

No. 1-10-1742

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
FIRST JUDICIAL DISTRICT

ANTONIO MARTINEZ, as Special Administrator of)
the Estates of Yolanda Martinez-Miranda, Deceased;)
Everardo Miranda, Jr., Deceased; and Baby Miranda,)
Deceased; EVERARDO MIRANDA, SR.;)
ELIZABETH VELASCO, Individually and as Mother)
and Next Friend of KELLY VELASCO;)
and SANDRA MARTINEZ,)
Plaintiffs-Appellants,)

v.)

ILLINOIS STATE TOLL HIGHWAY AUTHORITY;)
CONSOER TOWNSEND ENVIRODYNE)
ENGINEERS, INC.; and WILBUR SMITH)
ASSOCIATES, INC.,)
Defendants-Appellees,)

(Timothy J. Kennedy, Inc., doing business as Kennedy)
Transportation; Kennedy Transportation Services, Inc.;)
Dozier Transportation, Inc.; Nathaniel Dozier; Consoer)
Townsend & Associates, Inc.; Kurdna & Associates,)
Ltd.; and Plus Transportation, Inc.,)
Defendants).)

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY

No. 04 L 12707

HONORABLE
MARY A. MULHERN,
JUDGE PRESIDING.

TESHEANA SIMS,
Plaintiff,

v.

CIRCUIT COURT OF
COOK COUNTY

TIMOTHY J. KENNEDY, INC., doing business as)	
KENNEDY TRANSPORTATION; KENNEDY)	No. 05 L 13419
TRANSPORTATION SERVICES, INC.; DOZIER)	
TRANSPORTATION, INC.; NATHANIEL DOZIER,)	
Individually and as agent of DOZIER)	
TRANSPORTATION, INC.; CONSOER TOWNSEND)	
& ASSOCIATES, INC.; and WILBUR SMITH)	HONORABLE
ASSOCIATES, INC,)	MARY A. MULHERN,
Defendants.)	JUDGE PRESIDING.

JUSTICE STEELE delivered the judgment of the court.
Justices Neville and Murphy concurred in the judgment.

ORDER

HELD: In a personal injury action where a driver lost control of his tractor-trailer truck and crashed into a highway toll plaza structure, killing and injuring people in a car stopped at the plaza, the circuit court did not err in granting summary judgment to the Illinois State Toll Highway Authority and its contractors on the ground that the truck driver's loss of control was the sole proximate cause of the accident.

Plaintiffs, Antonio Martinez, as special administrator of the estates of Yolanda Martinez (deceased), Everardo Miranda, Jr. (deceased) and baby Miranda (deceased); Everardo Miranda, Sr.; Elizabeth Velasco, individually and as mother and next friend of Kelly Velasco, a minor; Victor Velasco; and Sandra Martinez, appeal orders of the circuit court of Cook County granting summary judgment in favor of defendants Illinois State Toll Highway Authority (Tollway), Consoer Townsend Envirodyne Engineers, Inc. (CTE), and Wilbur Smith Associates, Inc. (WSA), in a personal injury action.¹ The circuit court ruled there was no genuine issue of

¹ Defendants Timothy J. Kennedy, Inc., doing business as Kennedy Transportation; Kennedy Transportation Services, Inc.; Dozier Transportation, Inc.; Nathaniel Dozier; Consoer

material fact regarding the legal cause of a vehicle collision at a tollway plaza which killed the decedents and injured Sandra Martinez, Elizabeth and Kelly Velasco. For the following reasons, we agree and affirm the judgment of the circuit court.

BACKGROUND

The record on appeal discloses the following facts. On November 6, 2004, Yolanda Martinez was driving her 2003 Ford Taurus southbound on Interstate 294 in Cook County, Illinois. Yolanda was pregnant. Yolanda's one-year-old son, Everardo Miranda, Jr., was a passenger in the Taurus, as were Elizabeth and Kelly Velasco and Sandra Martinez. While Yolanda's car was stopped in a manual lane at the southbound 82nd Street toll plaza (Plaza 36), a fully loaded tractor-trailer truck driven by Nathaniel Dozier (Dozier) crashed into the toll plaza, entering the lane where the Taurus was stopped and crushing the car. Yolanda, her unborn baby, and her son were killed in the crash; the other passengers were injured.

