2015 IL App (2d) 150012-U
No. 2-15-0012
Order filed September 1, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CATHERINE EMORY,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 13-L-16
	)	
CLIFFORD EMORY,	)	Honorable
	)	Thomas E. Mueller,
Defendant-Appellee.	)	Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justice Spence concurred in the judgment.
Justice Zenoff dissented.

ORDER

¶ 1 *Held*: The trial court erred in granting defendant summary judgment on plaintiff's negligence claim, specifically on the issue of proximate cause: plaintiff's testimony that she was on one stairway, that she fell, and that she ended up on the floor at the bottom of an adjacent stairway supported the inferences that she fell over the side of the first stairway and that the absence of a railing between the two stairways was a proximate cause of her fall to the floor.

¶ 2 Plaintiff, Catherine Emory, sued defendant, Clifford Emory, for injuries sustained when she fell down an exposed flight of basement stairs at defendant's home. The trial court granted summary judgment for defendant, finding that plaintiff failed to present sufficient evidence that

defendant's alleged negligence was a proximate cause of her injuries. Plaintiff timely appealed. For the reasons that follow, we reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff alleged in her complaint that, on January 21, 2011, she was an invitee in defendant's home when she fell down an exposed flight of stairs. She alleged that defendant breached his duty of ordinary care to maintain his residence in a reasonably safe condition, in that he (1) failed to install and/or maintain handrails or banisters near the area where she was injured; (2) failed to comply with applicable building codes; (3) failed to maintain the stairs and residence in a safe condition; and (4) was otherwise careless or negligent. She further alleged that she was injured as a direct and proximate result of defendant's negligent acts or omissions.

¶ 5 Plaintiff testified at her deposition that, on January 21 or 22, 2011, she was visiting defendant (who was her ex-husband) at his home in order to bring him groceries and medication. Plaintiff entered the home through the back door, which led to a "mudroom." Plaintiff explained that, upon entering the mudroom, "[y]ou can go to the right and go up the stairs to the kitchen or walk forward approximately five or six feet and there are the stairs to the basement." There are at least seven stairs leading to the basement. After entering the mudroom, plaintiff set down a small bag of groceries on the stairs leading to the kitchen. Plaintiff then attempted to unzip and remove her ankle boots. While doing so, she fell. Plaintiff had no recollection of falling down the stairs. All she could remember was waking up on the basement floor. She did not know what caused her to fall. She could not recall whether she was sitting or standing when she fell; she stated that "[i]t could have been either/or." When asked whether she fell because of the exertion of trying to remove a boot, she replied: "I don't know. Yes." When asked whether she fell face-first or backward, she responded: "The stairs are to the side of the other stairs so I

would say probably sideways. I don't know." Several minutes after she fell, defendant heard her screaming and came to help her. The deposition concluded with the following colloquy:

"Q. In your Answers to Interrogatories there was a question about the number of times prior to your fall that you had gone up and down the basement stairs, and you've answered thousands of times.

A. I wouldn't—to the basement, no. Up to the kitchen, yes.

Q. The question that you were asked in the Interrogatory says the number of times you'd walked up or down the stairway where you fell prior to the time of your alleged accident. And that was the answer—

A. Well, I guess I took it as I fell from the stairway going to the kitchen.

Q. Although the stairs that you actually went down were the ones that went to the basement, correct?

A. Well, I went over. You have to look at the pictures. There's, you know—I was—there's a very narrow area there going up into the kitchen. There is nothing on either side.

Well, on one side there is nothing. On the other side there is maybe four inches until that hole."

¶ 6 Defendant filed a motion for summary judgment, contending that plaintiff "failed to present sufficient evidence that [d]efendant's alleged negligence was the proximate cause of her injures [*sic*] as there is no testimony or evidence connecting [p]laintiff's fall to the condition of the staircase." Defendant argued that plaintiff did not know what caused her to fall and that she had no recollection of falling down the stairs. According to defendant, the "mere possibility that the allegedly unreasonably safe condition of the stairway was the cause of [p]laintiff's fall is

insufficient to establish the causal connection necessary to survive a motion for summary judgment."

¶ 7 Plaintiff filed a response, arguing that there was a genuine issue of material fact about whether the absence of a banister was a proximate cause of her injuries. She argued that the evidence established that she fell into the open stairwell and that, had there been a banister, it would have prevented her from falling into the stairwell. Plaintiff attached as exhibits A and B two photocopies of photographs purportedly of the mudroom (although the pictures are very dark and grainy).

¶ 8 In reply, defendant argued that plaintiff's assertion that the open staircase was the proximate cause of her fall was unsupported by the evidence, because plaintiff failed to establish the location or cause of her fall. Defendant further argued that, because the photographs were not authenticated, they could not be considered.

