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2014 IL App (3d) 120828-U, 2014 IL App (3d) 120829-U cons.

Order filed June 13, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

TOMAS AGUILERA, Individually, and as Administrator of the Estate of Antonia Aguilera, Deceased,)	Appeal from the Circuit Court of the Thirteenth Judicial Circuit, LaSalle County, Illinois
Plaintiff-Appellant,)	
v.)	Appeal No. 3-12-0828 Circuit No. 07-L-181
RUSSELL E. FLANDERS, MICHAEL J. YANKE, MILAN EXPRESS COMPANY, INC., and CHRYSLER LLC, a Delaware Limited Liability Company,)	Honorable Eugene P. Daugherty, Judge, Presiding.
Defendants-Appellees.)	

JOSE CARREON, Individually, and as Administrator of the Estate of Marciela Carreon, Deceased,)	Appeal from the Circuit Court of the Thirteenth Judicial Circuit, LaSalle County, Illinois
Plaintiff-Appellant,)	
v.)	Appeal No. 3-12-0829 Circuit No. 08-L-59
RUSSELL E. FLANDERS, MICHAEL J. YANKE, MILAN EXPRESS COMPANY, INC., and CHRYSLER LLC, a Delaware Limited Liability Company,)	Honorable Eugene P. Daugherty, Judge, Presiding.
Defendants-Appellees.)	

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices O'Brien and Schmidt concurred in the judgment.

ORDER

- ¶ 1 Held: Trial court properly awarded summary judgment in favor of defendant truck driver and his employer because evidence that truck driver stopped suddenly or performed some other negligent act that was a proximate cause of the traffic accident that killed plaintiffs' decedents was speculative.
- ¶ 2 Antonia Aguilera (Antonia) and Marciela Carreon (Marciela) were killed in a horribly tragic automobile accident when the Jeep Cherokee in which they were driving was struck from the rear by a pickup truck driven by Russell Flanders and pushed into a semi truck driven by Michael Yanke. Plaintiffs Tomas Aguilera, individually and as the administrator of Antonia's estate, and Jose Carreon, individually and as the administrator of Marciela's estate, brought separate actions for wrongful death and survival against Flanders and Yanke. The two actions were consolidated for discovery and trial. The plaintiffs alleged that Yanke negligently caused his vehicle to come to a sudden stop without providing sufficient time for Flanders to stop, thereby causing Flanders to run into the Aguilera/Carreon Jeep and push it into Yanke's trailer. The plaintiffs also alleged that Yanke was negligent by: (1) failing to maintain a proper lookout; (2) failing to keep his vehicle under proper control; (3) failing to stop his vehicle and provide adequate warning to Antonia (who was driving her Jeep directly behind Yanke's vehicle) when he "knew or should have known that such failure would cause [Antonia] to stop suddenly and expose her vehicle to being stuck from behind by vehicles traveling behind her"; (4) failing to warn Antonia or other vehicles traveling behind him of his intention to stop. Yanke and Milan filed answers to the plaintiffs' first amended complaints denying all allegations of negligence and proximate cause.

¶ 3 Yanke and Milan filed a motion for summary judgment, which the trial court granted.

The trial court subsequently entered an order pursuant to Supreme Court Rule 304(a) finding that there was no just reason to delay enforcement or appeal of its summary judgment order. This appeal followed.

¶ 4

FACTS

¶ 5 Yanke worked as a truck driver for Milan. During his deposition, Yanke testified that, on October 16, 2007, he was transporting a load from Wauwatosa, Wisconsin to Missouri. Before departing, he inspected all of the lights on his truck and found them to be working properly.

¶ 6 Later that evening, Yanke was driving southbound on Interstate 39 near Tonica, Illinois. He was driving in the right-hand lane going approximately 55 miles per hour. Visibility was good, and there was no fog or precipitation. As he drove past the Tonica exit near Milepost 48, he saw that traffic was stopped in both southbound lanes and was backed up all the way to Milepost 46. He disengaged his cruise control, looked in his mirror and observed a car behind him, tapped his brakes a few times, turned on his emergency flashers, slowed down, and stopped. After he came to a stop, he looked to make sure the car behind him was stopped with him. He then turned on his CB radio to find out what was happening. He heard over the CB that there was a hay truck on fire further down the road and they should be moving shortly. After he was stopped for a while, Yanke turned off his emergency flashers.