On November 12, 2004, plaintiffs filed a personal injury against Dozier and Timothy J. Kennedy, Inc., doing business as Kennedy Transportation and Kennedy Transportation Services, Inc. (Kennedy companies), as Dozier's employer or principal. Plaintiffs alleged that Dozier negligently operated the truck at an excessive speed, failed to decrease the speed of the truck,

Townsend & Associates, Inc.; Kurdna & Associates, Ltd.; and Plus Transportation, Inc. are not parties to his appeal. Also, Tesheana Sims, the plaintiff in a related case consolidated by the circuit court, is not a party to this appeal.

failed to maintain control of the truck, operated the truck with a reckless disregard for the safety of others, and failed to properly maintain the truck.

On November 4, 2005, in their second amended complaint, plaintiffs added the Tollway as a defendant. Plaintiffs included claims under the Wrongful Death Act (740 ILCS 180/1 *et seq.* (West 2004)) and the Survival Act (755 ILCS 5/27–6 (West 2004)), for loss of consortium and negligence. Plaintiffs alleged that the Tollway negligently designed Plaza 36, particularly the design and construction of the concrete islands and I-Pass lanes at the plaza.²

On November 23, 2005, Tesheana Sims, the tollbooth operator for the lane where the collision occurred, filed a personal injury suit against Dozier and the Kennedy companies. On February 6, 2006, the Tollway filed counterclaims against Dozier and the Kennedy companies, including a claim for reimbursement for the physical damage to Plaza 36. On February 9, 2006, the circuit court ordered the consolidation of plaintiffs' lawsuit and Sims's lawsuit.

On November 3, 2006, in their third amended complaint, plaintiffs added CTE as a defendant. Plaintiffs' claims were similar to those filed against the Tollway, except that the claims alleged CTE negligently designed changes to Plaza 36 and negligently planned, supervised or managed the construction of the I-Pass lanes there. Plaintiffs also alleged CTE negligently failed to properly inspect the area.

² I-Pass lanes allow drivers to use transponders to pay their tolls electronically without stopping at a manual or automatic toll booth.

On October 26, 2007, in their fourth amended complaint, plaintiffs added WSA as a defendant. Plaintiffs' claims were similar to those filed against CTE, which focused on the design and construction of the I-Pass lanes at Plaza 36.

During discovery, Dozier gave discovery and evidence depositions. Dozier testified that on November 6, 2004, he left a trailer yard in Romeoville, Illinois at approximately 10 a.m., driving a tractor trailer truck loaded with steel intended for delivery in Delaware. Dozier stated he had gone off duty at 9:45 p.m. the night before, but had a full night's rest. Dozier testified he did not feel tired that day. Dozier also stated he did not have a cold, flu, or other ailment that day. Dozier had a bottle of cold medicine (NyQuil) in his truck, but he stated he had not consumed any that morning. According to Dozier, the weather was clear with good visibility. Dozier further stated that his daily logs accurately reflected his driving time that week.

Dozier took Joliet Road to Illinois Route 55. Dozier drove north on Route 55, connecting to southbound Interstate 294. Dozier stated he intended to use lane 8, the I-Pass lane for trucks, at Plaza 36. Dozier testified that he was familiar with the Illinois Tollway, had used truck I-Pass lanes before, was familiar with Plaza 36, and had used lane 8 several times. Dozier further testified that he started in the far right lane of Interstate 294, driving approximately 55 miles per hour on cruise control. Dozier stated he began to slow down to approximately 33 miles per hour as he headed toward the I-Pass lane, knowing the speed limit for the lane was 5 miles per hour.

