

No. 1-11-0277

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

PATRICIA DELGADO, Individually and as)	Appeal from the Circuit Court
mother of KELLY DELGADO, a minor,)	of Cook County, Illinois
)	
Plaintiff-Appellant,)	
)	
v.)	No. 09 L 5657
)	
TINLEY PARK PUBLIC LIBRARY,)	Honorable
)	Marcia Maras,
Defendant-Appellee.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

Held: The circuit court properly granted summary judgment in defendant's favor because plaintiff failed to contradict the factual evidence raised by defendant in its motion and failed to show the proximate cause of her injuries. The circuit court erred in denying plaintiff's motion for leave to file a second amended complaint.

¶ 1 Here we are called upon to determine whether the circuit court properly granted summary judgment in favor of defendant Tinley Park Public Library (Library). Plaintiff, Patricia Delgado,

No. 1-11-0277

individually and as the mother of Kelly Delgado, a minor, filed a complaint against the Library seeking personal injury damages due to injuries that occurred to herself and her daughter while on an elevator in the Library.¹ On appeal, Delgado contends that the circuit court erred in granting the Library's motion for summary judgment because a material fact exists concerning whether the Library was negligent.² Delgado also argues that she should have been allowed to file a second amended complaint after the circuit court granted the Library's motion for summary judgment.

¶ 2 We hold that the circuit court did not err in granting summary judgment in favor of the Library because Delgado failed to contradict the factual evidence raised by the Library and failed to show that any of the actions she alleged the Library negligently performed or failed to performed were the proximate cause of her injuries. We hold that the circuit court erred in denying Delgado's motion for leave to file its second amended complaint.

¶ 3 JURISDICTION

¶ 4 On December 22, 2010, the circuit court granted the Library's motion for summary judgment. On December 27, 2010, the circuit court denied Delgado's motion for leave to file a second amended complaint. On January 19, 2011, Delgado timely filed her notice of appeal.

¹ Delgado's complaint also sought personal injury damages from Elite Elevator Systems who was in charge of the maintenance of the subject elevator, and the Village of Tinley Park. Elite Elevator Systems is not part of this appeal as they reached a settlement agreement with Delgado prior to trial. Delgado conceded in her opening brief that her appeal is only against the Library, not the Village of Tinley Park.

² The Library and the Village of Tinley Park, who were represented by the same counsel before the circuit court, filed a joint motion for summary judgment. On appeal, Delgado only contends the circuit court erred in granting summary judgment in favor of the Library.

No. 1-11-0277

Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 5

BACKGROUND

¶ 6 On June 2, 2009, Delgado filed her first amended complaint against the Library.³ In count two of her first amended complaint, Delgado alleged that on June 13, 2008, the Library owned, operated, controlled, managed, and maintained the Tinley Park Library and the elevator contained therein. Delgado alleged that the Library "did and then invite the public, including [Delgado], to enter its premises for the purposes of utilizing the library." Delgado alleged the Library owed her a duty to operate the premises so that Delgado would not be injured. Delgado alleged further that the Library:

- "a. Carelessly and negligently operated, managed, maintained and controlled said premises, including the elevator;
- b. Carelessly and negligently allowed the elevator therein to be and remain in an unsafe condition although [the Library] knew or in the exercise of ordinary care should have known that said condition created a hazard to [Delgado];
- c. Carelessly and negligently failed to have the elevator therein

³ Delgado's first amended complaint contained six counts. Counts two and four are against the Library. The other counts contain allegations against either the Village of Tinley Park or Elite Elevator Systems and will not be addressed because Delgado only disputes the circuit court's findings as to the Library.

No. 1-11-0277

properly inspected for its safety;

d. Carelessly and negligently failed to repair the elevator to ensure the safety of the patrons of the library, including [Delgado];

e. Failed to warn [Delgado] of the dangerous condition of the elevator, although [the Library] knew or in the exercise of ordinary care should have known that said condition created a hazard to [Delgado]."

¶ 7 Delgado alleged that as a proximate result of the alleged acts or omissions to act by the Library, she was injured when the elevator "suddenly dropped to the first floor." Delgado alleged that due to the Library's negligence, her head, body, and limbs were injured "both internally and externally." In addition, she alleged that she "suffered bodily pain and injury and mental anguish" which was ongoing. Due to her injuries, Delgado alleged she has suffered and will continue to suffer from monetary losses.

¶ 8 Count four of Delgado's amended complaint is identical to count two as stated above, except that she makes the allegations on behalf of her minor daughter, Kelly Delgado.