¶ 7 Several minutes later, a collision occurred behind Yanke's vehicle. Yanke looked in his mirror and saw flames going across the highway and at the back of his trailer. He pulled his trailer forward to get out of the fire. He then got out of the truck and went back to investigate.

He saw that Antonia's vehicle was on fire. Yanke and others attempted to put the fire out with fire extinguishers, but they were unable to do so. Police, rescue personnel, and an IDOT inspector subsequently arrived on the scene. The IDOT inspector examined Yanke's truck and trailer and found no mechanical problems.

¶ 8 Yanke testified that both his vehicle and the car behind him were at a complete stop for several minutes before the collision occurred. He and the vehicle behind him were at the end of a line of stopped vehicles.

¶ 9 Russell Flanders was also deposed. During his deposition, Flanders testified that, at the time of the accident, he was driving southbound on I-39 in his F150 pickup truck. He claimed that there was a patchy fog at the time. For the majority of the trip, Flanders was traveling at approximately 65 miles per hour, but he might have slowed a bit just before he collided with Antonia's car.¹ He testified that he saw Antonia's brake lights and the brake lights of a line of vehicles in front of Antonia's car a "split second" before impact. Flanders claimed that, by the time he saw the brake lights in front of him, there was no time to touch his brakes. Although he saw brake lights ahead of him, he did not know whether Antonia had been stopped or was just stopping. He also did not know whether the vehicle in front of Antonia was slowing down or

¹ Flanders testified that, prior to the accident, he had his cruise control set to 65 miles per hour, the posted speed limit on I 39. He believed that, some time prior to the collision, he tapped his brakes to slow down a bit because that was his "habit" when he drives into a patch of fog.

However, Flanders did not specifically remember tapping his brakes prior to the accident, and he admitted that it was possible that his vehicle was still on cruise control at the time of the accident.

already stopped. He did not know how much time passed from the time he saw Antonia's car until the impact. He was in a foggy patch, and he just saw the car and then hit it. The impact pushed Antonia's car under the semi-truck in front of it and Antonia's car immediately burst into flames.

¶ 10 Flanders testified that he was unable to stop in time to prevent the accident because his vision was partially obscured by a patch of fog. He could not say how long any of the cars in front of him were stopped at the time of the accident. When asked whether there was anything that Antonia's car did that contributed to the accident in any way, Flanders responded "[n]ot that I*** could tell you." When asked whether he knew of any cause of the accident other than the foggy conditions, Flanders responded "[n]ot that I could tell you."

¶ 11 Michael Vickers, another witness to the accident, was also deposed. Vickers testified that he had been driving southbound on I 39 for six or seven miles before he witnessed the collision. As he was driving, he observed a line of vehicles and semis stopped ahead of him. When he saw that some of these vehicles had their hazard lights on, Vickers slowed down and turned on his hazard lights. Vickers testified that, although it was dark, he did not remember it being foggy and he did not remember anything obstructing his vision. He was traveling in the right lane and was the first vehicle behind the pickup truck that collided with the Jeep in front of it. A semi was in front of those vehicles. Although Vickers could not recall seeing brake lights, he testified that the semi in front of the Jeep was stopped. Vickers believed that every vehicle he saw in front of him was stopped except for the pickup truck. He testified that "it was pretty obvious there [were] hazard lights and vehicles were stopped." He could not say whether the semi had its hazards on at the time. Although he was not certain, Vickers estimated that he was about four or five hundred feet behind the pickup when the collision occurred. He heard an explosion and saw

a fireball. After the impact, Vickers saw the semi ahead of the Jeep pull off to the side of the road and saw the semi driver get out of the truck.