Dozier testified that he felt phlegm in his throat and began to cough. According to Dozier, "it wasn't a normal cough" and he was getting short on air. Dozier stated that he then reached down for his "spit bottle," which was an empty one-gallon water bottle he filled with an

1-10-1742

inch of bleach to kill germs. Dozier added he normally kept such a bottle handy and had urinated into this bottle the night before. According to Dozier, he unscrewed the cap on the bottle, leaned over to spit into the bottle, was overcome by fumes that smelled like bleach, and passed out behind the wheel. Dozier regained consciousness some time after his truck struck the toll plaza.

Tesheana Sims testified that she was working as the toll collector at lane 6 of Plaza 36 at the time of the accident. Sims did not see the truck at any point prior to feeling an impact. Sims had no firsthand knowledge of what the truck may have done prior to the impact. Sims further testified that she had previously complained to her supervisor about excessive speeds in the truck I-Pass lane.

Illinois state commercial vehicle enforcement officer James Kirkpatrick testified at a deposition that he was called to the scene of the accident on the morning of November 4, 2004. Officer Kirkpatrick's job was investigating commercial vehicle drivers' daily logs to check for falsifications that would allow the driver to spend more time driving than the law allowed. Officer Kirkpatrick compared Dozier's daily logs to receipts from the computerized ComData system and CAT weight scale tickets, which showed where Dozier fueled and weighed his truck during the week before the accident. Officer Kirkpatrick opined Dozier's log book contained falsifications and Dozier likely had less rest and off-duty time than the law allowed.

Officer Kirkpatrick also testified his opinion would change if the records he relied on were inaccurate. Officer Kirkpatrick further testified the State filed charges against Dozier for falsifying his logs. The court directed a verdict for Dozier because the State was unable to prove

its case. According to Officer Kirkpatrick, the assistant State's Attorney said the State could not prove the reliability or accuracy of the time stamps on the ComData receipts.

Gregory Stukel, the Tollway's executive of engineering, submitted an affidavit stating the concrete island and crash block located in front of the toll booth for lane 6 at Plaza 36 was completed on February 23, 1993, and the plaza was opened to the public on April 2, 1993. According to Stukel, later contracts pertaining to Plaza 36 involved the installation of I-Pass equipment, I-Pass only lanes for cars, and a truck/car I-Pass only lane, none of which caused any change to the concrete island or crash block in front of the toll booth for lane 6.

In deposition testimony, Stukel stated the basis of the design of the concrete island, with a tapered edge facing traffic and sloping upward toward the plaza, is to deflect errant vehicles away from the toll booth or a supporting column, and back into the plaza lane. Stukel stated that a block with a flat face is not desirable on a roadway system.

Stukel also testified that he was aware of one other incident where a semi truck struck the Army Trail toll plaza, striking a crash block and collapsing a column for the canopy. Stukel did not know whether anyone was injured or a lawsuit was filed in connection with that incident.

Richard Smith, a senior associate at WSA, submitted an affidavit stating he was a co-author of the 2006 Guidelines Manual of the United States Department of Transportation Federal Highway Administration, titled "State of the Practice and Recommendations on Traffic Control Strategies at Toll Plazas" (2006 Guidelines). Smith also stated he participated and managed numerous studies and projects regarding the operation of toll plazas in the United States and internationally. Smith further stated that in December 1999, WSA was retained by the Tollway

1-10-1742

to provide traffic engineering services. These services included an analysis and evaluation of the need and location for a truck I-Pass lane at Plaza 36.

Moreover, Smith stated WSA evaluated Plaza 36 in 2000, including retaining seven commercial truck drivers with 18-wheel, stone-hauling trucks, to perform "runs" through the right, left and center lanes of the plaza. A technical memorandum attached to Smith's affidavit summarized the results of these tests. The truck drivers preferred the center location of the I-Pass lane because of the presence of toll collection staff on the right side of the plaza, the faster car traffic on the left side of the plaza, and the difficulty of weaving to and from the left of the plaza. The technical memorandum also stated any change in truck operations is potentially dangerous and the center location would require positive enforcement of the 5 miles per hour speed limit. Smith added that locating the truck I-Pass lane at the right of the plaza would restrict access to the far right lane to automobile traffic and that the flashing yellow light signaling the I-Pass lane would be more visible to trucks in the center location.

