2015 IL App (2d) 141073-U
No. 2-14-1073
Order filed June 9, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MATTHEW KOK and IRENE KOK,	)	Appeal from the Circuit Court
	)	of Mc Henry County.
Plaintiffs-Appellants,	)	
	)	
v.	)	No. 11-LA-224
	)	
ANDERW GALLOS,	)	Honorable
	)	Thomas A. Meyer,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: Plaintiffs failed to raise genuine issue of material fact as to why fall occurred and, as such, summary judgment was proper where no jury could reasonably infer that anything defendant did or failed to do was the proximate cause of the fall and ensuing injuries.

¶ 2 I. INTRODUCTION

¶ 3 Plaintiffs, Matthew Kok and Irene Kok, appeal the orders of the circuit court of McHenry County granting summary judgment to defendant, Andrew Gallos, and denying their motion to reconsider. On appeal, they contend that they raised genuine issues of material fact entitling

them to move forward with this case. We disagree, and, for the reasons that follow, we affirm the judgment of the trial court.

¶ 4 Defendant has also filed a motion to strike portions of plaintiffs' reply brief due to their failure to comply with various provisions set forth in Illinois Supreme Court Rule 341 (eff. February 6, 2013). Specifically, defendant points to plaintiffs' failure to cite the record and support their argument with legal authority. We remind plaintiffs that the Supreme Court Rules are not mere suggestions; rather, they are mandatory and must be followed. *In re Marriage of Hluska*, 2011 IL App (1st) 092636, ¶ 51. Nevertheless, in our discretion, we may disregard such nonconforming arguments as well as arguments raised for the first time in reply briefs. As such, we deny defendant's motion, and we will give plaintiffs' arguments whatever consideration they are due in light of the extent they are supported by authority and the record.

¶ 5 II. BACKGROUND

¶ 6 The instant case arises out of an incident occurring on June 17, 2009, where Matthew—while doing repair work for Andrew, his father in law—fell from a plank that had been placed between two ladders to serve as scaffolding. Matthew, as a favor to Andrew, was fixing a crack in the drywall of a house that Andrew had purchased. Andrew set up the scaffolding before Matthew arrived at the house. However, Andrew was not present at the time Matthew fell. Matthew testified (via deposition) that that the ladders were about 15 feet to 18 feet high. The plank was on the second rung from the top.

¶ 7 Andrew testified (also via deposition) that he erected the scaffolding the night before the accident. Matthew was not present. Andrew did not check to see if the plank would move between the two ladders, aside from "shak[ing it] a little." The plank was a foot-and-a-half to

two feet wide. He did not use anything to secure the plank to the ladders. He was not aware of anything Matthew did that would have caused the fall.

¶ 8 Matthew did not recall doing anything to test the stability of the scaffold prior to ascending it. He was about half finished fixing the crack when he fell. The plank did not wobble or move from side to side while he was on it, though he did not recall anything holding it in place. The crack he was fixing was at his eye level, approximately. He was within a foot or two of the wall. The ladder had rubber feet. The ladder did not slip prior to the fall. Matthew testified that he could recall the 10 seconds leading up to the fall. He was standing on the plank inspecting his work. He did not touch the wall. He was holding his knife in his left hand. Then, "[e]verything gave way." He explained, "The entire – Both ladders, everything fell away from the wall." The ladders caught his shin, twisted him, and flipped him forward. Matthew testified that he did not know what caused the ladders to the fall. He believed that they were sitting on a level floor. He landed on his right arm first, then his head, and then his left arm. Matthew was severely injured and taken to the hospital by helicopter. He stated that he had no reservation or hesitation about using the scaffold prior to the accident.

¶ 9 The trial court granted summary judgment in defendant's favor. It explained that there was no evidence regarding why the scaffold fell. It stated that there was no evidence that the ladders, plank, or overall set-up were defective. It acknowledged plaintiff's argument that an expert might be able to identify a defect, but it noted that plaintiff had not produced an expert by the time that the summary judgment motion was being ruled on. The trial court believed that it could not deny summary judgment based on evidence that might be developed in the future.