¶ 9 On October 8, 2010, the Library filed a motion for summary judgment pursuant to section 2-1005 of the Illinois Code of Civil Procedure (Code). 735 ILCS 5/2-1005 (West 2008). In its motion, the Library argued that depositions of people who service the elevator and an expert witness show that there were no defects in the elevator that could have caused the accident as alleged by Delgado. The Library argued further that Delgado did not retain a liability expert to prove her allegations. On November 1, 2010, the Library filed a memorandum in support of its

No. 1-11-0277

motion for summary judgment. In its memorandum, the Library argued Delgado offered no evidence the elevator in question was defective. Specifically, there was no evidence that a rupture in the hydraulic lines caused the elevator to fall. The Library argued that the only evidence regarding an alleged defect is Delgado's testimony, which the Library argued was not sufficient to withstand a motion for summary judgment. The Library contended that because the elevator in question was a hydraulic elevator and, thus, a specialized machine, specialized knowledge was required to show that there was a defect in the elevator. Delgado did not provide any expert testimony and, therefore, the Library argued that summary judgment was proper.

¶ 10 In support of its motion for summary judgment, the Library attached to its memorandum Delgado's first amended complaint, as well as the deposition testimony of Robert Krause, William Brennan, Bernard Flynn, Patrick O' Dwyer, and Patricia Delgado. The Library also attached the deposition testimony of James Bohac, an expert witness of co-defendant Elite Elevator Systems. In addition, the Library attached co-defendant Elite Elevator System's supplemental disclosure regarding witnesses who would have testified at trial, its own supplemental disclosure incorporating co-defendant Elite Elevator System's expert, James Bohac's testimony, as an expert witness that would have testified at trial, an affidavit from the Administrator of the Library, and the accident form filled out by the Library staff regarding the incident.⁴

¶ 11 Robert Krause, an employee of Elite Elevator Systems, Inc., testified during his

⁴ The Administrator of the Library, Richard Wolf, stated in his affidavit that the Village of Tinley Park does not maintain the Library.

No. 1-11-0277

deposition that he is a supervising elevator mechanic. His employer provided maintenance and repair work for the Library during the relevant time period. He testified that the elevator at the Library was a hydraulic elevator. Krause testified that he read the deposition testimony of both Patricia Delgado and Kelly Delgado. The following exchange occurred during the deposition:

"Q: You saw me quiz [Patricia and Kelly Delgado] in fair detail about how the accident occurred?

A: Yes

Q: They commented that the elevator went up to what they thought was the second floor and then free fell down to the first floor.

A: Okay

Q: Do you recall seeing that in their deposition?

A: Yes

Q: That's impossible, isn't it?

A: Yes."

Krause testified that in order for a free fall to occur on a hydraulic elevator, such as the elevator in question here, there would have had to have been a catastrophic loss of oil from the elevator. He testified that if that would have occurred, a significant amount of oil would have been found in the area of the elevator, which was not the case here. Krause testified that a free fall effect could not be felt by an elevator user absent a catastrophic loss of oil. Additionally, Krause testified that if the elevator had failed, as Delgado claimed, the elevator would have been rendered completely out of service and not operable. A technician would have been needed for

No. 1-11-0277

the elevator to resume service.

¶ 12 Krause testified further that elevators, such as the elevator in this case, are inspected every six months by law. During his deposition, Krause reviewed the inspection checklist from Bernard Flynn, an elevator inspector from Thompson Elevator. The inspection checklist was completed a month before the accident in this case. Krause testified that Flynn's inspection showed there were no problems with the elevator a month prior to plaintiff's injuries. Krause testified that had Flynn found a problem, Elite Elevator Systems would have been contacted.

¶ 13 Krause also reviewed the work ticket completed by an employee of his company, William Brennan, who serviced the elevator three days after plaintiff sustained her injuries. Krause testified that Brennan adjusted the door lock, the spiorater, and adjusted the vane on the door restrictor. Krause testified that Brennan made the above adjustments and followed the typical procedure for an elevator mechanic after receiving a service call from a client. When asked whether any of the adjustments made by Brennan would "indicate that there was a problem with the hydraulic or safety switches," Krause answered there were "none."

¶ 14 William Brennan, a mechanic for Elite Elevator Systems, testified that the elevator in the Library was a hydraulic elevator. He had been doing repair and regular maintenance work on the elevator at the Library for three years. Brennan performs maintenance inspections on the elevator on a monthly basis. When asked how he would know if there was a problem during his monthly inspection with the hydraulics on the elevator, he responded that "you would see a leak, oil on the floor." He testified that he checks the hydraulics and the pistons of the elevator during his monthly inspections. During his deposition, the following exchange occurred:

No. 1-11-0277

"Q: *** Would it be possible for a hydraulic elevator to free-fall from the second floor to the first floor on this passenger elevator at the Tinley Park Library, is that possible?

A: No

Q: Can you tell me why this is not possible?

A: If an elevator - - if it free-fell, someone would have to come out to turn it back on.

