintiff alleges that the vehicle identification number does not matter, essentially because defendant exclusively performed maintenance work on *all* vehicles. However, this sounds more akin to a *res ipsa* theory, suggesting that defendant is automatically liable for any injury caused by any equipment failure. Again, plaintiff did not present a *res ipsa* theory of liability below and cannot, due to forfeiture, do so here. See, *e.g.*, *In re Estate of Chaney*, 2013 IL App (3d) 120565, ¶ 8 ("It is well-settled law in Illinois that issues, theories, or arguments not raised in the trial court are forfeited and may not be raised for the first time on appeal"). Instead, plaintiff must produce some evidence to support his own complaint allegations that defendant failed to repair the truck or adequately service the hydraulic tank. As such, even viewed in plaintiff's favor, there exists no *evidence* that, prior to the accident, defendant failed to properly maintain or repair the lift-truck that plaintiff used.

¶ 21 Similarly, construing the evidence in his favor, there exists insufficient evidence to support plaintiff's allegations that defendant breached its duty by failing to: (1) remove the truck from service, when it knew the truck could malfunction; and (2) warn him that the hydraulic tank

was not properly serviced. As he did below, to establish breach (and proximate cause) under these theories, plaintiff relies heavily upon the statement that he overheard made by one of defendant's unidentified employees (*i.e.*, that the truck had been called in and it should have been tagged out as inoperable). As the evidence must be construed in plaintiff's favor, we set aside conflicting testimony on that point (*i.e.*, Krueger, who made the call, remembered no such statement). However, even if that statement reflects that a call for repair was made, the evidence reflects that the call to defendant was made *earlier in the shift*, and concerned an oil leak, not the hydraulic cylinder. Thus, although the evidence supports plaintiff's assertion that defendant removed machines when they needed repair, the call reporting an oil leak was allegedly was made "earlier in the shift," which commenced at 7:30 a.m., and the accident happened before 11 a.m. Plaintiff does not point to any evidence suggesting that defendant was required to remove a vehicle called in for repair within a specific time frame, such that it breached a duty by not responding more quickly here. To the contrary, the only evidence presented on this point reflects that there was *no* specific time frame by which defendant was required to respond to repair requests and that the requests were attended to in order of priority, based on the type of machine involved. Eiten testified that responding to service calls concerning a vehicle such as the one plaintiff used would have been a "medium priority." Thus, there is nothing in the record to support plaintiff's assertion that defendant was duty-bound to remove the truck in the few hours between the alleged call and the accident.

¶ 22 As to the alleged failure to warn, we again note that, even if we assume that some (also unidentified) person called defendant earlier that day about an oil leak, Eiten testified that it was *Caterpillar's* responsibility to call security to have the machine tagged out when a machine needs repair or is inoperable, a procedure that *Caterpillar* apparently did not follow. Plaintiff

testified that he did not know who was responsible for tagging out the equipment. Krueger testified that anyone could tag out a machine. Defendant's position that it is Caterpillar's responsibility to do so is supported by the evidence that, after the accident, Krueger marked the machine as inoperable so that no one else would use it. Thus, according to the evidence, the statement that plaintiff allegedly overheard actually supports defendant's position that Caterpillar failed to lock out the machine after calling in for a repair. In sum, viewed in plaintiff's favor, the evidence is simply insufficient to find breach of duty.

¶ 23 As plaintiff's inability to prove breach of duty, an essential element of his cause of action, is sufficient to render summary judgment proper, we need not analyze the other elements the court found lacking. Nevertheless, we note that the foregoing analysis essentially applies with equal force to the proximate-cause element. Liability against a defendant cannot be predicated on speculation, surmise, or conjecture. *Berke v. Manilow*, 2016 IL App (1st) 150397, ¶ 34. The plaintiff bears the burden of showing, affirmatively and positively, that the *defendant's* alleged negligence *caused* the injuries for which the plaintiff seeks to recover. *Id.* Generally, proximate cause presents a question of fact; however, it becomes a question of law when the facts alleged indicate that a party would never be entitled to recover. *Id.* at ¶ 32. Proximate cause consists of two requirements: (1) a defendant's conduct must be a cause in fact of the plaintiff's injury, such that the injury would not have occurred absent the defendant's conduct; and (2) the conduct must be a "legal cause" of the injury, which involves an assessment of foreseeability and consideration whether the injury is of the type that a reasonable person would foresee as a likely result of his or her conduct. *Id.* at ¶ 33.

¶ 24 A plaintiff may establish proximate cause through circumstantial evidence; 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." (Emphasis added). *Id.* at ¶ 35. "Indeed, where the proven facts demonstrate that the nonexistence of the fact to be inferred appears to be *just as probable* as its existence, then the conclusion is a matter of speculation, conjecture, and guess and the trier of fact cannot be permitted to make that inference." (Emphasis added.) *Id.* Summary judgment is proper if a plaintiff fails to establish the element of proximate cause. *Id.* at ¶ 32.

¶ 25 Here, the evidence, viewed in plaintiff's favor, does not reflect either that the injury would not have occurred absent defendant's conduct or that plaintiff's injury is of the type that defendant could have reasonably foreseen as a likely result of its conduct. Again, there is no evidence supporting the existence of defendant's alleged specific "conduct" (*e.g.*, a failure to repair, failure to maintain, failure to warn, etc.), let alone that it was foreseeable that its conduct would likely cause plaintiff's injury. Plaintiff takes issue with the trial court's comments that the pin *might* have fallen, causing the hydraulic cylinder to drop, from normal use or during the incident itself. However, we read the court's comments as relating to the insufficiency of evidence reflecting circumstantially that the *only probable* reason for the cylinder dropping and plaintiff's resulting injury was a breach of duty by defendant. There exists no evidence, other than the fact that defendant maintained and repaired vehicles, to establish that defendant's acts, or failure to act, caused the accident, as opposed to anything else. As such, defendant's liability would improperly be left up to speculation, conjecture, and guess. As to defendant's alleged failure to remove the truck from the premises, the evidence does not support plaintiff's argument that defendant's failure to remove the truck caused his accident. Again, even if defendant was aware, before the accident, of a need for repair, the evidence does not establish that defendant was responsible for tagging-out the machine until it could respond to the repair request, and there

is no evidence reflecting that there existed an established time frame by which removal was required.

¶ 26 In sum, we agree with the trial court that there exist no genuine issues of fact and that summary judgment is proper.

¶ 27 III. CONCLUSION

¶ 28 For the foregoing reasons stated, we affirm the judgment of the circuit court of Kane County.

¶ 29 Affirmed.