¶ 10 Plaintiff moved to reconsider and submitted an affidavit from an individual purported to be an expert. The affidavit stated that the expert would testify that defendant "violated numerous

standards for ladder safety including OSHA, ANSI, NSC, as well as numerous customs and practices within society which require safety to be a consideration with the use of ladders and scaffolds." The trial court struck the affidavit, finding that it did not constitute newly discovered evidence such that it could be considered in connection with plaintiff's motion to reconsider. It further noted that it had granted plaintiff two extensions to respond to the summary judgment motion. Therefore, it explained, the record indicates that had plaintiff asked for an extension to obtain an expert affidavit prior to the hearing on the summary judgment motion, it likely would have been granted. However, plaintiff never sought such a continuance. As the report could have been procured at this earlier time, it did not constitute newly discovered evidence. Absent the affidavit, the trial court found that it had no reason to revisit its earlier ruling, so it denied plaintiff's motion to reconsider. This appeal followed.

¶ 11 III. ANALYSIS

¶ 12 Plaintiff contends that the trial court erred in granting summary judgment in this case. Summary judgment is a drastic remedy that should only be granted when the movant's entitlement to prevail is free from doubt. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). It is appropriate only where no genuine issues of material fact exist and the movant is entitled to judgment as a matter of law. *Id*. The record must be construed liberally in favor of the party opposing the motion and strictly against the movant. *Smith v. Associated Bureaus, Inc.*, 177 Ill. App. 3d 286, 289 (1988). Our review is *de novo* (*Id*.), meaning we owe no deference to the trial court and we may freely substitute our judgment for that of the trial court. *Miller v. Hecox*, 2012 IL App (2d) 110546, ¶ 29. Moreover, we review the result to which the trial court came rather than its reasoning. *In re Marriage of Ackerley*, 333

Ill. App. 3d 382, 392 (2002). Finally, we may affirm on any basis appearing in the record. *Stoll v. United Way of Champaign County, Illinois, Inc.*, 378 Ill. App. 3d 1048, 1051 (2008).

¶ 13 As a preliminary matter, we must address the state of the record—specifically, whether the affidavit of plaintiffs' expert may be considered with respect to the propriety of the trial court's grant of summary judgment. In the course of ruling on plaintiff's motion to reconsider, the trial court stated it was striking the affidavit. Relying on *Wilfong v. L.J. Dodd Construction*, 401 Ill. App. 3d 1044, 1063 (2010), it found that the affidavit did not constitute newly discovered evidence as "[i]t certainly could have been obtained prior to [the original summary judgment] hearing." Accordingly, the trial court determined that it would not be appropriate to consider it in connection with plaintiffs' motion to reconsider. *Id.*; see also *Landeros v. Equity Property & Development*, 321 Ill. App. 3d 57, 65 (2001) (quoting *Gardner v. Navistar International Transportation Corp.*, 213 Ill. App. 3d 242, 248 (1991)) (" 'Trial courts should not allow litigants to stand mute, lose a motion, and then frantically gather evidentiary material to show that the court erred in its ruling.' ").

¶ 14 Initially, we note that plaintiffs do not contest the trial court's decision to strike the affidavit in their opening brief, thereby forfeiting any objection to this portion of the trial court's order. *In re Rayshawn H.*, 2014 IL App (1st) 132178, ¶ 38. Furthermore, when plaintiffs address this issue in their reply brief, they provide no authority in support of their argument, also forfeiting the issue. *In re Marriage of Wassom*, 352 Ill. App. 3d 327, 332-33 (2004). Moreover, their argument is simply that no schedule had been set for the disclosure of expert witnesses. Plaintiffs were clearly aware of the pending summary judgment motion (they responded to it) and chose not to seek a continuance to procure an expert opinion (despite seeking continuances for other matters). A party cannot claim error based on a course of action in which they

acquiesced. See *People v. Alvarado*, 2013 IL App (3d) 120467, ¶ 11. Accordingly, for all these reasons, we will not disturb the trial court's decision to strike plaintiffs' expert's affidavit.