Q: So you're saying, if the elevator free-fell, it would shut down?

A: Yes

Q: What I'm asking is a little bit different. Is it possible for that even to happen with the hydraulic elevator?

A: I've never seen it happen.

Q: Okay. In your 20 years of experience, you've never seen it happen?

A: No

Q: Robert Krause from Elite [Elevator Systems] testified that an elevator, a hydraulic elevator such as the passenger elevator at the Tinley Park Library, could not free-fall because - - unless there was a catastrophic event that would basically sever the hydraulic lines.

Would you agree with that?

A: Yes.

No. 1-11-0277

Q: If that happened when you came in to repair the elevator, would there be a mess of oil on the floor, would you notice that?

A: Yes"

¶ 15 Brennan testified that when he performs a repair or maintenance work, he completes a "work ticket." During his deposition, a work ticket he completed dated June 16, 2008, was presented as an exhibit. The work ticket contained a narrative, which stated, "Someone was stuck leaving the first floor up to 2, adjusted first floor door lock and spiorator, also adjusted vane for door restrictor. It was rubbing on rollers." He described the "spiorator" as a "Door closer." Brennan testified that June 16, 2008, was a Monday and he arrived at 8:00 in the morning. He testified that had there been a hydraulic oil leak, he would have put that information in his work ticket.

¶ 16 On cross-examination, when asked by Delgado's counsel, "Just because you have not seen a hydraulic elevator free-fall does not mean a hydraulic elevator free-fall could not happen, correct." Brennan responded, "It could happen, yes." Brennan also clarified that in the narrative in his work ticket where he referred to adjusting the restrictor, he was referring to the service elevator as opposed to the public elevator.

¶ 17 On re-direct examination, the following exchange took place:

"Q: *** Explain to me then how its possible for a hydraulic elevator to free-fall?

A: If an oil line got sheared

Q: Explain to me, when you say an oil line got sheared, break that

No. 1-11-0277

down for me. What does that mean for me?

A: It's like the oil line feeds the cylinder- - cylinders, and, if it broke, the oil would leak out.

Q: If that happened, would the elevator - - how - - how fast would the elevator fall?

A: As fast as oil could leak out. Not- - Not-

Q: would that be-

A: - - very fast

Q: Would that be what I'm thinking of a free fall is as fast as possible from top to bottom, or would it take time for that oil to leak out of the line?

A: Oh, it would take time.

Q: So would the elevator fall - -

A: Gradually.

Q: - - gradually like a balloon was deflating?

A: Correct.

Q: If that had happened, if the lines were severed, when you came in to look at the elevator, would you know that?

A: Yes

Q: Are there safety devices on the elevator to prevent it from

No. 1-11-0277

falling as you just described gradually if the lines are severed?

A: Yes. There's a pressure switch.

Q: What does the pressure switch do?

A: When you lose pressure, it shuts off everything to the valve.

Q: Okay.

A: And then you would have to physically reset it or jump it to get the elevator back in service."

¶ 18 During his deposition, Brennan answered questions from an attorney representing Elite Elevator Systems. Brennan testified that the elevator at the Library was a "Hollis" hydraulic elevator which are "above ground" so that he is able to see the entire system when he does either maintenance or repair work on them. The attorney for Elite Elevator Systems then initiated the following exchange:

"Q: Do you know approximately how many gallons of hydraulic oil this system holds?

A: No.

Q: It would be more than 25 though, wouldn't it?

A: Yes.

Q: If - - You've been asked repeatedly about whether or not a hydraulic elevator can free-fall. And barring something catastrophic, catastrophic failure of the supply lines, catastrophic failure of the cylinder, catastrophic failure of the head unit or

No. 1-11-0277

packing, that does not happen correct?

A: Correct.

Q: Something like any of those scenarios that I just gave you would cause a leak of the hydraulic fluid, correct?

A: Correct.

Q: Considering the system is compromised of more than 25 gallons worth of *** hydraulic fluid, that would be something that would be noticeable, would it not?

A: Yes.

Q: That would leave a great deal of fluid in the pit, would it not?

A: Yes."

Brennan testified further that had there been catastrophic failure, the elevator would not run. He also testified that when performing monthly maintenance at the library, he manually checks all of the safeties on the elevator and that had any of the safeties not been working he would have noted it on the work ticket.

¶ 19 Bernard Flynn, a certified elevator inspector, testified that he had inspected the elevators at the Library annually for three or four years. He had inspected the elevator in question on May 21, 2008, almost a month before the accident in this case. Flynn testified that the elevators at the Library passed the inspection he gave on May 21, 2008. He testified he next inspected the Library's elevators on November 25, 2008, upon request by the Village of Tinley Park, and that

No. 1-11-0277

the elevators passed inspection. Flynn testified that aside from a catastrophic event, a hydraulic elevator cannot free fall. During his deposition, the following exchange took place:

"Q: And then one of the plaintiffs in this case is named Patricia Delgado. She also gave a deposition describing how the accident occurred. And I want you to take a look at her testimony ***, and if you can read that aloud for us that would be great.

