2012 IL App (2d) 120024-U
No. 2-12-0024
Order filed November 6, 2012

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

KAREN JOHNSON,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 10-L-210
	)	
UTOPIA TOURS, INC., and BRIAN LAPPI,	)	Honorable
	)	John T. Elsner,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justice McLaren and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly granted summary judgment in the defendants' favor because the defendants' actions were not the proximate cause of the plaintiff's injuries.

¶ 2 The plaintiff, Karen Johnson, paid to participate in a senior citizen New England Fall Colors bus tour operated by defendant, Utopia Tours, Inc. (Utopia), and led by defendant Brian Lappi. The first night of the trip was spent in Downers Grove. After arriving at the hotel, the plaintiff attempted to cross an unlit highway in front of the hotel in order to get to a restaurant. She was struck by a car and was injured. The plaintiff thereafter filed a complaint asserting that the defendants were

negligent for designing a tour that required her to walk across an unlit highway in order to get dinner. The circuit court of Du Page County granted summary judgment in the defendants' favor, and the plaintiff appeals from that order. We affirm.

¶ 3 BACKGROUND

¶ 4 The following relevant facts are taken from the record. The plaintiff decided to visit the east coast of the United States. She read Utopia's brochure for their "East Coast Fall Colors Tour." The brochure stated that "the price includes motor coach transportation, hotel accommodations, fully escorted." The brochure further stated that "[a] congenial and trained tour director will handle every detail, attend to the comfort and pleasure of each individual and provide expert guidance throughout the tour." Believing that the tour guide would take care of all the arrangements, the plaintiff signed up for the tour.

¶ 5 Prior to the departure date, the plaintiff received a hotel list provided by Utopia. According to the hotel list, the first night's stay would be at the Comfort Inn in Downers Grove, which had a restaurant on the premises.

¶ 6 On September 22, 2009, the first day of the tour, the day was spent on the bus traveling from Minnesota to Downers Grove. The bus arrived at Downers Grove between 6:30 pm and 7 p.m. The hotel manager came outside to the parking lot to welcome the group and told them about the restaurants in the area. There was no restaurant at the Comfort Inn. At about 7:30 p.m to 7:45 p.m., Lappi gave the plaintiff a room key. Lappi told her to find something to eat and to be back to the hotel by 9:30 p.m for a get-acquainted social. Lappi indicated that he was going to get refreshments for the meeting. After leaving her luggage in her room, the plaintiff left the hotel in order to get dinner. It never occurred to her to ask Lappi for a ride.

¶ 7 The plaintiff walked out into the Comfort Inn parking lot to Finley Road. Finley Road is a four-lane divided highway with a median barrier. She did not see either Lappi or the tour bus. She did not ask anyone for assistance or transportation because she "didn't have anyone to ask." She did not see any restaurants to the left, but she did she a Red Lobster restaurant to the right across the highway. She walked through the parking lot, then down an incline to the street level. It was completely dark and there were no streetlights. She walked to the left, looking for a crosswalk, but she did not see any. She then walked back to where she had been standing across from the Red Lobster. While she was standing there, some other members from the tour came up to her and said that they had walked all the way down to the corner to the right and that there was no crosswalk there. Although there was a crosswalk to the left at the intersection of Butterfield and Finley, it was not visible from where the plaintiff was standing because it was around the corner and down the hill.

¶ 8 Some of the other people in the tour group informed the plaintiff that they had already crossed the highway at the spot where the plaintiff was standing. After looking both ways, the plaintiff decided to cross at that spot also even though there was no crosswalk for pedestrians there. The plaintiff was subsequently struck by a car while crossing the highway. While the plaintiff was lying in the road, more people kept crossing the road at the same spot.

¶ 9 Lappi indicated that he had worked for General Mills for ten years as an employee services coordinator setting up tours for retirement groups and employees. He had designed about 20 tours and had personally escorted about 10 to 12 senior citizen bus tours. He was contacted by Elaine Angen, an owner of Utopia Tours, asking him if he would escort the Fall Colors Tour. He agreed, and the night before the tour, he met Angen for the first time and spent about a half hour with her. During their meeting, Angen did not offer him any specific training, even though he had never been

to any of the places or any of the stops on the tour. Had he known that the senior citizens would have had to cross the road from the Comfort Inn to a restaurant, he would have offered bus transportation. In the itinerary, there were several nights people were on their own for dinner where it was indicated that the bus would take them places to eat. He did not know of any reason that this could not have been done on the first night.