¶ 15 We now turn to the propriety of the trial court's grant of summary judgment. The trial court based its decision primarily on plaintiffs' failure to set forth facts from which causation could be inferred. It stated, "Proximate cause can be established only where there's a reasonable certainty that the Defendant's act caused the injury," adding that "[h]ere there is no evidence as to why the scaffold fell." Proximate cause is typically a question of fact for the jury. *Vertin v. Mau*, 2014 IL App (3d) 130246, ¶ 10. However, lack of proximate cause may be determined as a matter of law where the facts alleged (taken as true) are insufficient to establish proximate causation. *Id*. Moreover, liability cannot rest upon mere speculation and conjecture. *Castro v. Brown's Chicken & Pasta, Inc.*, 314 Ill. App. 3d 543, 553 (2000). Indeed, the mere occurrence of an accident does not support an inference of negligence in itself, and absent affirmative proof of proximate causation, a plaintiff cannot carry his or her burden of establishing 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 While we are not bound by the trial court's findings in a case such as this, we nevertheless find persuasive the trial court's reasoning on the issue of causation. Matthew testified that the plank did not wobble or move from side to side. The ladder did not slip. The floor was level. Quite simply, he stated he did not know why the scaffold fell. With no evidence as to why the scaffold fell, it is impossible to determine what caused the fall. We note that plaintiffs repeatedly emphasize that the plank was not secured to the ladder. However, as Matthew testified that plank did not move, that the plank was not attached to the ladder could not have caused the fall.

¶ 17 This case does not involve the method of proof known as *res ipsa loquitur*. That doctrine allows an inference of negligence where the occurrence at issue does not normally take place in the absence of negligence and the instrumentality causing the injury was in the exclusive control of a defendant. *Britton v. University of Chicago Hospitals*, 382 Ill. App. 3d 2009, 2011 (2008). Nothing in the record indicates that falls from high places do not normally occur absent negligence or that Matthew could not have altered the scaffold prior to using it, and plaintiffs do not attempt to establish either premise. As such, plaintiffs were required to provide direct proof of negligence, including causation.

¶ 18 Plaintiffs cite a number of cases in arguing to the contrary. Plaintiffs first call our attention to *Olsen v. Williams All Seasons Co.*, 2012 IL App (2d) 110818. In that case, a firefighter investigating an alarm in a dark warehouse, fell over an 11 foot drop-off into an underground storage area. The drop-off was protected by a spring-loaded gate. The plaintiff could not recall the accident. Nevertheless, there was circumstantial evidence that the gate was malfunctioning and open. For example, the warehouse was dark and there was no safety tape on the floor. A police officer investigating the scene noted that the gate, which was spring loaded, did not close properly after he opened it. The officer also noted that the gate made noise when being opened or closed. Other firefighters present at the time of the plaintiff's fall heard no noise, allowing an inference that the gate was open. *Id.* ¶ 27. Moreover, it was inferable that the reason it was open was that the spring system was not working properly. Conversely, in this case, the only defect cited by plaintiffs is the failure to secure the plank. However, that purported defect is ruled out as a cause of Matthew's accident by Matthew's own testimony.

¶ 19 Plaintiffs also cite *Housh v. Swanson*, 203 Ill. App. 3d 377 (1990). That case is easily distinguishable. The plaintiff—who could not recall her fall—fell from a second floor deck and

was discovered on the ground with an antenna wire wrapped around her leg. There was a loose antenna wire on the the deck near the area from which she fell. The house was rented. Quite obviously, a jury could infer that the plaintiff tripped on the loose wire. *Id.* at 382 ("A reasonable inference to be drawn from the uncontradicted fact that a part of the antenna wire was wrapped around plaintiff's legs when she was found on the ground after the fall is that plaintiff came in contact with the wire immediately before her fall. It is therefore reasonable to infer that the wire could have caused the fall."). No similar facts exist in the present case; nothing ties any possible defect in the scaffolding to Matthew's fall. Likewise, in *Block v. Lohan Associates, Inc.*, 269 Ill. App. 3d 745 (1993), circumstantial evidence, which included expert testimony, existed to establish causation despite the fact that the plaintiff's fall from a ladder was unwitnessed. Plaintiff does not explain what circumstantial evidence in this case allows a similar inference. As noted, the failure to secure the plank to the ladder is flatly irrelevant in light of Matthew's uncontradicted testimony that the plank did not move, and the mere fact of the fall cannot, in itself, establish negligence (at least absent the development of a *res ipsa loquitur* theory).