A: [Reading Delgado's deposition testimony] "The elevator went up to the second floor and then just started to shake back and forth and then there was a loud banging like someone banging on metal. I remember Kelly and I looked at each other and then the elevator just dropped back down. I was holding on with my left hand. I fell back and hit the back of my head on the back of the elevator. Kelly was not holding and she went up in the air and came back down and then she didn't know if she should push the emergency button.
***."

Q: ***. Based on Ms. Delgado's testimony, would you agree that it's impossible for the accident to have occurred in a hydraulic elevator in the manner in which she described in her deposition?

A: Yes."

Flynn testified that Elite Elevator Systems was doing their job maintaining and servicing the elevator and that he has not found fault with the elevator on any of his inspections.

No. 1-11-0277

¶ 20 James Bohac, who was called as an expert witness by co-defendant Elite Elevator Systems, testified regarding his investigation of the accident. He testified that he read both Patricia and Kelly Delgado's depositions and that the accident they described in their depositions is not possible. Bohac testified further that had a catastrophic event occurred, there would have been hydraulic fluid in the room or the pit by the alleged leak. He testified that upon reading the deposition testimony in this case, as well as his inspection of the area, it did not look like there was ever a leak at the elevator. Bohac also inspected Elite Elevator's work ticket from three days after the incident, which did not indicate any catastrophic breakdowns. In regards to the maintenance of the elevator, the following exchange took place:

"Q: The net result is that people at the library seem to be having this thing serviced on a regular basis, am I correct?

A: Correct

Q: They're doing, in your opinion, what they're supposed to be doing?

A: Absolutely."

¶ 21 Bohac also testified that he agreed with the opinion of Robert Kraus as contained in Krause's deposition. During his deposition the following exchange took place:

"Q: ***. It is also my understanding from reading your report, that if there had been a breakdown of the type described by the plaintiffs, this elevator would not have gone back up to the second floor after the event and let them out?

No. 1-11-0277

A: Absolutely.

Q: Why is that?

A: Well, if there were a catastrophic loss of oil, it would have been physically impossible to pump the car that high. You need a certain volume of oil to push the jacks up."

When asked whether Bernard Flynn's deposition sounded "approximately correct," Bohac answered "Yes." When asked what his opinion was in this case, Bohac answered, "I do not believe that the accident occurred as described." On cross-examination, Bohac testified, "what was described as happening is virtually impossible."

¶ 22 Bohac was also asked about the work ticket dated June 16, 2008, completed three days after the incident by Elite Elevator Systems, and the following exchange took place:

"Q: And you reviewed the repair ticket, June 16th, 2008, which is just three days after the incident, right?

A: Correct.

Q: *** the net result is it looks like he's looking for a problem as opposed to really finding problems?

A: We call it shot gunning in the elevator business. You have a complaint, you investigate but you find no specific cause.

Q: And you read the deposition of Mr. Brennan who prepared that ticket?

No. 1-11-0277

A: Correct.

Q: And you recall that the gist of his testimony was he wasn't finding anything wrong, he was looking for problems?

A: Correct."

¶ 23 Patrick O'Dwyer, the facilities manager/building engineer at the Tinley Park Library, testified that on the day of the incident he received a call at home from the Library staff who informed him that there was an accident in the elevator. He testified that he told the staff to take the elevator out of service for the weekend. O'Dwyer testified that Elite Elevator Systems does monthly maintenance on the elevator.

¶ 24 Delgado testified that on the day of the incident, she went to the Library with her daughter Kelly. The alleged accident occurred at around four or five in the evening. Delgado testified that she is familiar with the elevator at the Library because she used it regularly in the past and never had any problems with it. On the day of the incident, she and her daughter got on the elevator to go to the second floor. She testified:

"The elevator went up to the second floor and then just started to shake back and forth, and then there was like a loud banging like someone banging on metal. I remember Kelly and I looked at each other and then the elevator just dropped back down.

I was holding on with my left hand. I fell back and hit the back of my head on the back of the elevator. Kelly was not holding on and she went up in the air and came back down. And

No. 1-11-0277

then she didn't know if she could push the emergency button. And as she said, mom, what do we do, the elevator started to go back up. They never opened at the first floor. The elevator went back up to the second floor and the doors opened."