On June 14, 2000, WSA recommended the center location for the truck I-Pass lane at Plaza 36. Smith further stated in his affidavit that in 1997 through 1999, there were 267 motor vehicle accidents in the southbound approach to Plaza 36. However, in 2002 through 2004, following the location of the truck I-Pass in lane 8, there were only 83 such accidents. At his deposition, Smith opined that the decision to locate the truck I-Pass in lane 8 complied with the standard of care in the transportation engineering profession.

Plaintiffs' group exhibit 3, included in the record on appeal, shows that Plaza 36 had 14 lanes before and after the project at issue. Prior to the project, from left to right, lanes 1 through

1-10-1742

8 were manual, lanes 9 through 13 were automatic, and lane 14 was an automobile I-Pass lane. Smith further testified at his deposition that the project at issue converted lane 8 from a manual lane to a truck I-Pass lane, and lane 13 from an automatic lane to an automobile I-Pass lane.

Karman Khan, WSA's senior vice-president of the transportation finance technology group, testified at his deposition that WSA did not design, construct, renovate or manage the installation of the truck I-Pass lane in lane 8 at Plaza 36. Khan testified the physical changes to Plaza 36 would have been the purview of engineering and the general consultant, CTE. Joseph Catalano, a professional engineer and Chicago transportation operations manager for a company called AECOM, which acquired CTE, gave deposition testimony, stating CTE was the general consultant engineer and design section engineer for the work on Plaza 36. Catalan testified CTE's work on Plaza 36 was limited to lanes 8 and 13. Catalano also testified the Tollway had input from WSA and CTE, but the Tollway had "the final word" relative to the I-Pass lanes for trucks.

Catalano further testified that an energy attenuator was installed as part of the work on Plaza 36, between the automobile I-Pass lane and the automatic toll lanes. Stukel testified at his deposition that an energy attenuator is made from steel, plastic and cables, and bolted to the front of a modified crash block. At his deposition, Smith was also asked about energy attenuators, which he described as devices or apparatuses placed in front of a physical hazard to absorb energy from the impact of a vehicle, to protect the structure and toll collector, and to decrease the damage to the vehicle. Smith was asked about a passage in the 2006 Guidelines stating, "Even with mass concrete protection commonly constructed with the island, in front of tollbooths a

1-10-1742

properly designed energy absorbing device offers additional protection particularly in the case of errant trucks." Smith was unaware of any studies or documentation supporting that statement.

Duane Buchko, a civil engineer employed by AECOM, testified that the tapered concrete at lane 6 was a better attenuator than the energy attenuator placed on the automobile I-Pass lanes, because the latter is limited to 4,000 pound vehicles. According to Buchko, any vehicle exceeding that weight is going to hit a blunt end, if traveling fast enough.

Catalano testified an energy attenuator could accommodate impacts from a vehicle up to 4,000 or 5,000 pounds. Catalano stated the Level 2 energy attenuator installed at Plaza 36 would be good up to a speed of 56 miles per hour. Catalano testified that he was not aware of any energy attenuator in 2000 that would have been successful in stopping or redirecting a 70,000 pound truck. Similarly, Smith testified he was not aware of any energy attenuator rated for a 70,000 vehicle traveling in excess of 45 miles per hour.

Baryl Gamse, Ph.D., P.E., a traffic engineer and design professional, stated in an affidavit that the changes at Plaza 36 in 2000 and 2001 affected the dynamics of the entire plaza, including the interaction of vehicles approaching the toll islands, the speed distribution across the islands and the vehicle size distribution across the islands. Dr. Gamse opined that the Tollway, WSA and CTE violated the standard of care for design professionals regarding the changes to Plaza 36 by: locating the truck I-Pass lane in lane 8, between lanes requiring traffic to stop; directing the flow of vehicles that could be expected to approach the toll islands at speeds exceeding 30 miles per hour towards structures that, if impacted, would likely propel or launch a vehicle airborne in an area where other vehicles were present; failing to modify the tapered concrete noses that were

1-10-1742

exposed to oncoming trucks not required to stop; failing to provide sufficient guardrails and spacing between I-Pass lanes and lanes where traffic was required to stop; failing to use energy attenuators to separate I-Pass traffic from other traffic; and failing to include adequate speed monitoring.