¶ 12 Gregory Land, a truck driver employed by Conway Freight in Rockford, also witnessed the accident. During his deposition, Land testified that he was traveling southbound on I 39 in the driving lane on the night of the accident. According to Land, the weather conditions that night were clear and cool and there were no problems with visibility. As he approached mile marker 47, he saw that traffic was stopped. He turned on his CB radio and heard that the road was closed because a truck that was hauling hay was on fire at the 41 mile marker. Land saw "everybody stopping [with] their four-ways [*i.e.*, hazard lights] on." He had no difficulty seeing the line of cars that were stopped in front of him. He put on his hazard lights, slowed down, and then applied his brakes and stopped. He left his hazard lights on after he stopped.

¶ 13 Land testified that he was watching his rearview mirror on the left side to make sure that everyone behind him was slowing down to stop. He stated that he had learned through his experience and training as a truck driver that, if you have to bring your truck to a stop on the interstate, you must let people behind you know that you are stopping or slowing so that they can act accordingly. While he was looking in his rearview mirror, Land saw the truck which he later learned to be Yanke's truck stop directly behind him. Yanke's truck was not "real close" to Land's truck because Land could see Yanke's headlights. He thought that Yanke had his front hazard lights on, but he could not tell whether Yanke's rear hazard lights were on. Both Land and Yanke were stopped for at least two minutes before the collision occurred. When the accident happened, Land looked in his mirror again and saw a fireball. Land did not feel that Yanke had anything to do with the accident. Land got out of his truck and emptied fire

extinguishers on the burning Jeep for several minutes until emergency personnel arrived. He was later taken to the hospital.

¶ 14 Trooper Chad Broyles, an accident reconstruction expert with the Illinois State Police, arrived on the scene sometime after 10 p.m., after the fire department had extinguished the fire. Trooper Broyles spoke with Trooper Dalton at the scene and got a general impression of what happened. He took accident photographs, examined the physical evidence, interviewed several witnesses (including Vickers and Land), took narrative statements from Vickers and Land, and prepared a written report. He did not speak with Yanke or Flanders.

¶ 15 Trooper Broyles concluded that Antonia died from the fire. He was uncertain as to whether Marciela died from the impact, the fire, or both. He concluded that Antonia's Jeep and Yanke's semi truck were slowed or stopped in traffic when Flanders's pickup truck failed to yield or stop, struck the Jeep, and pushed it into the back of Yanke's trailer. The Jeep caught fire upon impact. There was no evidence of braking by the pickup truck before it hit Antonia's Jeep. Based on the massive damage to the rear of Antonia's Jeep, Broyles concluded that the pickup truck was traveling close to or in excess of 60 miles per hour at the time of the impact. Broyles believed that it was clear that night and there had been no fog. The police report stated that the cause of the accident was Flanders's failure to reduce speed to avoid a crash. Broyles concluded that, at the time of impact, Antonia's Jeep was either completely stopped or moving at a very minimal rate of speed, *i.e.*, less than two miles per hour.

¶ 16 Yanke and Milan moved for summary judgment. The trial court granted the motion. The trial court noted that the plaintiffs' theory of liability was that Yanke's truck came to a sudden stop, causing Flanders to run into Antonia's Jeep. However, the court observed that none of the witnesses testified that Yanke's truck came to a sudden stop. Thus, the trial court found that the

claim that Yanke suddenly stopped was based on speculation, which is not sufficient to defeat a motion for summary judgment.

¶ 17 The trial court also ruled that Yanke's alleged failure to leave his hazard lights on could not support a claim for negligence. The court ruled that there is no statutory duty to turn on one's hazard lights while stopped in traffic. The court concluded that, because the decision to turn on one's hazard lights in such situations is a "discretionary act," a driver's failure to turn on his hazard lights on "can't be the basis of a negligent act." Although the court acknowledged that Yanke was required to have his brake lights on, it found no record evidence that Yanke's truck did not have its brake lights on at the time.

