

1-09-3477

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DAVID BALL, SPECIAL ADMINISTRATOR OF THE)	Appeal from the
ESTATE OF TINA BALL, Deceased,)	Circuit Court of
)	Cook County.
Plaintiff-Appellant,)	
v.)	
)	No. 05 L10059
TENG & ASSOCIATES, INC., UNITED RENTAL)	
HIGHWAY TECHNOLOGIES, INC., BOWMAN)	
BARRETT & ASSOCIATES, INC.,)	Honorable
)	Jennifer Duncan-Brice,
Defendants-Appellees.)	Judge Presiding.

PRESIDING JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

Held: We affirm the trial court’s grant of the defendants’ motions for summary judgment and hold that the plaintiff has failed to show sufficient facts to establish that the alleged defendants’ negligence was a proximate cause of the accident that caused the death of the plaintiff’s wife’s.

¶ 1 The plaintiff is appealing from the circuit court of Cook County’s grant of summary judgment in favor of three defendants whom plaintiff alleged failed to design, implement, effectuate

and enforce a safe and proper traffic control plan at the highway construction site where his wife was killed while working as a traffic flagger. The plaintiff alleged that the defendants' negligence proximately caused the death of his wife who died after she was hit by a car operated by an intoxicated driver. The plaintiff also appeals the trial court's grant of the defendants' motion to bar two of the plaintiff's witnesses from testifying.

¶ 2 On appeal, the plaintiff raises the following issues: (1) whether the trial court erred in granting the defendants' motions for summary judgment; (2) whether the trial court's grant of the motion to bar the plaintiff's witnesses should be reviewed under a *de novo* standard; and (3) whether the trial court abused its discretion in granting the defendants' motion to bar the plaintiff's witnesses.

¶ 3 For the reasons that follow, we affirm the judgment of the circuit court of Cook County.

¶ 4 **BACKGROUND**

¶ 5 In September 2005, the plaintiff, David Ball (David), initiated this lawsuit in the circuit court of Cook County as the special administrator of the estate of his deceased wife, Tina Ball (Tina). Tina was employed as a traffic flagger by K-Five Construction Company (K-Five) at a roadway resurfacing site located on Interstate 57 in Cook County. On September 15, 2003, at approximately 3:40 p.m., Tina was struck at the construction site by a car driven by Thomas Harris.¹ Harris had a blood alcohol level of approximately 0.17 g/dL at the time of the accident. This level is twice the statutory limit of 0.08 g/dL that prohibits driving while under the influence of alcohol. 625 ILCS 5/11-501 (West 2004). Tina died from the injuries that she sustained in the accident.

¹Harris is a named defendant in the instant lawsuit along with Mardean Cole, the owner of the car Harris was driving. These defendants are not involved in this appeal.

¶ 6 On September 14, 2005, David filed a lawsuit pursuant to the Wrongful Death Act and the Survival Act. 740 ILCS 180/1 (West 2004); 755 ILCS 5/27-6 (West 2004). David named twelve defendants in his lawsuit and he subsequently voluntarily dismissed seven of them. The remaining defendants involved in this appeal are: (1) Teng and Associates, Inc. (Teng), the engineering firm that contracted with the Illinois Department of Transportation (IDOT) to prepare the traffic plans for the project; (2) United Rental Highway Technologies, Inc. (United), the company that subcontracted with K-5 to provide the temporary traffic control warning signs and barricades; and (3) Bowman Barrett and Associates, Inc. (Bowman), the engineering consultant company hired by IDOT to monitor K-5's compliance with the plan specifications. David alleged in his complaint that the three construction defendants were negligent in providing an unsafe working condition which proximately caused the accident.

¶ 7 Each of the three defendants filed separate motions for summary judgment. 735 ILCS 5/2-1005 (West 2004). In their motions, the defendants argued that David did not plead sufficient facts to show that the defendants owed a duty to exercise ordinary care for Tina's safety, that the defendants breached that duty and that the breach was the proximate cause of Tina's injuries and death. The defendants argued that Harris' decision to drive a car while intoxicated was the intervening act and proximate cause of Tina's death. The three defendants also filed a joint motion to bar David's two experts from testifying at trial because: (1) the witnesses lacked qualifications and credentials to render expert opinions; and (2) the witnesses' opinions regarding the accident were based upon speculation and conjecture.

¶ 8 On November 17, 2009, the trial court entered a very detailed and thorough written order

granting the defendants' motions for summary judgment. The trial court concluded that Harris' act of driving the car while intoxicated was the sole proximate cause of Tina's death. The trial court also granted the defendants' joint motion to bar the testimony of David's two witnesses. On December 15, 2009, the trial court entered an order finding that there was no just cause to delay enforcement or appeal of the judgment. Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). David filed a timely notice of appeal on December 16, 2009, and therefore this court has jurisdiction to hear this appeal. Ill. S. Ct. R. 303(a) (eff. May 30, 2008).

¶ 9

ANALYSIS

¶ 10 We first review whether the trial court's grant of summary judgment in favor of the defendants was proper. We use a *de novo* standard for this review. *Jackson v. Graham*, 323 Ill. App. 3d 766, 779, 753 N.E.2d 525, 536 (2001). We examine the record anew and do not give deference to the trial court's decision to determine whether it was correct. *Id.* "Summary judgment is proper when the pleadings, affidavits, depositions and admissions of record, construed strictly against the moving party, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Agolf, LLC v. Village of Arlington Heights*, ___ Ill. App. 3d ___, 946 N.E.2d 1123, 1130 (2011).