At his deposition, Dr. Gamse testified that he never designed, analyzed or redesigned a toll plaza on a mainline highway. Dr. Gamse agreed that none of the work at Plaza 36 caused Dozier to lose consciousness, awareness or control of his truck. Dr. Gamse stated that if there had been no truck I-Pass lane, the accident might still have occurred, although he opined it would be less likely. Dr. Gamse also testified that if the sloped concrete nose in front of lane 6 had not been tapered, the accident most probably still would have occurred, or possibly a worse accident.

Dr. Gamse further testified that placing the truck I-Pass in lane 12 would have still created a situation of trucks passing through a lane next to a lane where automobiles were required to stop. Gamse agreed that an energy attenuator cannot handle a 72,000 pound truck traveling at 50 m.p.h. Gamse further agreed that speed enforcement would not have affected an unconscious truck driver.

Rudolph Mortimer, Ph.D., a certified human factors professional, testified at a deposition that the truck I-Pass lane should have been located at the left or right of lanes used by vehicles required to stop. Dr. Mortimer opined that widening the truck I-Pass lane would decrease the likelihood that a truck would deviate from its lane and strike a channelizing device or barrier. Dr. Mortimer also opined that if speed enforcement measures had been in place, it was likely that Dozier's truck would have been approaching at a slower speed, caused less of an impact, and

1-10-1742

been less likely to strike the car in lane 6. Dr. Mortimer further opined that if the truck I-Pass had not been located in lane 6, Dozier's truck would more likely than not have been launched into an area of stopped traffic.

Dr. Mortimer stated that prior to this case, he never analyzed or offered opinions regarding toll plaza design. Dr. Mortimer is not an engineer or expert in design. Dr. Mortimer agreed that Dozier's loss of control of his truck was the immediate cause of the accident. Dr. Mortimer stated that it was possible that Dozier's foot remained on the gas pedal and that the speed of the truck increased after he lost consciousness. Dr. Mortimer conceded that the accident would have occurred, even if the truck I-Pass lane had been widened to 12 feet. Dr. Mortimer also conceded that moving the truck I-Pass to the left or right would have still created a situation of trucks passing through a lane next to a lane where automobiles were required to stop.

On September 10, 2008, WSA filed a motion for summary judgment against the plaintiffs, arguing: (1) Dozier's operation of his truck while unconscious was the sole proximate cause of the accident; (2) WSA breached no duty it owed to the plaintiffs; and (3) plaintiffs' claims are barred by the two-year statute of limitations for personal injury actions (735 ILCS 5/13-202 (West 2004)) and the two-year statute of limitations for claims under the Wrongful Death Act (740 ILCS 180/1 (West 2004)). On October 24, 2008, the Tollway filed a motion for summary judgment, arguing: (1) the Tollway breached no duty owed to the plaintiffs; and (2) neither the location of the truck I-Pass lane nor the presence of the concrete median lane separator was the proximate cause of the accident. The motions were fully briefed.

On May 27, 2010, following a hearing, the circuit court granted the motions for summary judgment on the ground that Dozier's failure to maintain control of the speed and direction of his truck was the sole proximate cause of the accident. The circuit court entered orders granting summary judgment to the Tollway and WSA. The circuit court also entered an order stating, "the parties being in agreement," and granted CTE's motion to adopt WSA's motion for summary judgment and entered judgment in favor of CTE. In each order, the circuit court found no just reason to delay enforcement or appeal pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010). On June 16, 2010, plaintiffs filed a timely notice of appeal to this court.

DISCUSSION

The issue on appeal is whether the trial court erred in granting summary judgment to the defendants. 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). The trial court must view these documents and exhibits in the light most favorable to the nonmoving party. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004). Our review of a summary judgment ruling is *de novo*. *Arangold Corp. v. Zehnder*, 204 Ill. 2d 142, 146 (2003).