Delgado testified that the elevator made it all the way up to the second floor before the problems started, but that the door did not open at the second floor. She testified that the shaking she experienced occurred when the doors should have opened at the second floor. Delgado described the distance she fell in the following exchange:

"Q: ***. Now, the second floor is about 12 or 13 feet above the first floor at the library, isn't it?

A: Yes.

Q: Okay. Is it your opinion that the elevator dropped the entire 12 or 13 feet?

A: Yes.

Q: Just a free fall?

A: Yes.

Q: ***. In your opinion, did the elevator free fall that 12 or 13 feet from the second floor to the first floor?

A: Yes.

Q: So you fell just as fast as if someone had thrown you off a ladder 12 feet high, that's how fast you fell down?

No. 1-11-0277

A: Yes.

Q: Then when it got to the first floor, did it abruptly stop?

A: Yes."

Delgado testified that once the elevator dropped to the first floor, it stayed on the first floor for approximately 10 seconds before going back up to the second floor. Once they left the elevator, she testified that she walked by a librarian who asked her if she was okay. Another librarian then told her that she heard a loud banging noise. Delgado then told the librarians that the elevator dropped. Delgado testified that she filled out a report at the Library, but declined medical attention.

¶ 25 The accident report stated the incident occurred on the patron elevator at 7:30 p.m. on June 13, 2008. The report stated further that:

"A patron was going on the elevator to the second floor when the elevator only traveled to about halfway and dropped to the first floor. When it dropped to the first floor, the door did not open. The elevator eventually did go up to the 2nd floor, but the patron bumped her head in the process. We offered her an ambulance, but she refused."

The report was signed by a staff member and a supervisor.

¶ 26 Delgado responded to the Library's motion arguing that the Library's reliance on expert testimony to refute her testimony created a question of fact for the jury to decide such that summary judgment was improper. Delgado argued that because she only pled ordinary

No. 1-11-0277

negligence she does not need to provide expert testimony to survive a motion for summary judgment. Delgado did not file any exhibits to her motion, but refers to her own deposition testimony as attached to the Library's motion for summary judgment.

¶ 27 On December 22, 2010, the circuit court granted the Library's motion for summary judgment. In making its ruling, the circuit court commented that it believed "expert testimony with this complaint is necessary and there cannot be any proximate cause shown without it."

¶ 28 On December 27, 2010, Delgado filed an emergency motion for leave to file a second amended complaint. Delgado sought to amend her complaint by alleging that the Library was a common carrier that "owed a duty to [Delgado] to exercise the highest degree of care for common carriers of its type" and adding two counts of negligence based on the doctrine of *res ipsa loquitur*, one for herself and one on behalf of her minor daughter. On that same day, Judge Maras entered an order denying Delgado's motion to file a second amended complaint.

¶ 29 On January 19, 2011, Delgado timely filed her notice of appeal asking this court to reverse the circuit court's grant of summary judgment in favor of the Library on December 22, 2010, and to reverse the circuit court's denial of her motion for leave to file a second amended complaint.

¶ 30 ANALYSIS

¶ 31 Before this court, Delgado argues the circuit court erred in granting the Library's motion for summary judgment because a genuine issue of material fact exists as to whether the Library was negligent. Delgado argues further that expert testimony is not needed to show that a material fact exists as to whether Tinley Park was negligent. Delgado also contends the circuit

No. 1-11-0277

court erred in not allowing her to file a second amended complaint.

¶ 32 The Library argues there is no evidence that there was a defect with the elevator that they caused. Specifically, the Library maintains that there is no evidence to support Delgado's allegations that the Library failed to maintain, inspect, and repair the elevator or that the Library caused a defect with the elevator. The Library argues further that lay witness testimony is not sufficient to create a genuine issue of material fact as to the repair, maintenance, and inspection of the elevator. In regards to Delgado's argument that she should have been able to file a second amended complaint, the Library argues that this court should not consider the argument because neither the motion nor the proposed second amended complaint were included in the record on appeal. The Library argues further that the circuit court properly denied Delgado's motion for leave to file a second amended complaint as it would not cure Delgado's defective pleading, the Library would be prejudiced by the amended complaint, and the proposed amendment was untimely.

¶ 33 Summary judgment is proper 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 judgment as a matter of law." 735 ILCS 5/2-1005(c)(West 2008). In ruling on a motion for summary judgment, the circuit court is to determine whether a genuine issue of material fact exists, not try a question of fact. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). "Summary judgment is to be encouraged in the interest of prompt disposition of lawsuits, but as a drastic measure it should be allowed only when a moving party's right to it is clear and free from doubt." *Pyne v. Witmer*, 129 Ill. 2d 351, 358 (1989). We review

No. 1-11-0277

summary judgment rulings *de novo*. *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 113 (1995).