¶ 11 In order to prove negligence on the part of a defendant, a plaintiff has to provide facts to establish that: (1) the defendant owed the plaintiff a duty; (2) the defendant breached that duty; and (3) that the breach proximately caused the plaintiff's damages. *Dardeen v. Kuehling*, 213 Ill. 2d 329, 336, 821 N.E.2d 227, 231 (2004). David strenuously argued to the trial court that each of the defendants owed Tina a duty of care because of the role they played in the design and maintenance

of the construction work site where Tina was killed. David's two expert witnesses offered their opinions as to why the defendants owed Tina this duty and how each of the defendants breached it.

¶ 12 Teng was employed by IDOT to prepare the contract plans and special provisions for the project. As part of its responsibilities, Teng prepared plans for the site that contained traffic sign modifications, guard rail and barrier modifications. At the time of the accident, Tina was part of the milling crew that was removing the top layer of the old pavement on the left shoulder of the highway. The left lane and left shoulder of the highway were closed to traffic. Tina's job as a flagger was to help slow traffic to allow the trucks to periodically enter and exit the milling site from live traffic. IDOT engineers devised a specific standard to be used for this situation known as the "TC-18 - Signing For Flagging Operations at Work Zone Openings" (TC-18). Teng included this standard in its plans. Under the TC-18 plan, the work zone is separated from the live lanes of traffic by temporary barricades. A flagger is positioned in the work zone with a control sign 100 feet from the start of the opening directly adjacent to the lanes of live traffic.

¶ 13 At the time of the accident, there were no trucks entering or exiting the milling site and Tina was not performing flagging duties. Tina was standing inside the work zone, two to five feet behind a barricade. Harris entered the highway from a ramp and lost control of his vehicle. Harris' car hit a construction barricade, struck Tina and then came to rest after colliding with a construction truck. Immediately after the accident, Harris told police that he passed a truck/trailer combination vehicle after entering the highway and then swerved to avoid that vehicle because it was very close to him. Harris estimated he was traveling at 50 to 60 miles per hour in the construction zone that had a speed limit of 45 miles per hour.

¶ 14 David alleged that the three construction defendants failed to provide and maintain a safe and proper traffic control plan. David proffered deposition testimony of two alleged experts who suggested alternate methods of traffic control that were contrary to the IDOT-approved TC-18 plan that was the standard for that type of construction site. The experts further surmised that the traffic plan was not properly implemented by the defendants. The experts based their opinions on aerial video and photographs produced after the accident that the experts admitted did not depict the area at the time of the accident. Further, the experts based their opinions on a state trooper's report that only documented a limited crash environment beginning from the point where Harris' car first impacted the barricade. Both of the experts admitted that they could not speculate as to what caused Harris to lose control of his car.

¶ 15 Although we may base our determination of the propriety of trial court's grant of the defendants' motions for summary judgment on any grounds, we will, as the trial court did, focus our analysis on the proximate cause element of David's negligence claims. The determination of proximate cause is generally a question for the trier of fact, but may become a question of law when the facts are "not only undisputed but are also such that there can be no difference in the judgment of reasonable men as to the inferences to be drawn from them." *Mack v. Ford Motor Co.*, 283 Ill. App. 3d 52, 57, 669 N.E.2d 608, 612-13 (1996).

¶ 16 In order for a plaintiff to satisfy the third element of a negligence claim, the plaintiff must provide sufficient facts to establish that the defendants' actions were a proximate cause of the plaintiff's injuries. A proximate cause is one that produced the plaintiff's injury through a natural and continuous chain of events unbroken by any effective intervening cause. *In re Estate of Elfayer*

v. City of Chicago, 325 Ill. App. 3d 1076, 1083, 757 N.E.2d 581, 587 (2001). The proximate cause of an injury is different than a condition, which merely makes an injury possible. *Id.* As stated by the appellate court in the *Elfayer* case:

“If a defendant’s conduct ‘does nothing more than furnish a condition’ and that condition causes injury only because of the subsequent independent act of a third party, the creation of that condition is not a proximate cause of the injury. [Citation.] Instead, the subsequent independent act breaks the causal connection between the original wrong and the injury and becomes the sole proximate cause. [Citation.]” *Id.*

When the issue of proximate cause involves a fact pattern with an intervening cause, the question becomes “whether the first wrongdoer reasonably might have anticipated the intervening efficient cause as a natural and probable result of the first party’s negligence.” *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 257, 720 N.E.2d 1068, 1071 (1999).

¶ 17 It has been recognized in Illinois that the determination of proximate cause describes two distinct requirements: cause in fact and legal cause. *Id.* at 257-58, 720 N.E.2d at 1072 (1999). Cause in fact occurs only if the defendant’s conduct is a material element and substantial factor resulting in the plaintiff’s injury: whereas, legal cause is a question of whether the injury is of a type that a reasonable person would foresee as a likely result of his or her conduct. *Id.*

¶ 18 Applying the tests to the facts in this case, we agree with the trial court that, as a matter of law, Harris’ errant driving was the intervening and sole cause of Tina’s injuries and subsequent

death. Even if we assume that each of the construction defendants owed a duty of care to Tina that they breached, we cannot say that their actions were either the cause in fact or the legal cause of the accident. Their conduct only created the condition under which Harris' independent act caused the accident. David failed to present evidence, construed strictly against the defendants, that would contradict this conclusion.

¶ 19 We agree with the parties that this accident was a senseless tragedy for which a man who decided to drive a vehicle while drunk is now deservedly serving a prison sentence. However, we conclude that the trial court did not err when it granted summary judgment in favor of the construction defendants. In light of our conclusion, we need not address the other issues that David raises in this appeal.

¶ 20 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 21 Affirmed.