The causes of action alleged in this case sound in negligence. In a negligence action, the plaintiff must show that the defendant owed a duty to the plaintiff, defendant breached that duty, and the breach was the proximate cause of plaintiff's injuries. *E.g., Thompson v. County of Cook*, 154 Ill. 2d 374, 382 (1993). In this case, the circuit court first ruled that there was no triable

issue of fact on proximate causation. Generally, the existence of duty is a question of law, while the determination of proximate causation is a question of fact. *Thompson*, 154 Ill. 2d at 382.

However, it is well settled that proximate causation 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).

Typically, a court will first address the existence of a duty, because, absent a legal duty, there can be no recovery in negligence as a matter of law. See, e.g., *Nickel v. Hollywood Casino-Aurora, Inc.*, 313 Ill. App. 3d 925, 929 (2000). We may, however, assume the existence of a duty and its breach for the sake of discussion in order to address the proximate cause issue. *Abrams*, 211 Ill. 2d at 257; *Thompson*, 154 Ill. 2d at 382. Where the appeal is resolved on proximate cause grounds, we need not address the merits of the parties' duty arguments. *Abrams*, 211 Ill. 2d at 257; *Thompson*, 154 Ill. 2d at 384.

In this case, the circuit court relied on the well-established rule that "Illinois courts draw a distinction between a condition and a cause." *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 257 (1999). "[I]f 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.* The key to determining whether an initial wrongdoer's negligence is a cause of an injury or only furnishes a condition for the injury is whether that defendant "might have reasonably anticipated the intervening efficient cause as a natural and probable result of his own

negligence," or "whether the intervening efficient cause was of a type that a reasonable person would see as a likely result of his conduct." *Abrams*, 211 Ill. 2d at 259.

For example, in *Galman*, one of the defendants had parked a tanker truck in a no parking zone, 41 feet from an intersection with a crosswalk. *Galman*, 188 Ill. 2d at 254. The plaintiff's decedent, a pedestrian, walked the 41 feet from the intersection and attempted to cross the designated trucking street at mid-block near the tanker. *Id.* The pedestrian was struck by a car in the street and killed. *Id.* at 255. The *Galman* court ruled that the defendant's conduct in parking the truck was a "cause in fact" of the decedent's fatal injuries, but then held that it clearly was not the "legal cause" of those injuries:

"We have no quarrel with [the plaintiff's] assertion that 'it was readily foreseeable that at school closing time school children might be crossing the street, and [a driver] might need both lanes of traffic to avoid an accident.' That, however, is not the question. The question is whether it was reasonably foreseeable that violating a 'no parking' sign at mid-block would likely result in a pedestrian's ignoring a marked crosswalk at the corner, walking to mid-block, and attempting to cross a designated truck route blindly and in clear violation of the law. Clearly, it would not. [Decedent's] decision to jaywalk, while undeniably tragic and regrettable, was entirely of her own making. [Defendants] neither caused [decedent] to make that decision, nor reasonably could have anticipated that decision as a likely consequence of their conduct. One simply does not follow from the other." *Galman*, 188 Ill. 2d at 260-61.

The circuit court relied in part on *In re Estate of Elfayer*, 325 Ill. App. 3d 1076 (2001), which involved a car accident that occurred on the elevated overpass at 3800 South Damen Avenue in Chicago, Illinois. Salvador Alvarez, who was driving northbound with a blood-alcohol level of 0.206 and cocaine in his system, blacked out, lost control of his vehicle and hit the overpass' median, crossing over that barrier and colliding with Chicago Police Sergeant Joseph Elfayer's vehicle. *Elfayer*, 325 Ill. App. 3d at 1078. Elfayer died as a result of his injuries. *Id.* Elfayer's estate filed an action against the City of Chicago for failure to properly maintain the median barrier, claiming that Elfayer's death was proximately caused by an alleged reduction in the median's height. *Id.* The claim was supported by an affidavit and deposition testimony from a civil traffic engineer stating that due to roadway resurfacing, the median, which was to be eight inches in height according to original design specifications, had been reduced to six inches, which was a "substantial contributing factor in causation" of the accident. *Id.* at 1078-79.

