2015 IL App (1st) 143658-U

FOURTH DIVISION
November 12, 2015

No. 1-14-3658

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PATRICK M. ROBINSON, JR., a Minor, by his father and next friend, PATRICK M. ROBINSON, Plaintiff-Appellant, v. BT II, INC., an Illinois corporation, d/b/a McDONALD'S STORE NO. 11049 and McDONALD'S CORPORATION, a Delaware corporation, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County.
	)	No. 12 L 7951
BT II, INC., an Illinois corporation, d/b/a McDONALD'S STORE NO. 11049 Third-Party-Plaintiff, v. BARBARA BROWN, an Individual, Third-Party-Defendant.	)	Honorable John H. Ehrlich, Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Ellis and Cobbs concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court's grant of summary judgment in favor of defendants is affirmed because the evidence does not show what caused plaintiff's injury and, consequently, plaintiff has failed to establish proximate cause.

¶ 2 Plaintiff Patrick M. Robison Jr., through his father and next friend Patrick M. Robinson, appeals from the circuit court's order granting the motion for summary judgment of defendants BT II, Inc., and McDonald's Corporation (defendants) on plaintiff's negligence claims. On appeal, plaintiff contends that the court erred because a genuine issue of material fact exists as to whether defendants' negligence proximately caused plaintiff's injuries. We affirm.

¶ 3 On May 15, 2008, plaintiff fell and was injured while playing in the "Playland" at a McDonald's Restaurant.

¶ 4 In July 2012, plaintiff filed, through his father, a complaint against defendants alleging that he was injured by, *inter alia,* defendants' failure to inspect and maintain the Playland in a reasonably safe condition for use by small children and to warn plaintiff of the dangerous condition of the Playland. Plaintiff subsequently filed an amended complaint alleging that defendants permitted the "carpet and/or mat" on the stairs of the Playland to come loose and failed to remedy this dangerous condition after it was identified as a hazard by third-party inspectors. The amended complaint also included a *res ipsa loquitur* claim alleging that defendants had exclusive control and management over the Playland, plaintiff was injured as a result of the dangerous and hazardous condition of the Playland, and defendants' negligence was the direct and proximate cause of plaintiff's injuries.

¶ 5 In plaintiff's deposition, he stated that he was three years old when he cut his forehead. He did not remember the day that it happened, but he did remember going to daycare where Mrs. Barbara was in charge. He further stated that although all the children at daycare went to the Playland, he did not remember how many children were there. At the Playland there were slides and tubes to crawl through. Mrs. Barbara sat at a table and supervised while the children were in the Playland. There were more than 5 children, but he was not sure if there were more than 10.

¶ 6 With regard to the fall itself, plaintiff did not remember what part of the Playland he was on or what he was doing on the Playland at that time. He did remember playing tag with a friend on the ground, that is, a "flat area." He realized he was bleeding as he walked to the table where Mrs. Barbara was sitting. He later went to a hospital and received seven stitches to the forehead. Plaintiff's father, Patrick stated in a deposition that that plaintiff stated that plaintiff was playing on the "playset" and was hurt.

¶ 7 In her deposition, Barbara Brown, the owner of the daycare that plaintiff attended at the time of the incident, stated that in May 2008 there were six children in her daycare aged three to four years old. On the day that plaintiff fell, the group went to McDonald's to celebrate a birthday. Once inside the play area, the children dispersed and Brown could not see "each and every one." She stated that there was a "blind spot" in the tunnel, but that one could still hear the children. At one point, she heard a "loud, screeching scream" from the stairwell of the play area. When she looked, she saw plaintiff on the floor. No one was near plaintiff and she did not see anyone coming down the stairs.

¶ 8 When she reached plaintiff, he was facedown on the floor. She saw a mat that was not glued to the surface of the stairs and assumed that it "aided him in falling." She did not see plaintiff fall and had "no idea" how he fell; rather she "just assumed" that he fell on the mat

because plaintiff was the only child "coming down" at that time. Additionally, in order to end up in the position that he was, plaintiff had to have "come down the stairs." When she asked plaintiff what happened, he said that he fell.

¶ 9 In September 2014, defendants filed a motion for summary judgment, relying on the depositions of plaintiff and Brown, alleging that defendants were entitled to summary judgment as a matter of law because plaintiff did not remember how he fell and there were "no witnesses that can provide testimony as to what caused the fall." The motion further argued that because no one knew how the accident occurred and there were possible explanations for the fall other than defendants' negligence, plaintiff could prove neither his negligence nor his *res ipsa loquitur* claim. The motion concluded that absent any witnesses to the fall or "positive and affirmative proof" to support plaintiff's claim that the fall was proximately caused by the loose mat on the floor, plaintiff was unable to "prove" the proximate cause of his injury. The motion also alleged that the *res ipsa loquitur* claim must fail as there were "multiple reasonable inferences that are deductible" as explanations for plaintiff's fall, that is, he could have tripped, been pushed or merely lost his balance as he was three years old at the time.