¶ 20 Instead, we find sound guidance from the case of *Kimbrough v. Jewel Cos., Inc.*, 92 Ill. App. 3d 813 (1981). In that case, the plaintiff fell on a ramp while she was leaving the defendant's store. During a deposition, she stated that she did not know why she fell, and she could produce no other witnesses to the fall. The only defect or potentially dangerous condition she could identify was that there were grease spots on the ramp. She testified that she did not know if her foot actually touched the grease before she fell. The reviewing court affirmed the trial court's grant of summary judgment, explaining that the plaintiff could not produce any evidence "to show that even if there was some object lying on the defendant's premises, or there

was some defect in the ramp, this object or this defect caused her fall." *Id*. at 817. Similarly, in this case, even if the scaffold was defective, nothing ties any potential defect to Matthew's fall. The fact that the plank was not secured to the ladder could not have caused Matthew's fall given his deposition testimony that the plank did not move. Like the grease spots in *Kimbrough*, nothing ties the purported defect with the construction of the scaffold to Matthew's fall. See also *Truelsen v. Levin*, 24 Ill. App. 3d 733, 529-30 (1974) (upholding finding of lack of proximate causation where there was evidence that dishwasher sometimes leaked in to area where the plaintiff fell, but no evidence that it was leaking at the time she fell).

¶ 21 Similarly, in *Barker v. Eagle Food Centers, Inc.*, 261 Ill. App. 3d 1068 (1994), the plaintiff alleged she slipped and fell in the produce department of a supermarket because the floor was wet. In her deposition, the plaintiff testified that sprinkling the vegetables makes the floor wet. However, she also testified that she did not notice water on the floor before or after she fell, and she did not notice if her clothes were wet. The only thing she observed on the floor was a carpet, but she assumed the floor was wet since she slipped. The *Barker* court stated that her "conclusional assertion that the floor was wet" was insufficient to defeat the defendant's summary judgment motion. *Id*. at 1072. It further held that there was nothing in the record that would allow a jury to infer that the floor was wet or that plaintiff's fall was caused by any contact with wetness. *Id*. As in this case, the absence of evidence regarding why the plaintiff fell led to summary judgment for the defendant. See also *Kellman v. Twin Orchard Country Club*, 202 Ill. App. 3d 968, 974-75 (1990) (summary judgment held proper where the plaintiff "was unable to produce any evidence *** to show that even if there was some defect in the shower basin, this defect had caused decedent to fall.").

¶ 22 At times, plaintiffs frame this as a premise-liability case. They contend that Matthew was an invitee and that consequently Andrew owed him a duty of care. Initially, we note that the Premises Liability Act abolished the distinction between invitees and licensees. 740 ILCS 130/2 (West 2014). Moreover, it also defined the duty an owner or occupier of land owes to an entrant as being one of reasonable care. *Id*. Pertinent here, it goes on to state:

> "The duty of reasonable care under the circumstances which an owner or occupier of land owes to such entrants does not include any of the following: a duty to warn of or otherwise take reasonable steps to protect such entrants from conditions on the premises that are known to the entrant, are open and obvious, or can reasonably be expected to be discovered by the entrant; a duty to warn of latent defects or dangers or defects or dangers unknown to the owner or occupier of the premises" *Id*.

If the dangerousness of the scaffold was apparent to Andrew, it also would have been obvious to Matthew, and there would have been no duty to warn pursuant to the passage cited above. Conversely, if the condition was not obvious to Matthew, there is no reason to believe it would have been known to Andrew, and no duty would exist in accordance with the latter portion of this statutory passage. Moreover, even if plaintiffs could clear this hurdle, their inability to establish causation would still preclude defendant's liability.

¶ 23 Plaintiffs also challenge the trial court's ruling on the motion to reconsider. To the extent that this argument relies heavily on the affidavit from plaintiff's expert that the trial court struck, we find it ill founded. Furthermore, nowhere in this argument do the plaintiffs identify anything that would allow a jury to infer causation between any potential defect and Matthew's fall. As such, the trial court did not err in denying it.

¶ 24 In conclusion, no genuine issue of material fact exists that, if resolved favorably to plaintiffs, would allow an inference of causation. As such, the trial court did not err in granting summary judgment.

¶ 25 Affirmed.