This court affirmed summary judgment in favor of the city, ruling in part:

"In the instant case, it is undisputed that Alvarez was driving on the overpass while both heavily intoxicated and high on cocaine. He blacked out and left his lane of traffic, hitting the median and crossing into Elfayer's lane. The median was, at most, merely a condition in this accident which made the crash possible. It did not cause Alvarez' reckless driving, which was the sole subsequent independent act breaking the causal connection between the alleged defect in the median's height and Elfayer's death.

Accordingly, the trial court did not err in holding that neither the median nor defendant's

alleged failure to maintain its height was a proximate cause of this accident. *Id.* at 1083-84.

In this case, plaintiffs argue that a genuine issue of material fact exists about whether Dozier lost consciousness before the collision. Based on Officer Kirkpatrick's testimony, plaintiffs assert Dozier may have been merely inattentive or drowsy and covering up falsifications of his daily logs. We disagree. Even when viewed in the light most favorable to plaintiffs, Officer Kirkpatrick's testimony is equally consistent with Dozier losing consciousness as it is with Dozier being drowsy. "Mere speculation, conjecture, or guess is insufficient to withstand summary judgment." *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313, 328 (1999). Moreover, whether Dozier lost consciousness or became drowsy is not a material fact in this case, as it is undisputed that Dozier lost control of the truck. The subsequent, independent act of Dozier is his driving or loss of control of the truck, not his loss of consciousness.

Plaintiffs argue that the circuit court erred in ruling that they could not establish "legal causation" as a matter of law. Plaintiffs rely on two cases decided by this court, *Michalak v. LaSalle County*, 121 Ill. App. 3d 574 (1984), and *Thompson v. Gordon*, 398 Ill. App. 3d 538 (2009), *rev'd on other grounds*, 241 Ill. 2d 428 (2011). We address these cases in turn.

In *Michalak*, the plaintiff lost control of his car after he leaned over to put the ashes of a cigarette he was smoking into the ashtray. *Michalak*, 121 Ill. App. 3d at 575. The car slid into a guardrail, the end of which pierced the plaintiff's car and amputated his left leg between the ankle and the knee. *Id.* Michalak sued LaSalle County, alleging that the county negligently installed and maintained the guardrail in that the end of the guardrail was not blunted or buried. *Id.* The

1-10-1742

circuit court granted summary judgment to the county. However, this court reversed, ruling in part that the County's actions were not a mere condition as a matter of law. *Id.* at 576-79.

However, the *Michalak* court did so by questioning the viability of the "cause vs. condition" doctrine after the doctrine of comparative negligence was adopted in Illinois in *Alvis v. Ribar*, 85 Ill. 2d 1 (1981). *Michalak*, 121 Ill. App. 3d at 576-79; see *Cannon v. Commonwealth Edison Co.*, 250 Ill. App. 3d 379, 382 (1993) (discussing *Michalak* and *DiBenedetto v. Flora Township*, 219 Ill. App. 3d 1091 (1991), *rev'd*, 153 Ill. 2d 66 (1992)). The *Cannon* court, after reviewing the case law, concluded that our supreme court still adhered to the "cause vs. condition" doctrine, even after the adoption of comparative negligence. *Cannon*, 250 Ill. App. 3d at 383-85. Later Illinois Supreme Court decisions applying the "cause vs. condition" doctrine, including, but not limited to *Galman* and *Abrams*, demonstrate that the *Cannon* court was correct not to follow *Michalak*.