¶ 18 Although the trial court recognized that issues of proximate causation are usually questions of fact, it found that, in this case, there is "no evidence beyond speculation to support a breach of duty that was, as a matter of law, a proximate cause of this accident by the defendant [Yanke or] Milan." Accordingly, the court granted Milan and Yanke's motion for summary judgment. This appeal followed.

¶ 19

ANALYSIS

¶ 20 Summary judgment is appropriate when the pleadings, depositions, admissions and affidavits show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2006). Where there is a dispute regarding a material fact, or where reasonable persons could draw divergent inferences from the undisputed material facts, summary judgment should be denied and the issue decided by the trier of fact. *Espinoza v. Elgin, Joliet and Eastern Railway Co.*, 165 Ill. 2d 107, 114 (1995). However, a "reasonable inference" sufficient to forestall summary judgment "cannot be established on mere speculation, guess or conjecture." *Salinas v. Werton*, 161 Ill. App. 3d 510,

515 (1987). We review a trial court's grant of summary judgment *de novo* (*Gyllin v. College Craft Enterprises, Ltd.*, 260 Ill. App. 3d 707, 711 (1994)), viewing all reasonable inferences in favor of the nonmoving party (*Buchaklian v. Lake County Family Young Men's Christian Ass'n*, 314 Ill. App. 3d 195, 199 (2000)).

¶ 21 To state a cause of action for negligence, the plaintiff must establish that the defendant owed a duty of care, that the defendant breached this duty, and that the plaintiff incurred injuries proximately caused by the breach. *Wojdyla v. City of Park Ridge*, 148 Ill. 2d 417, 421 (1992).

To survive a motion for summary judgment in a negligence case, the plaintiff must present some factual basis in support of each element of the cause of action, including proximate cause.

Gyllin, 260 Ill. App. 3d at 710-11 (1994). Proximate cause can be established only when there is a "reasonable certainty" that the defendant's negligent acts caused the injury. *Salinas*, 161 Ill. App. 3d at 514; see also *Geelan v. City of Kankakee*, 239 Ill. App. 3d 528, 529-30 (1993) (ruling that "[t]o establish proximate cause, a plaintiff must demonstrate with reasonable certainty that a defendant's alleged negligence caused the injury for which plaintiff seeks recovery," and that "[l]iability cannot be premised *** upon speculation or conjecture"). Accordingly, to survive summary judgment, the plaintiff must present "some evidence" to show that the defendant's alleged negligence was a "reasonably certain" proximate cause of the plaintiff's injuries. See *Gyllin*, 260 Ill. App. 3d at 714. "The circumstances must justify a reasonable inference of *probability* of negligence, as distinguished from *mere possibility*." (Emphasis added.) *Id.*

¶ 22 In this case, there is no evidence supporting a reasonable inference that any action taken or not taken by Yanke was a reasonably certain proximate cause of the accident that killed the plaintiffs. As the trial court noted, no witness testified that Yanke stopped his truck suddenly, and the witness testimony does not support a reasonable inference to that effect. Both Land and

Yanke testified that Yanke's semi was stopped for several minutes (at least two minutes, according to Land) before the accident. This testimony was corroborated by Vickers, who testified that the semi in front of the Jeep was stopped prior to the accident. Vickers believed that every vehicle he saw in front of him was stopped except for the pickup truck, and that "it was pretty obvious there [were] hazard lights and vehicles were stopped."

¶ 23 Moreover, multiple witnesses testified that Antonia's Jeep was stopped prior to the accident. Yanke testified that Antonia's Jeep was at a complete stop for several minutes before the accident. Vickers testified that all of the vehicles ahead of him had stopped prior to the accident except for Flanders's pickup truck. Moreover, Trooper Broyles concluded that, at the time of impact, Antonia's Jeep was either completely stopped or moving at a very minimal rate of speed, *i.e.*, less than two miles per hour.