¶ 34 When determining whether a genuine issue of material fact exists, the pleadings are to be liberally construed in favor of the nonmoving party. *Williams*, 228 Ill. 2d at 417. "If a party moving for summary judgment supplies facts which, if not contradicted, would entitle such party to a judgment as a matter of law, the opposing party cannot rely on his pleadings alone to raise issue of material fact." *Purtill v. Hess*, 111 Ill. 2d 229, 240-41 (1986). A party opposing summary judgment must present facts, not conclusions in supporting its claim. *Wilson v. Bell Fuels, Inc.*, 214 Ill. App. 3d 868, 872 (1991). Thus, the nonmoving party "must present a factual basis which would arguably entitle him to a judgment." *Allegro Services, Ltd. v. The Metropolitan Pier & Exposition Authority*, 172 Ill. 2d 243, 256 (1996). Additionally, "facts contained in an affidavit in support of a motion for summary judgment which are not contradicted by counteraffidavit are admitted and must be taken as true for purposes of the motion." *Purtill*, 111 Ill. 2d at 241. This rule also applies to uncontradicted deposition testimony. *Cnota v. Palatine Area Football Assoc.*, 227 Ill. App. 3d 640, 652 (1992); *In re Estate of Allen*, 365 Ill. App. 3d 378, 387 (2006).

¶ 35 Summary judgment is proper if the plaintiff fails to establish an element of the cause of action. *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 163 (2007). Further, "[i]f what is contained in the papers on file would constitute all of the evidence before a court and would be insufficient to go to a jury but would require a directed verdict, summary judgment should be entered." *Pyne*, 129 Ill. 2d at 358. A plaintiff alleging negligence must allege facts establishing

No. 1-11-0277

that the defendants owed the plaintiff a duty of care, that they breached that duty of care, and that the alleged breach proximately caused the plaintiff's injuries. *Iseberg v. Gross*, 227 Ill. 2d 78, 86-87 (2007). This court has held:

"Liability cannot be predicated upon surmise or conjecture as to the cause of the injury; proximate cause can only be established when there is a reasonable certainty that defendant's acts caused the injury. [Citations]. No liability can exist unless the defendant's alleged negligence is the legal cause of the plaintiff's injury and if the plaintiff fails to establish the element of proximate cause, she has not sustained her burden of making a *prima facie* case and a directed verdict is proper." *Kimbrough v. Jewel Companies, Inc.*, 92 Ill. App. 3d 813, 817 (1981).

¶ 36 Initially, we note that Delgado only pled ordinary negligence. She did not plead that the Library was a common carrier nor did she argue that the doctrine of *res ipsa loquitur* applied.⁵

¶ 37 Delgado, however, failed to show that her injuries were caused by any of the negligent acts she alleges in her complaint. Delgado alleged that the Library negligently: operated, managed, controlled the library; allowed the elevator to be in an unsafe condition; failed to have the elevator properly inspected; failed to repair the elevator; and failed to warn her of the alleged dangerous condition of the library. However, Delgado did not support her allegations with facts

⁵ See *Shoemaker v. Rush-Presbyterian- St. Luke's Medical Center*, 187 Ill. App. 3d 1040, 1045 (1989) ("an elevator is considered a common carrier [citation] and, as such, the operator is charged with exercising the highest duty of care consistent with the operation of the business.").

No. 1-11-0277

sufficient to withstand the Library's motion for summary judgment.

¶ 38 In support of its motion for summary judgment, the Library presented deposition testimony that addressed both the impossibility of the elevator falling as described by Delgado and the maintenance and inspection procedures followed by the Library. Robert Krause, William Brennan, Bernard Flynn, and James Bohac all testified that in order to have the hydraulic elevator in the Library act as described by Delgado, the elevator would have had to have failed and a significant amount of oil or fluid would have leaked out of the elevator. Brennan, the mechanic who provided the regular maintenance and repair work for the elevator in question testified that three days after the accident, he made adjustments to the elevator as shown in the work ticket that he completed. None of those adjustments he made were made in response to any oil leak or catastrophic failure. Brennan testified had there been a hydraulic oil leak, he would have put that information in his work ticket. He also testified that had there been a fluid or oil leak, there would have been a significant amount of fluid or oil found in the area. Both Krause and Bohac testified that they reviewed Brennan's work ticket, and affirmed that none of the repairs made by Brennan addressed a catastrophic failure or oil leak. Bohac, who testified as an expert, described Brennan's work ticket as "shot gunning" which he explained was where "You have a complaint, you investigate but you find no specific cause." Bohac opined further that based on his inspection of the elevator, it did not look like there was ever a leak at the elevator.

¶ 39 Brennan testified he performed maintenance inspections on the elevator on a monthly basis. Pat O'Dwyer confirmed that Elite Elevator Services does monthly maintenance of the elevator. During those inspections, Brennan manually checks the safeties on the elevators.