¶ 9 Following a hearing, the trial court granted defendant's motion for summary judgment. (The order does not set out the basis of the court's decision, and the record does not contain a transcript of the hearing.)

¶ 10 Plaintiff filed a motion for reconsideration. In her motion, plaintiff argued that the trial court erred in finding that plaintiff failed to produce evidence that the absence of a banister at the edge of the mudroom landing was a proximate cause of her fall. According to plaintiff, her testimony regarding where she was immediately before the fall and that she "went over," when construed strictly against defendant and liberally in her favor, established a genuine issue of material fact as to whether the absence of a banister was a proximate cause of her fall. Plaintiff further argued that the photographs attached to her response were properly authenticated during her deposition.

¶ 11 In response, defendant argued that the trial court properly found the photographs inadmissible. Further, defendant maintained that the motion for reconsideration should be denied because plaintiff failed to raise newly discovered evidence, changes in the law, or errors in the court's previous application of existing law.

¶ 12 Following a hearing, the trial court denied plaintiff's motion for reconsideration, "consistent with [its] original finding" that "there's no ability on the plaintiff's behalf nor any independent evidence or witness that puts her in the factual scenario that the plaintiff relies upon." In support of its ruling, the court pointed to plaintiff's deposition testimony that she did not know whether she fell face-first or backward, that she had no recollection of falling down the stairs, that she did not know which stair she contacted first or where she first landed, and that all she knew was that she woke up on the basement floor.

¶ 13 Plaintiff timely appealed.

¶ 14 II. ANALYSIS

¶ 15 The question presented is whether plaintiff presented sufficient evidence to raise a genuine issue of fact that the absence of a banister was a proximate cause of her fall to the basement such that summary judgment was improperly granted.

¶ 16 Summary judgment is appropriate 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 a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). Although the plaintiff need not prove his case at the summary-judgment stage, he must present sufficient evidence to create a genuine issue of material fact. *Wiedenbeck v. Searle*, 385 Ill. App. 3d 289, 292 (2008). "The purpose of summary judgment is not to try a question of fact, but rather to determine whether a genuine issue of material fact exists." *Adams v. Northern*

Illinois Gas Co., 211 Ill. 2d 32, 42-43 (2004). In determining whether a genuine issue of material fact exists, the court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the nonmovant. *Id*. at 43. Where reasonable persons could draw divergent inferences from the undisputed material facts or where there is a dispute as to a material fact, summary judgment should be denied and the issue decided by the trier of fact. *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 114 (1995).

¶ 17 The summary-judgment procedure is to be encouraged as an aid in the expeditious disposition of a lawsuit. *Adams*, 211 Ill. 2d at 43. However, summary judgment is a drastic means of disposing of litigation and should not be granted unless the movant's right to judgment is clear and free from doubt. *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 280 (2007). The entry of summary judgment is subject to *de novo* review. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 18 To prevail in a negligence action, the plaintiff must prove that the defendant owed a duty to him, that the defendant breached that duty, and that the plaintiff's injury proximately resulted from that breach. *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 225 (2010). "Proximate cause ordinarily is a question of fact for the jury." *Olson v. Williams All Seasons Co.*, 2012 IL App (2d) 110818, ¶ 25. "It becomes a question of law only where there can be no difference in the judgment of reasonable men on inferences to be drawn." *Bakkan v. Vondran*, 202 Ill. App. 3d 125, 128 (1990). "Where inferences may be drawn from facts which are not in dispute, and where reasonable minds would draw different inferences from the facts, then a triable issue exists." *Block v. Lohan Associates, Inc.*, 269 Ill. App. 3d 745, 756 (1993). " 'An injury may have more than one proximate cause.' " *Richter v. Village of Oak Brook*, 2011 IL App (2d) 100114, ¶ 21 (quoting *Smith v. Armor Plus Co.*, 248 Ill. App. 3d 831, 840 (1993)). Illinois law

defines a proximate cause as: "[A] cause that, in the natural or ordinary course of events, produced the plaintiff's injury. [It need not be the only cause, nor the last or nearest cause. It is sufficient if it combines with another cause resulting in the injury.]" Illinois Pattern Jury Instructions, Civil, No. 15.01 (2011).

¶ 19 Plaintiff argues that the trial court erred in granting summary judgment for defendant, because it overlooked plaintiff's testimony that she fell from the kitchen stairway into the open basement staircase. In response, defendant maintains that "a careful reading of [plaintiff's] testimony reveals that she attempted to take off her boots then ended up on the basement floor." According to defendant, "[t]here is no clear evidence from the testimony that [plaintiff] in fact fell over the side of the open staircase as she suggests."