¶ 10 Angen testified that she designs all of Utopia's tours. The Fall Colors Tour had stayed at the Downers Grove Comfort Inn a number of times and had not had any complaints. The Fall Colors Tour restaurant list showed that the Comfort Inn had its own restaurant, but this was an error. Angen herself had never been to that Comfort Inn in Downers Grove or to any hotel in Downers Grove.

¶ 11 Officer John Yocum of the Downers Grove police department testified that he found the plaintiff laying in Finley Road. There was no sidewalk on the south side of Butterfield Road where the Comfort Inn was located. There are no streetlights on Finley Road for the block south of Butterfield Road where the Comfort Inn is located. From the Comfort Inn, one would have to walk down a grassy slope to get to the west side of Finley Road. No crosswalk could be seen from the scene of the accident. There was a crosswalk at the intersection of Butterfield and Finley, although it did not have a walk/don't walk signal. There were a lot of accidents within the area of the intersection of Butterfield Road and Finley Road, although not exactly in the intersection itself. The area was considered the most accident-prone in Illinois.

¶ 12 On August 2, 2010, the plaintiff filed a complaint against the defendants sounding in negligence. The complaint alleged that the defendants were negligent for not including a place to eat dinner on the first night of the tour that could be reached safely by senior citizens. The complaint

further alleged that the defendants were negligent for failing to stop the tour bus at a place where senior citizen passengers could safely leave the bus to eat dinner.

¶ 13 On August 5, 2011, the defendants filed a motion for summary judgment. The defendants argued that they did not owe the plaintiff a duty to assist her in seeking a place to have dinner or to obtain transportation for that purpose. They also argued that they did not breach any duty to the plaintiff and that none of their actions constituted the proximate cause of the plaintiff's injuries. On December 21, 2011, the trial court granted summary judgment in the defendants' favor. The trial court explained that the defendants did not owe any duty to protect the plaintiff from the injuries that she suffered because they did not control the area in which the plaintiff was injured and there was no evidence that they had any knowledge of the danger associated with the hotel. The plaintiff thereafter filed a timely notice of appeal.

¶ 14 ANALYSIS

¶ 15 On appeal, the plaintiff argues that the trial court erred in granting the defendants' motion for summary judgment. Specifically, the plaintiff contends that the defendants breached their duty of reasonable care as a tour guide and caused her injuries due to their negligent planning and execution of the tour.

¶ 16 At the outset, we note that the purpose of a motion for summary judgment is to determine whether a genuine issue of triable fact exists (*McLaughlin v. Sternberg Lanterns, Inc.*, 395 Ill. App. 3d 536, 540 (2009)) and that such a motion should be granted only when "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)). An order granting summary judgment should be reversed if the evidence

shows that a genuine issue of material fact exists or if the judgment was incorrect as a matter of law. *Clausen v. Carroll*, 291 Ill. App. 3d 530, 536 (1997).

¶ 17 To recover on a claim of negligence, a plaintiff must establish facts demonstrating the existence of a duty of care owed by defendants to the plaintiff, a breach of that duty, and an injury proximately caused by that breach. *Thompson v. Gordon*, 241 Ill. 2d 428, 438 (2011). A duty is an obligation to conform to a certain standard of conduct for the protection of another against an unreasonable risk of harm. *Mt. Zion State Bank v. Consolidated Communications, Inc.*, 169 Ill. 2d 110, 116 (1996). Whether or not a duty of care exists is a question of law to be determined by the court, and thus may be determined on a motion for summary judgment. *Curatola v. Village of Niles*, 154 Ill. 2d 201, 207 (1993).