No. 1-11-0277

Bernard Flynn testified that he inspected the elevator a month prior to the accident and that the elevator passed his inspection. He also inspected the elevator a few months after the accident, and the elevator again passed his inspection. Flynn testified that he has never found fault with the servicing or maintenance of the elevator in question. Bohac testified that based on his investigation of the incident, the Library appeared to have the elevator serviced on a regular basis. When asked whether the Library was "doing *** what they're supposed to be doing" he testified, "Absolutely."

¶ 40 In order to survive the Library's motion for summary judgment, Delgado had to contradict the facts raised by the Library in its motion. *Purtill*, 111 Ill. 2d at 241 ("facts *** which are not contradicted by counteraffidavit are admitted and must be taken as true for purposes of the motion."). In her reply, Delgado referred to her deposition, where she explained that the elevator went up to the second floor, then dropped down 12 or 13 feet to the first floor. She did not present any other factual evidence to contradict the facts raised in the Library's motion. She merely stated that the accident happened as she described it. In opposing the Library's motion, she was required to present facts, not conclusions to support her claim. *Wilson*, 214 Ill. App. 3d at 872. Specifically, Delgado did not show how any of the negligent acts of the Library as alleged in her complaint proximately caused her injuries. *Kimbrough*, 92 Ill. App. 3d at 817 ("Liability cannot be predicated upon surmise or conjecture as to the cause of the injury; proximate cause can only be established when there is a reasonable certainty that defendant's acts caused the injury."). She did not contradict the Library's evidence that in order to have a drop in the elevator as she described, the elevator would have had to fail catastrophically and there would

No. 1-11-0277

have been a massive oil leak present. Nor, did Delgado address how the Library maintained, inspected, or repaired the library. The Library provided evidence that the elevator passed an inspection conducted by an independent inspector a month prior to the incident and that Elite Elevator Systems provided monthly maintenance on the elevator. Delgado did not contradict these facts and, therefore we must take those facts as true for the purposes of reviewing a motion for summary judgment.

¶ 41 Delgado's reply to the Library's motion focused on her own deposition testimony, which did not provide support for any of the allegations in her complaint. Specifically, she has not shown how any of the negligent acts she alleged the Library performed caused her injuries. Delgado failed to establish an element of her cause of action, that the Library was the proximate cause of her injuries. *Bagent*, 224 Ill. 2d at 163 (summary judgment is proper if the plaintiff fails to establish an element of the cause of action). Therefore, the circuit court did not err in granting the Library's motion for summary judgment.

¶ 42 The Library, in its brief before this court, argues that summary judgment is proper in this case because Delgado failed to provide expert testimony to support her position in regards to the workings of the elevator. We need not determine whether expert testimony is required in negligence cases for elevator injuries. Our decision is based on Delgado not providing factual evidence to either support her claim or to contradict the factual evidence raised by the Library. Additionally, the authorities that the Library relied upon are all distinguishable to the facts of the case at bar. The Library relied upon *Henry v. Panasonic Factory Automation Co.*, 396 Ill. App. 3d 321 (2009); *Baltus v. Weaver Division of Kiddie and Co., Inc.*, 199 Ill. App. 3d 821 (1990);

No. 1-11-0277

and *Weldon v. Otis Elevator Co.*, 1998 Mass. App. Div. 19 (1998) in support of its argument.

Henry and *Baltus* are distinguishable because they addressed expert testimony in regards to allegations of defective design against a manufacturer of a product, which is not the case here.

Although the Massachusetts Appellate Court in *Weldon* did state that "The plaintiff presented no expert evidence that the defendant did or failed to do anything that would have caused the elevator to act as alleged" in ruling that the plaintiff failed to show proximate cause in an elevator accident, the Massachusetts court did not say that expert testimony is required. *Weldon*, 1998 Mass. App. Div. at 20.

¶ 43 Delgado's final contention is that the circuit court erred when it denied her motion for leave to file a second amended complaint. Section 2-1005(g) of the Code states that "[b]efore or after the entry of summary judgment, the court shall permit pleadings to be amended upon just and reasonable terms." 735 ILCS 5/2-1005(b) (West 2008). In reviewing a denial of a motion to amend a complaint, there are four factors that determine whether the trial court abused its discretion in ruling on a motion to amend a complaint: "(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified." *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992).