¶ 10 Plaintiff filed a response to the motion for summary judgment, arguing that there was sufficient evidence to "infer" that the loose mat on the Playland stairs was the proximate cause of his injury. Plaintiff relied on Brown's statement in her deposition that she saw plaintiff on the Playland stairs immediately prior to the fall and found him facedown at the base of the stairs.

¶ 11 Attached to the response in support was the deposition of Latasha Evans Wilson, the former manager of the McDonald's restaurant. She stated that the Playland was inspected annually by Ecolab, and that after the inspection a list of "items *** that need to be taken care of" with regard to safety would be generated. Then Fun Time Things, the company that cleaned

the Playland on a quarterly basis, would make any repairs or necessary changes. Also attached in support were the 2008 and 2009 Ecolab reports, both dated after plaintiff's fall. The October 2008 report noted "Blue platform steps with bubbling of rubber surfacing," and classified this issue as "Needs Action." The August 2009 report noted "4th, 5th and 8th stairs of blue climber have bubbled platforms—loose with air under—creating dangerous surface," and classified this issue as "Needs Action"

¶ 12 In November 2014, the trial court held a hearing on defendants' motion for summary judgment. In granting the motion, the court noted that Brown did not see the fall and plaintiff stated that he did not know how the fall happened and that the mere fact that a fall occurred did not, absent any evidence, support an inference of negligence. The court then stated that it was "uncontested" that plaintiff was injured and that there was neither eyewitness testimony nor documentary evidence "as to how it occurred." In other words, there was "no testimony" as to "a cause-in-fact in this case." The court then granted defendants' motion for summary judgment. Plaintiff now appeals.

¶ 13 A trial court is permitted to grant a motion for summary judgment only if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Thompson v. Gordon*, 241 Ill. 2d 428, 438 (2011). This court reviews the trial court's order granting a motion for summary judgment *de novo*. *Thompson*, 241 Ill. 2d at 438.

¶ 14 In a negligence action, a plaintiff must plead and prove that the defendant owed him a duty, that the defendant breached that duty, and that an injury proximately resulted from that breach. *Deibert v. Bauer Brothers Construction Co.*, 141 Ill. 2d 430, 434 (1990). In the case at

bar, the parties do not make any argument on appeal regarding either duty or breach, focusing instead on the issue of proximate cause.

¶ 15 Proximate cause must be demonstrated by establishing with reasonable certainty that the defendant's acts or omissions caused the injury. *Kellman v. Twin Orchard Country Club*, 202 Ill. App. 3d 968, 974 (1990). Although the issue of cause is typically a question of fact for the jury, the lack of proximate cause may be determined as a matter of law when the facts "as alleged" are insufficient. *Vertin v. Mau*, 2014 IL App (3d) 130246, ¶ 10. At the summary judgment stage, a plaintiff is not required to prove his case (*Kellman*, 202 Ill. App. at 974), however, liability cannot be based on mere conjecture or surmise as to the cause of injury (*Kimbrough v. Jewel Companies, Inc.*, 92 Ill. App. 3d 813, 817 (1981)). Put another way, the mere fact that an accident occurred does not support an inference of negligence, and absent affirmative proof of causation, a plaintiff cannot carry his burden to establish the existence of a genuine issue of material fact sufficient to defeat a summary judgment motion. *Strutz v. Vicere*, 389 Ill. App. 3d 676, 679 (2009).

¶ 16 On appeal, plaintiff argues that the circuit court improperly granted defendants' motion for summary judgment because there is a genuine issue of material fact as to the proximate cause of his injuries. He argues that although no one saw him fall a reasonable inference can be made, based upon circumstantial evidence, that the mat covering the Playland stairs caused his fall. Defendants respond that the circuit court properly granted summary judgment because there is no evidence in the record establishing the proximate cause of plaintiff's fall other than Brown's speculation. Defendants argue that Brown's "assumption" that the fall was caused by a loose mat is insufficient to overcome a motion for summary judgment.