¶ 24 The plaintiffs note that Flanders testified that he saw brake lights only a split second before the impact. They argue that this testimony gives rise to a reasonable inference that Yanke braked suddenly, causing Antonia to stop suddenly before the accident. We disagree. Although Flanders testified that he saw brake lights at the last minute, he stated that he did not know whether Antonia's Jeep had been stopped or was just stopping at the time. He also testified that he did not know whether the vehicle in front of the Jeep was slowing down or already stopped before the accident. He could not say how long any of the cars in front of him were stopped at the time of the accident. Thus, Flanders's testimony does not create a genuine factual dispute on the issue of whether Yanke or Antonia stopped suddenly prior to the accident. See *Steiner Electric Co. v. NuLine Technologies, Inc.*, 364 Ill. App. 3d 876, 882 (a witness's testimony of lack of knowledge cannot be used to create a question of fact to defeat summary judgment).

¶ 25 Moreover, even assuming *arguendo* that Yanke did stop suddenly, Flanders's testimony does not support a reasonable inference that Yanke's sudden stop was a "reasonably certain" proximate cause of the accident. The undisputed testimony of the occurrence witnesses suggests that Antonia's Jeep was at a complete stop prior to the accident.² Thus, there is no evidence that any sudden stop by Yanke rendered Antonia unable to stop in time to avoid an accident. Moreover, there is no evidence that a sudden stop by Yanke somehow made it impossible or more difficult for Flanders to stop in time. The plaintiffs' theory is that Yanke stopped suddenly, which caused Antonia to stop suddenly, which, in turn, made it impossible for Flanders to stop before hitting Antonia. However, when asked whether there was anything that Antonia's car did that contributed to the accident in any way, Flanders responded "[n]ot that I *** could tell you." When asked whether he knew of any cause of the accident other than the foggy conditions, Flanders gave the same response ("[n]ot that I could tell you.").

¶ 26 In sum, despite rigorous and exhaustive questioning by very able counsel, none of the occurrence witnesses were able to present testimony supporting a reasonable inference that Yanke or Antonia came to a sudden stop or that any such stop was a proximate cause of the accident. Flanders disavowed any claim that Yanke or Antonia contributed to the accident in any way, and the undisputed testimony of the other witnesses establishes that Yanke was completely stopped prior to the accident.

² As noted, Yanke testified that Antonia was at a complete stop for several minutes before the collision occurred and Vickers testified that all of the vehicles in front of him were stopped prior to the accident except for Flanders's pickup. Flanders's testimony does not dispute this because Flanders testified that he did not know whether Antonia was stopped or was just stopping immediately before the accident.

¶ 27 The plaintiffs also argue that Yanke's failure to leave his flashing hazard lights on prior to the accident proximately caused the plaintiffs' deaths. To decide this issue, we must first determine whether Yanke had a duty to turn his hazard lights on under the circumstances, *i.e.*, while he was temporarily stopped in traffic due to an accident. No governing statute or regulation establishes such a duty. Under the Illinois Vehicle Code, the use of hazard lights to warn of a traffic hazard is discretionary. See 625 ILCS 5/11-804(d) (West 2006) (noting that a turn signal "*may* be used on both sides of a vehicle to indicate a traffic hazard.") (Emphasis added.). Section 392.22(a) of the Code of Federal Regulations provides that the driver of a stopped commercial vehicle shall activate warning signal flashers whenever the vehicle "is stopped upon the traveled portion of a highway or the shoulder of a highway for any cause *other than necessary traffic stops*." (Emphasis added.) 49 C.F.R. § 392.22(a). Because Yanke's truck was stopped in traffic due to an accident (*i.e.*, due to a "necessary traffic stop"), Yanke was not required to activate his hazard lights under this federal regulation.³

³ The plaintiffs argue that, under 49 C.F.R. § 392.22(a), "necessary traffic stops" include only stopping at stoplights or stops initiated by the police. This interpretation is not supported by the language used in the regulation and we have found no case law supporting this interpretation. Moreover, the regulation provides that the use of flashing lights is required only "**Error! Main Document Only**.until the driver places the warning devices required by paragraph (b) of this section" (49 C.F.R. § 392.22(a)), which include reflective triangles or flares (49 C.F.R. §§ 392.22(b)(3), 393.95(f)). Such warning devices must be deployed when a truck is parked or disabled on a roadway, not when it is temporarily stopped in traffic due to a traffic jam or accident ahead of the truck. See, *e.g.*, **Error! Main Document Only**.*Mack v. Wilkerson*, 801 S.W.2d 26, 27 (Ark. 1990) (**Error! Main Document Only**.holding that the duty to deploy