¶ 18 In considering proximate cause, our supreme court in *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 257 (1999) held: "Illinois courts draw a distinction between a condition and a cause." The supreme court further stated:

> "Indeed, if 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. *Briske v. Village of Burnham*, 379 Ill. 193, 199 (1942); *Merlo v. Public Service Co.*, 381 Ill. 300, 316 (1942); see also *Thompson* [v. *County of Cook*,] 154 Ill. 2d [374,] 383 [1993]. The test that should be applied in all proximate cause cases is whether the first wrongdoer reasonably might have anticipated the intervening efficient cause as a natural and probable result of the first party's own negligence. [Citation.]" *Galman*, 188 Ill. 2d at 257.

¶ 19 The *Galman* court also identified a second test for determining proximate cause which was established in *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 455 (1992). Specifically, it stated:

> "In *Lee* the court held that the term 'proximate cause' describes two distinct requirements: cause in fact and legal cause. [Citation.] Cause in fact exists where there is a reasonable certainty that a defendant's acts caused the injury or damage. [Citation.] A defendant's conduct is a cause in fact of the plaintiff's injury only if that conduct is a material element and a substantial factor in bringing about the injury. [Citation.] A defendant's conduct is a material element and a substantive factor in bringing about an injury if, absent that conduct, the injury would not have occurred. [Citation.] 'Legal cause,' by contrast, is essentially a question of foreseeability. [Citation.] The relevant inquiry here is whether the injury is of a type that a reasonable person would see as a likely result of his or her conduct. [Citation.]" *Galman*, 188 Ill. 2d at 257-58.

¶ 20 The *Galman* court noted the parties in that case were under the mistaken impression that the two tests were incompatible. Instead, the supreme court held that although *Briske*, *Merlo*, and *Thompson* employed a different vocabulary than *Lee*, all of the cases asked the same question: "Was defendant's negligence a material and substantial element in bringing about the injury, and, if so, was the injury of a type that a reasonable person would see as a likely result of his or her conduct. *Galman*, 188 Ill. 2d at 258-59. It went on to conclude that, "far from conflicting, *Briske*, *Merlo*, *Thompson*, and *Lee* uniformly embrace the traditional proximate cause test that has governed Illinois for the better part of this century. [Citation.]" *Id.*

¶ 21 We further observe that proximate cause ordinarily is a question of fact for the jury; however, it becomes a question of law where there can be no difference in the judgment of reasonable men on the inferences to be drawn. *Olson v. Williams All Seasons Co.*, 2012 IL App (2d) 110818 at ¶ 25.

¶ 22 Here, based on our supreme court's decision in *Galman*, we believe that even if we were to find that the defendants owed the plaintiff a duty of care and that they breached that duty, we could not find that the defendants' conduct was the proximate cause of the plaintiff's injuries. See *Perez v. Sunbelt Rentals*, 2012 IL App (2d) 110382 at ¶ 7 (appellate court may affirm a grant of summary judgment on any basis appearing in the record, regardless of whether the trial court relied upon that ground). In *Galman*, Howard Dobson illegally parked his tanker trunk, owned by ADM Trucking, Inc., on the north side of Lawrence Avenue, 41 feet from the intersection of English Street in Springfield. Lawrence Avenue is a four-lane road. May Phillippart was walking south on English Street. She did not use the intersection at Lawrence Avenue and English Street. Instead, she turned right and headed west on Lawrence, walking 41 feet plus the full length of the truck before deciding to cross. After walking in front of Dobson's truck, she began running at a 45-degree angle across the street. Phillippart was subsequently struck and fatally injured by a car driven by Angela Galman. *Galman*, 188 Ill. 2d at 254-55.

¶ 23 Phillippart's estate filed a negligence action against Dobson, ADM, and Galman. After a jury returned a verdict in the plaintiff's favor and the appellate court affirmed, Dobson and ADM appealed to the supreme court. They argued that they were entitled to a judgment notwithstanding the verdict because (1) the illegally parked truck was not the proximate cause of Phillippart's injuries and (2) they owed no duty of care to Phillippart, who was illegally jaywalking when the accident occurred. The supreme court determined that Dobson and ADM were not the proximate cause of

Phillippart's injuries. *Id.* at 261. The supreme court reasoned that where the tanker truck was parked was a condition, or "cause in fact," of Phillippart's injuries because had Dobson not parked his truck illegally on Lawrence Street, Phillippart's injuries almost certainly would not have occurred. *Id.* at 259-60. The supreme court expounded that Phillippart still may have chosen to cross Lawrence Avenue at mid-block in clear violation of the law, but she would have had an unobstructed view of the roadway and presumably would have timed her crossing to avoid a collision with oncoming traffic. *Id.* at 260.