¶ 20 Viewing the evidence in the light most favorable to plaintiff (see *Olson*, 2012 IL App (2d) 110818, ¶ 28), we find that plaintiff presented sufficient evidence on the issue of proximate cause to withstand summary judgment. It is true that the direct evidence concerning precisely how plaintiff came to rest on the basement floor is weak. As the trial court correctly noted, plaintiff had no recollection of falling. Thus, the only direct evidence in support of plaintiff's theory that she fell over the side of the open staircase is plaintiff's vague testimony that she "went over."

¶ 21 Nevertheless, despite the dearth of direct evidence on the issue of proximate cause, plaintiff presented sufficient *circumstantial* evidence to overcome defendant's motion for summary judgment. A plaintiff may establish negligence by using either direct or circumstantial evidence. *Mort v. Walter*, 98 Ill. 2d 391, 396 (1983). "Circumstantial evidence is the proof of facts and circumstances from which a fact finder may infer other connected facts that usually and reasonably follow, according to the common experience of mankind." *Nowak v. Coghill*, 296 Ill.

App. 3d 886, 896 (1998). "Even where the circumstances support more than one logical conclusion, circumstantial evidence is sufficient to establish proximate cause to overcome a motion for summary judgment as long as the inference in question may reasonably be drawn from the evidence." *Id*. Here, plaintiff testified that the stairway down to the basement was next to the stairway up to the kitchen. She explained that she entered the mudroom and put a bag of groceries down on the stairway up the kitchen. As she attempted to remove her boots, she fell. The next thing she remembered was lying on the basement floor. Given these circumstances, it is certainly a reasonable inference that she got to the basement floor by falling over the side of the open staircase. Thus, it is also reasonable to infer that the absence of a railing along the edge of the open staircase was a proximate cause of plaintiff's fall to the basement below.

¶ 22 We find the circumstances of the present case to be distinguishable from the cases relied upon by defendants. In *Strutz v. Vicere*, 389 Ill. App. 3d 676 (2009), and in *Vertin v. Mau*, 2014 IL App (3d) 130246, the courts found that summary judgment was properly granted on the issue of proximate cause because the plaintiffs were unable to produce evidence that the alleged defect in the stairs caused their falls. Here, however, plaintiff is not alleging that a defect in the stairs caused her to slip. Instead, plaintiff alleges that the lack of a banister was *a* proximate cause of her injuries because it allowed her to fall into the unguarded staircase. After reviewing the evidence liberally in plaintiff's favor, we cannot say that defendant's right to summary judgment is clear and free from doubt.

¶ 23 III. CONCLUSION

¶ 24 For the reasons stated, we reverse the order of the circuit court of Kane County granting summary judgment for defendant and remand the cause for further proceedings.

¶ 25 Reversed and remanded.

¶ 26 JUSTICE ZENOFF, dissenting.

¶ 27 Plaintiff was unable to identify what caused her to fall. Nor could she say whether she was standing or sitting prior to her fall or even whether she fell forward or backward. Indeed, as the majority acknowledges, "the only direct evidence in support of plaintiff's theory that she fell over the side of the open staircase is plaintiff's vague testimony that she 'went over.' " *Supra* ¶ 20. Nevertheless, the majority holds that "plaintiff presented sufficient *circumstantial* evidence to overcome defendant's motion for summary judgment." (Emphasis in original.) *Supra* ¶ 21. The only circumstantial evidence that the majority notes is (1) plaintiff's paraphrased testimony that the stairway down to the basement was "next to" the stairway up to the kitchen and (2) the fact that when plaintiff entered the mudroom and put the groceries down, she fell as she attempted to remove her boots and ended up on the basement floor. *Supra* ¶ 21. In my view, it is not reasonable to infer from plaintiff's vague deposition testimony that "she got to the basement floor by falling over the side of the open staircase" or that "the absence of a railing along the edge of the open staircase was a proximate cause of [her] fall to the basement below." *Supra*, ¶ 21. Accordingly, I respectfully dissent.

¶ 28 The majority frames the issue as "whether plaintiff presented sufficient evidence to raise a genuine issue of fact that the absence of a banister was a proximate cause of her fall to the basement such that summary judgment was improperly granted." *Supra* ¶ 15. It must be emphasized that there was very little evidence concerning the actual layout of the mudroom and the two staircases at issue. The trial court did not consider the photographic exhibits that plaintiff attached to her response to the motion for summary judgment as they were not authenticated, and plaintiff does not argue on appeal that such ruling was erroneous. Indeed, the only evidence describing the area where plaintiff fell comes from plaintiff's own deposition

testimony. That testimony is insufficient to reasonably give rise either to the inference that she fell over the side of an open staircase or that the absence of a railing was a proximate cause of her fall. Plaintiff testified that upon entering the mudroom, one could "go to the right and go up the stairs to the kitchen or walk forward approximately five or six feet and there are the stairs to the basement." Although she also testified that "[t]he stairs are to the side of the other stairs ***," whether the basement stairs and the stairs to the kitchen were actually "next to" each other is entirely unclear. Moreover, there is no evidence from plaintiff as to the actual distance between them—or, for that matter, the actual layout of the two staircases as portrayed in a diagram or otherwise.