¶ 17 Proximate cause in a negligence action may be established through circumstantial evidence that supports more than one logical conclusion. See *McCullough v. Gallaher & Speck*, 254 Ill. App. 3d 941, 949 (1993) (circumstantial evidence is proof of certain facts and circumstances from which the jury may infer other connected facts). Although a plaintiff may rely on reasonable inferences which may be drawn from the facts considered on a motion for summary judgment, an inference cannot be established on mere speculation or conjecture; rather, the circumstances must justify an inference of probability as opposed to mere possibility. *Salinas v. Werton*, 161 Ill. App. 3d 510, 515 (1987); see also *Kellman*, 202 Ill. App. 3d at 975 (the possibility that an unreasonably dangerous condition caused the deceased to fall was insufficient to establish a causal relationship between the defendant's alleged negligence and the injuries suffered by the deceased).

¶ 18 Here, plaintiff stated in his deposition that he did not remember what part of the Playland he was on or what he was doing on the Playland at the time of his fall. He did, however, remember playing tag with a friend on a flat area prior to his fall. Although Brown discovered plaintiff facedown on the floor and believed that the only way plaintiff could have ended up in that position was to fall coming down the stairs, she did not see the fall.

¶ 19 Defendants argue, and we agree, that the facts of this case are analogous to those of *Kellman v. Twin Orchard Country Club*, 202 Ill. App. 3d 968 (1990). In that case, the plaintiff filed suit against the defendant country club alleging that it was negligent in the design, construction, and maintenance of a shower stall after her husband was found dead on the floor of a shower stall. The decedent, who was "unsteady" on his feet, was assisted into a shower stall by his friend. *Id.* at 970. The friend then heard two thuds, looked through the shower stall door and saw the decedent lying on the floor. The plaintiff submitted affidavits of medical experts to

establish that the decedent died as a result of falling on the shower floor and an engineer opined that the shower stall in which the decedent had fallen was unreasonably dangerous because it was unreasonably slippery and the number of grab bars and grips in the stalls were inadequate. *Id.* at 972. The defendant moved for summary judgment asserting that there were no eyewitnesses to the fall and, therefore, the plaintiff was unable to prove the cause of the fall. The trial court granted the motion.

¶ 20 On appeal, the court determined that there was nothing in the record from which it could be inferred that any alleged act or omission on the part of the defendant was the proximate cause of the decedent's injuries. *Id.* at 974. The court stated that "[t]he possibility that the alleged unreasonably dangerous shower stall and basin had caused [the] decedent to slip and fall is insufficient to establish a causal connection between [the] defendant's alleged negligence and [the] decedent's injuries." *Id.* at 975. The court then concluded that the circumstantial evidence, including the condition of the shower stall and the position of the decedent's body after the fall, did not establish "with reasonable certainty" that the decedent's injury was the proximate result of the defendant's negligence. *Id.* at 976.

¶ 21 Here, as in *Kellman*, there is nothing in the record from which it can be inferred that any alleged act or omission of defendants was the proximate cause of plaintiff's injuries. The possibility that plaintiff fell off the Playland stairs because the mat was not glued down is insufficient to establish a causal connection between defendants' alleged negligence and plaintiff's injuries because no one saw plaintiff fall and the last thing plaintiff remembers is playing tag on a flat surface, not on the stairs. Similarly to *Kellman*, plaintiff can only present evidence that his injuries are possibly related to the alleged negligence of defendants and, therefore, fails to meet his burden on causation. See *Id.* at 974-75 (summary judgment was

proper because the plaintiff "was unable to produce any evidence * * * to show that even if there was some defect ***, this defect had caused [the] decedent to fall").

¶ 22 Plaintiff relies on several cases where circumstantial evidence regarding proximate cause was found to be sufficient and summary judgment was reversed. See, *e.g.*, *Block v. Lohan Associates, Inc.*, 269 Ill. App. 3d 745 (1993); *McKanna v. Duo-Fast Corporation*, 161 Ill. App. 3d 518 (1987), *abrogated on other grounds, Johnson v. United Airlines*, 203 Ill. 2d 121 (2003). However, in those cases, witness testimony established that the accidents were probably, not possibly, caused by the defendant's negligent conduct. See *Block*, 269 Ill. App. 3d at 757 (a witness saw Block start up a ladder and heard him say "hold it" just before seeing him lying on the ground); *McKanna*, 161 Ill. App. 3d at 527-28 (coworker saw the deceased on a roof, saw him place his left hand on a hatch, and saw him turn around to descend moments before he fell). Here, however, plaintiff can provide little, if any, evidence as to how his fall occurred. While it is possible that plaintiff fell because of the mat on the Playland stairs, it is equally possible that he fell as a result of another cause that is unrelated to the stairs, such another child pushing him or losing his balance.