¶ 24 Nevertheless, although the placement of the truck was a cause in fact of Phillippart's injuries, the supreme court held that it was not the legal cause, explaining:

> "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. May Phillippart's decision to jaywalk, while undeniably tragic and regrettable, was entirely of her own making. Dobson and ADM neither caused Phillippart to make that decision, nor reasonably could have anticipated that decision as a likely consequence of their conduct. One simply does not follow the other." *Id.* at 261.

¶ 25 In the case herein, the defendants' conduct, at best, was a condition, or a cause in fact, of the plaintiff's injuries. Had the defendants arranged that the first night of the trip be spent at a hotel with a restaurant, or had they arranged that the tour bus stop at a place where people could walk to a restaurant without crossing a major road, the plaintiff arguably would not have been injured crossing a highway to a restaurant. As such, the question becomes whether the defendants' choice of where to spend the first night of the trip was the legal cause of the plaintiff's injuries. More specifically,

the relevant question is whether it was reasonably foreseeable that a member of the tour group would decide to jaywalk across an unlit highway without first asking (1) the tour group director; (2) someone who worked at the hotel; or (3) someone familiar with the area what was the safest way to cross the road. We believe that it was not. Although the plaintiff did ask some of her fellow tour group members how to cross the road, we do not believe that a reasonable person could anticipate that she would choose to rely on the representations of such people who were as unfamiliar with the area as she was rather than asking someone who had actual knowledge of the area. Neither Utopia Tours nor Lappi caused the plaintiff to cross the road without first asking a competent person what was the safest way to get to the other side, nor reasonably could they have anticipated the plaintiff's decision as a likely consequence of their conduct.

¶ 26 In so ruling, we are unpersuaded by the plaintiff's attempt to distinguish *Galman*. The plaintiff insists that "*Galman* is strictly limited to statutory violations, *i.e.* illegal parking." The plaintiff's argument is inaccurate. The *Galman* court's holding was not based on how the duty between the decedent and the defendants arose but rather was premised on the determination that the defendants' conduct was not the legal cause of the decedent's injuries. The plaintiff additionally argues that, unlike the decedent in *Galman*, she did not know where the crosswalk was and thus did not intentionally choose not to use it. However, the fact remains that the reason she did not know where the crosswalk was is because she did not ask anyone with knowledge of the area where the crosswalk was or the safest way to cross the road.

¶ 27 In her deposition, the plaintiff asserts that she did not ask anyone for directions because "there was no one to ask." This statement is contradicted by the record and strains credulity. After arriving at the Comfort Inn, the hotel manager came to meet the tour group and told them about the

restaurants in the area. She failed to ask the hotel manager how to safely get to those restaurants. Next, she walked into the hotel to drop off her luggage. She could have asked some at the hotel front desk about how to safely get to a local restaurant. She did not. After dropping off her luggage and before leaving the hotel, she had the opportunity to ask someone how to safely get to the other side of the road. Again, she did not. Finally, after walking across the hotel parking lot and not seeing a safe way to cross the road, she could have returned to the hotel to ask for directions, but did not. Accepting the plaintiff's statement that "there was no one to ask" for help would require us to overlook her meeting with the hotel manager and infer that no one was working in the hotel when she entered or left it. As such, as her statement is contradicted by the record and is unbelievable, it is not sufficient to preclude an order of summary judgment being entered in the defendants' favor. See *Olson*, 2012 IL App 2d 110818 at ¶ 25.

¶ 28 We also note that the plaintiff relies extensively on cases from foreign jurisdictions. However, where our supreme court has already spoken on an issue, it is improper for us to depart from supreme court precedent. See *O'Casek v. Children's Home & Aid Society of Illinois*, 229 Ill. 2d 421, 440 (2008). We therefore decline the plaintiff's invitation to consider those foreign cases that are inconsistent with *Galman*.

¶ 29 Because this ruling is dispositive of all claims raised in this appeal, we need not address the remaining issues.

¶ 30 CONCLUSION

¶ 31 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 32 Affirmed.