¶ 29 Additionally, with respect to the stairs leading to the kitchen, plaintiff testified:

> "Well, I guess I took it as I fell from the stairway going to the kitchen.
>
> * * *
>
> [T]here's a very narrow area there going up into the kitchen. There is nothing on either side.
>
> Well, on one side there is nothing. On the other side there is maybe four inches until that hole."

It is certainly unclear exactly what "that hole" refers to. The kitchen stairs? The basement stairs? To the extent that she was referring to any gap between the two staircases that was not protected by a railing or banister, plaintiff presented no evidence as to how big the "hole" was or where it was.

¶ 30 Furthermore, the record is silent as to exactly where plaintiff was standing (or sitting) immediately before she fell. In her reply brief, plaintiff herself appears to be confused on this issue. In one part of her brief, she asserted that she "was on the kitchen stairs adjacent to the

unguarded staircase at the time she lost her balance and fell." Just a page before, plaintiff claimed that she "was not on the stairs when she began to fall." This confusion stems from the fact that plaintiff never testified where she was located immediately prior to her fall. It is true that at the very end of her deposition—after being unable to answer even the most basic questions about the circumstances of her fall—plaintiff testified that she "fell from the stairway going to the kitchen." However, she did not indicate whether she was *on* the kitchen stairs when she fell or whether she was just somewhere *near* the stairs. Without evidence of where plaintiff was standing (or sitting) before she fell, and in light of the paucity of evidence as to the layout of the mudroom and the stairs, I do not believe there is even circumstantial evidence from which it is reasonable to infer that the absence of a railing was a proximate cause of her injuries.

¶ 31 Plaintiff submits that "[i]t is uncontested that the absent banister would have run along the edge of the basement staircase adjacent to the stairway going to the kitchen" and that "the purpose of a banister along the open stairway would be to act as a barrier to prevent people from falling into the basement staircase from the kitchen stairway." As an initial matter, there is absolutely no evidence in the record to support those propositions. Nor does plaintiff explain how a banister (however constructed or wherever it might have been placed) would have prevented her injuries. As previously noted, we do not know where plaintiff was located immediately before the fall or in which direction she fell. Additionally, although plaintiff recalled "reaching for something and nothing was there," we have no idea where she was reaching. In fact, plaintiff could not say with confidence whether she reached out with her right or left hand. From plaintiff's deposition, it is not even clear whether she believed that there should have been a banister on the stairs leading to the kitchen, the stairs leading to the basement, or both.

¶ 32 The majority distinguishes *Strutz* and *Vertin* on the basis that plaintiff in the present case "is not alleging that a defect in the stairs caused her to slip," but instead "that the lack of a banister was *a* proximate cause of her injuries because it allowed her to fall into the unguarded staircase." (Emphasis in original.) *Supra*, ¶ 22. I submit that this is a distinction without a difference. As in *Strutz* and *Vertin*, plaintiff alleges that a staircase was defective (due to the absence of a banister that would have prevented her from failing to the basement floor) and that such defect caused her to injure herself.

¶ 33 The law is clear that a plaintiff must establish the cause of her injuries and that, if she cannot do so, the defendant is entitled to summary judgment. See *Kimbrough v. Jewel Companies, Inc.*, 92 Ill. App. 3d 813, 818 (1981) ("Since the plaintiff has admitted that she does not know what caused the fall, and she has at no time mentioned other known witnesses who could present evidence as to this question, it is clear that plaintiff cannot prove her case and at trial a directed verdict for the defendant would be required."). "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." *Kimbrough*, 92 Ill. App. 3d at 817. Additionally, although there was no evidence in the present case of a building code violation, any such violation would not in itself render defendant liable. See *Strutz*, 389 Ill. App. 3d at 681 ("Violations of an ordinance or a failure to comply with the building code, by themselves without evidence that the violations caused the injury, do not establish proximate cause.").

¶ 34 Lacking information about how plaintiff fell, in which direction she fell, or where she was in relation to the staircases immediately before she fell, and without sufficient evidence of the layout of the mudroom, I do not believe that we can reasonably make the inferences that the

majority proposes. We can only speculate as to the proximate cause of plaintiff's injuries. Accordingly, I believe that the trial court properly entered summary judgment in favor of defendant.