¶ 44 Applying the above factors to the case at bar, we conclude that the circuit court erred in denying Delgado's motion for leave to file a second amended complaint. First, Delgado's proposed amendments would cure her defective pleading. The doctrine of *res ipsa loquitur* is

No. 1-11-0277

appropriate where Delgado can show "she was injured (1) in an occurrence that ordinarily does not happen in the absence of negligence, (2) by an agency or instrumentality within the defendant's exclusive control." *Heastie v. Roberts*, 226 Ill. 2d 515, 531-32 (2007). Our supreme court has stated that the second element under the doctrine, whether defendant had exclusive control, is not a "rigid standard." *Id.* at 532. Our supreme court explained,

"In setting forth the second element, some authorities speak of 'management and control' rather than 'exclusive control,' but the terms have come to be viewed as interchangeable. In either case, the requisite control is not a rigid standard, but a flexible one in which the key question is whether the probable cause of the plaintiff's injury was one which the defendant was under a duty to the plaintiff to anticipate or guard against." *Id.*

It is well established that operators of an elevator are charged with the highest duty of care because an elevator is a common carrier. *Shoemaker*, 187 Ill. App. 3d at 1045 ("an elevator is considered a common carrier [citation] and, as such, the operator is charged with exercising the highest duty of care."). Further, "[e]levators which are correctly constructed, kept in repair and adequately inspected normally do not fall. When one does there is a reasonable inference of negligence." *Cobb v. Marshall Field & Co.*, 22 Ill. App. 2d 143, 153 (1959); *Daniels v. Standard Oil Realty Corp.*, 145 Ill. App. 3d 363, 368 (1986). To satisfy the first element of the *res ipsa loquitur* doctrine, Delgado offered testimony that the elevator fell, an occurrence that would normally not happen without negligence. *Cobb*, 22 Ill. App. 2d at 153. To satisfy the second

No. 1-11-0277

element, she alleged the Library was a common carrier who owed her the highest degree of care. Although Elite Elevator Systems performed the repair and maintenance of the elevator for the Library, the Library was a common carrier who had a duty to guard against possible injury to plaintiff. See *Heastie*, 226 Ill. 2d at 532 ("In either case, the requisite control is not a rigid standard, but a flexible one in which the key question is whether the probable cause of the plaintiff's injury was one which the defendant was under a duty to the plaintiff to anticipate or guard against."). Delgado's amended complaint cured her prior defective pleading because it clarified that the negligence of the Library was based on its characterization as a common carrier and raised the doctrine of *res ipsa loquitur* to prove her allegation of negligence.

¶ 45 Further we find the Library will not be surprised or sustain prejudice where the comments of both its attorney and the circuit court during the hearing on the motion for summary judgment show that the Library was aware of the possibility of the proposed amendments. At the hearing, the circuit court stated that "It seems to me that the case law on elevators seems to be common carrier duty." The attorney for the library also commented that he believed that the case "might turn into a common carrier case at sometime." The court further mentioned that in researching the issue, "there was a *res ipsa* whole line of cases" but noted the doctrine was not alleged in this case. Accordingly, Delgado's proposed second amended complaint would neither surprise or prejudice the Library where it is clear it was on notice.

¶ 46 Additionally, we are not convinced Delgado was untimely bringing her amended complaint. Section 2-1005 of the Code allows amendment of pleadings "[b]efore or after the entry of summary judgment." 735 ILCS 5/2-1005(g) (West 2008). Although before the circuit

No. 1-11-0277

court granted the Library's motion for summary judgment, the matter was set for trial nine days later, we do not think that Delgado's motion was untimely where it was filed only five days after the granting of summary judgment. Section 1005(b) clearly allows for amendment of pleadings after the entry of summary judgment. 735 ILCS 5.2-1005(g). After summary judgment was granted, Delgado acted quickly to cure the defect in her pleadings.

¶ 47 Lastly, we consider whether "previous opportunities to amend the pleading could be identified." *Loyola Academy*, 146 Ill. 2d at 273. As discussed above, we find Delgado acted quickly to amend her pleadings after the circuit court granted the Library's motion for summary judgment. Although technically Delgado could have filed her second amended complaint any time after June 2, 2009, the date she filed her first amended complaint, we find that she acted within a reasonable time after the circuit court granted the Library's motion for summary judgment on December 22, 2010. When it became clear her initial pleadings could not survive summary judgment, Delgado quickly amended those pleadings on December 27, 2010. It is not unreasonable to assume that prior to December 22, 2010, Delgado operated under the impression that her complaint alleging ordinary negligence did not need amending. Although prior opportunities to amend can be identified, Delgado acted reasonably after it became clear during the summary judgment hearing on December 22, 2010, that her complaint should be amended to include allegations that the Library had a duty as a common carrier and that the doctrine of *res ipsa loquitur* may apply. Based on our review of the above facts, we conclude that the circuit court erred when it denied Delgado's motion for leave to file a second amended complaint.

No. 1-11-0277

¶ 48

CONCLUSION

¶ 49 The judgment of the circuit court is affirmed in part and reversed in part.

¶ 50 Affirmed in part, reversed in part, cause remanded.