¶ 28 However, whether Yanke had a common law duty to turn on his hazard lights under the circumstances is another matter. Under the common law of negligence, Yanke had a duty to exercise due care for the safety of other motorists while slowing or stopping his truck. See, e.g., *Mernick v. Chiodini*, 12 Ill. App. 2d 249, 255 (1956)). Prior decisions of our appellate court arguably suggest that this duty does not include the duty to turn on one's hazard lights to signal a stop. See, e.g., *Joseph v. Schwartz*, 96 Ill. App. 3d 749, 756 (1981) ("We are not aware of any legal authority which requires a motorist to signal a stop by means other than the activation of rear stop lights by depression of the brake pedal."); *Amadeo v. Gaynor*, 299 Ill. App. 3d 696, 701 (1998) (noting that the court was not "aware of any statute or common-law duty that requires the driver of a car to give warning to vehicles approaching from behind, other than to have his taillights in proper working order"). However, this case is distinguishable from *Joseph* and *Amodeo* because here there was witness testimony supporting the existence of such a duty. Specifically, Land's testimony suggests that a reasonably prudent truck driver would have turned on his hazard lights under the circumstances.

¶ 29 Unfortunately, however, even if the plaintiffs could establish that Yanke had such a duty, their claims still cannot survive summary judgment because no occurrence witness was able to present testimony supporting a reasonable inference that Yanke's failure to turn on his hazard

warning devices under 49 C.F.R. § 392.22(b) does not apply to vehicles stopped for "necessary traffic stops," including stopping in traffic because of an accident ahead); see also *Salinas*, 161 Ill. App. 3d at 516-17 (ruling that Section 12-702 of the Illinois Vehicle Code (625 ILCS 5/12-702 (West 2006)) requires flares to be placed by certain classes of vehicles only when they are *disabled* on the road, not when they are merely stopped in traffic).

lights was a "reasonably certain" proximate cause of the accident. As noted, both Yanke and Vickers testified that Antonia was at a complete stop prior to the accident, and that testimony was undisputed. Thus, there is no evidence that Yanke's failure to keep his hazard lights on negatively impacted Antonia's ability to stop in time to avoid an accident. All of the evidence suggests that the cause of the accident was Flanders's failure to stop in time to avoid hitting Antonia's Jeep, and there is no evidence suggesting that Yanke's failure to leave his hazard lights on somehow made it impossible or more difficult for Flanders to stop in time. Flanders himself testified that he knew of no cause of the accident other than the foggy conditions.

¶ 30 As noted above, reasonable inferences sufficient to forestall summary judgment cannot be based on speculation or conjecture. *Salinas*, 161 Ill. App. 3d at 515. Given the witness testimony presented in this case, any suggestion that Yanke stopped suddenly or performed some other negligent act which was a proximate cause of the accident is speculative. It is also inconsistent with the undisputed testimony of several witnesses. At most, the evidence in this case suggests a *possibility* that Yanke was negligent, not a *probability* of negligence that was a "reasonably certain" proximate cause of the accident and the tragic deaths of Antonia and Marciela. That is not enough to prevent summary judgment. See, *e.g.*, *Gyllin*, 260 Ill. App. 3d at 714; *Geelan*, 239 Ill. App. 3d at 529-30; *Salinas*, 161 Ill. App. 3d at 514. Accordingly, the trial court properly granted summary judgment in favor of Yanke and Milan.

¶ 31 **CONCLUSION**

¶ 32 For the foregoing reasons, we affirm the judgment of the circuit court of LaSalle County granting summary judgment in favor of the defendants.

¶ 33 Affirmed.