In *Thompson*, a vehicle traveling east on Grand Avenue in Gurnee, Illinois, lost control, hit the median separating eastbound and westbound traffic, vaulted into the air, and hit a westbound vehicle in which Trevor and Amber Thompson were traveling. *Thompson*, 398 Ill. App. 3d at 540. After Trevor and Amber died as a result of the accident, plaintiff Corinne Thompson brought suit against defendants, Jack E. Leisch and Associates, Inc., and CH2M Hill, Inc., the engineering companies that designed the bridge and traffic interchange in the area where the accident occurred, alleging defendants were negligent in designing the bridge deck without considering or designing a median barrier that would have prevented the eastbound vehicle from becoming airborne and causing the accident. *Id.* at 540-41. During discovery, plaintiff submitted

1-10-1742

an affidavit from Andrew Ramisch, a civil engineer who opined in part that if the design work on the bridge deck had been performed within the standard of care, "more probably than not" a barrier would have been designed that would have prevented the accident. Ramisch also opined defendants "[were] aware, or should have been aware, of the vaulting characteristic of the existing median" and "should have been on notice that the proposed work was dangerous and likely to cause injury." *Id.* at 541.

The circuit court granted summary judgment to the engineers on the ground that assessing the sufficiency of the median, and modifying or redesigning the road surface and median, were outside the duties established in their contracts. This court reversed summary judgment on the issue of duty. *Id.* at 542-44. Having done so, this court then addressed proximate causation, and legal cause in particular, concluding that the Ramisch affidavit and testimony created a genuine issue of material fact on the issue. *Id.* at 550.

Although *Thompson* was subsequently reversed by our supreme court on the issue of duty without discussing legal cause (see *Thompson*, 241 Ill. 2d at 248), we decline to follow *Thompson* on the causation issue. The *Thompson* court cited *Abrams* as the proper standard for evaluating legal cause in "cause vs. condition" cases, but it did not properly apply that standard. Indeed, like the *Michalak* court's imposition of the comparative negligence doctrine to excuse the application of the "cause vs. condition" doctrine, the *Thompson* court imposes the rule that there may be more than one proximate cause of an injury. *Thompson*, 398 Ill. App. 3d at 550 (citing *Ray v. Cock Robin, Inc.*, 57 Ill. 2d 19, 23 (1974)). However, as our supreme court noted over 60 years ago:

"There may be more than one proximate cause of an injury. But if two wholly independent acts, by independent parties, neither bearing to the other any relation or control, cause an injury by one creating the occasion or condition upon which the other operates, the act or omission which places the dangerous agency in operation is the efficient intervening cause that breaks the causal connection and makes the other act or omission the remote and not the proximate cause of the injury." *Merlo v. Public Service Co. of Northern Illinois*, 381 Ill. 300, 317 (1942).

Thus, the "cause vs. condition" doctrine already accounts for the possibility of multiple causes.

Again, the proper inquiry is whether defendant "might have reasonably anticipated the intervening efficient cause as a natural and probable result of his own negligence," or "whether the intervening efficient cause was of a type that a reasonable person would see as a likely result of his conduct." *Abrams*, 211 Ill. 2d at 259. In this case, as in *Elfayer, Thompson and Michalak*, a vehicle collision is essentially conceded as foreseeable. After all, the Tollway would not place concrete noses, crash blocks, or energy attenuators at toll plazas if it did not contemplate the likelihood of vehicles crashing into the structures. It is foreseeable that a driver may lose control of his truck and crash into a toll plaza structure for any number of reasons. It is also foreseeable that such collisions may have tragic consequences, as happened in this case.

However, Dozier did not lose control of his truck because the defendants located the truck I-Pass in lane 8 of Plaza 36. Dozier also did not lose control of his truck because defendants retained a tapered nose on the concrete island and crash block located in front of the toll booth for lane 6 at Plaza 36. Assuming solely for the sake of argument those decisions were

1-10-1742

negligent, Dozier did not lose control of his truck as the natural and probable result of that negligence. Thus, plaintiffs' claim regarding the legal cause of the accident must fail. Accordingly, we need not reach the other issues raised by the parties on appeal.

CONCLUSION

In short, following cases including *Abrams*, *Galman* and *Elfayer*, we conclude Dozier's loss of control of his truck was the sole proximate cause of this tragic accident. Plaintiffs cannot show that defendants' alleged negligence was a legal cause of the collision. Accordingly, the circuit court did not err in granting summary judgment to the defendants. For all of the aforementioned reasons, the judgment of the circuit court of Cook County is affirmed.

Affirmed.