¶ 23 We are unpersuaded by plaintiff's reliance upon Brown's deposition to establish a genuine issue of material fact as to the cause of his fall. Although plaintiff is correct that Brown saw him on the floor immediately after hearing a scream near the play area, Brown did not see him fall and admitted that she had "no idea" how he fell. Rather, she saw a mat that was not glued to the Playland stairs and "just assumed" that he fell on it. However, Brown's "assumption" as to the cause of plaintiff's fall cannot form the basis of liability because absent positive and affirmative proof of causation, a plaintiff cannot sustain the burden to establish a genuine issue of material fact. See *Strutz*, 389 Ill. App. 3d at 679. Even if the mat on the Playland stairs was not attached,

plaintiff has not produced any evidence that this defect was the actual cause of his fall. See *Kimbrough*, 92 Ill. App. 3d at 817 (liability cannot be based on mere conjecture or surmise as to the cause of an injury).

¶ 24 Absent any evidence as to circumstances or cause of plaintiff's fall, there is no genuine issue of material fact for the trier of fact to determine. See *Strutz*, 389 Ill. App. 3d at 679. Because the inference as to how plaintiff was injured cannot rest upon mere conjecture or speculation (*Salinas*, 161 Ill. App. 3d at 515), the circuit court properly granted summary judgment in favor of defendants. See *Kellman*, 202 Ill. App. 3d at 976 (summary judgment for the defendant was proper when the plaintiff did not sustain the burden of making a *prima facie* case).

¶ 25 Plaintiff next contends that the trial court erred in granting summary judgment on the *res ipsa loquitur* count. Specifically, plaintiff argues that although no witnesses saw plaintiff fall, there is sufficient circumstantial evidence from which to infer that the mat on the stairs was the "instrumentality" which caused him to fall and injure himself.

¶ 26 *Res ipsa loquitur* is not a separate theory of liability; rather, it is a doctrine which permits the trier of fact to infer negligence by circumstantial evidence when the precise cause of the injury is not known by the plaintiff. *Wilson v. Michel*, 224 Ill. App. 3d 380, 386 (1991). Whether the *res ipsa loquitur* doctrine should apply is a question of law subject to *de novo review*. *Heastie v. Roberts*, 226 Ill. 2d 515, 531 (2007). A plaintiff seeking to rely on *res ipsa loquitur* must show that he was injured in an occurrence that normally does not happen in the absence of negligence and that the injury was received from an instrumentality that was under the defendant's control. *Id*. at 531-32.

¶ 27 Here, plaintiff has failed to establish that his fall is the kind of occurrence that does not ordinarily occur in the absence of negligence. Initially, we reject plaintiff's argument, unsupported by authority, that his injury was so severe that it could only have been caused by defendants' negligence. Even in the absence of negligence, a three-year-old boy may fall while playing and the *res ipsa loquitur* doctrine cannot be applied when "the condition causing injury can be accounted for as readily on the hypothesis of pure accident as on the ground of negligence." See *Hunter v. Alfina,* 112 Ill. App. 2d 432, 434 (1969).

¶ 28 *Rinck v. Palos Hills Consolidated High School District No. 230*, 82 Ill. App. 3d 856 (1979), is instructive. In that case, the plaintiff received an electric shock when another student plugged in an electric frying pan, and plaintiff sued the school district to recover for her injuries. On appeal the court found that the plaintiff's allegations were insufficient to state a cause of action based on the *res ipsa loquitur* doctrine because the facts "as alleged do not necessarily infer negligence." *Id.* at 862. The court listed several potential causes for the plaintiff's injuries, other than negligence by the defendant school, such as negligence by the other student or defects in either the frying pan or the electrical system. *Id.* See also *Britton v. University of Chicago Hospitals,* 382 Ill. App. 3d 1009, 1012 (2008) ("if two reasonable inferences are deducible from the same facts, one of which comports with defendant's responsibility and the other is directly *contra* thereto, neither should be indulged to permit recovery by use of the doctrine of *res ipsa loquitur*").

¶ 29 Similarly, here, the facts as alleged do not necessarily imply negligence on the part of defendants; rather, there are multiple reasonable inferences that are deducible from the same facts. For instance, plaintiff may have fallen because he was three years old or he may have been pushed by another child. The existence of these reasonable alternate possibilities, neither of

which involve defendants, negates the possibility of recovery under the doctrine of *res ipsa loquitur* (see *Britton*, 382 Ill. App. 3d at 1012), and, consequently, the circuit court did not err in entering summary judgment for defendants on this count of the complaint (see *Hunter*, 112 Ill. App. 2d at 434).

¶ 30 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 31 Affirmed.