2018 IL App (2d) 170884-U
No. 2-17-0884
Order filed June 11, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

AURALIA SCHMIT, Plaintiff-Appellant, v. JOHN GIAMBRONE and THERESA GIAMBRONE, Individually and as Parent-Guardian of VERONICA GIAMBRONE, a Minor; CHELSEA MANZELLA; JANET HAAS; LAUREN CALBECK, Defendants (Janet Haas, Defendant-Appellee).	)	Appeal from the Circuit Court of Kane County. No. 14-L-27 Honorable James R. Murphy, Judge, Presiding.

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

ORDER

¶ 1 *Held*: The trial court erroneously granted summary judgment where the record demonstrates the existence of genuine issues of material fact regarding claims that defendant participated in the battery of plaintiff or negligently injured plaintiff.

¶ 2 Plaintiff, Auralia Schmit, appeals the judgment of the circuit court of Kane County granting summary judgment in favor of defendant, Janet Haas. Plaintiff argues that the record demonstrates the existence of genuine issues of material fact sufficient to preclude summary

judgment on defendant's behalf regarding her claims of battery and negligence against defendant. We reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 On New Year's Eve, 2009, defendant was residing at the home of Veronica Giambrone (a defendant but not a party to this appeal) because defendant had left her own home after an argument with her parents. On that date, Veronica was 15 years old and defendant was 18 years old. Veronica's older sister was in the same grade as defendant and had cautioned Veronica not to spend time with defendant. In spite of her sister's warning, Veronica and defendant decided to take advantage of the fact that Veronica's parents would not be home that night and began to plan a party. Both planned whom to invite, and defendant sent a group message to the invitees. Among the invitees were defendants Chelsea Manzella and Lauren Calbeck (both of whom are not parties to this appeal), but plaintiff was not on the list of invitees.

¶ 5 The party was slated to begin at around 8 or 9 p.m. Chelsea arrived before the start of the party and helped to set up. Somebody obtained alcohol even though none of the attendees were of legal age to purchase it; Veronica and defendant both denied that Veronica's parents, defendants John and Theresa Giambrone (both of whom are also not parties to this appeal) had a liquor cabinet or other significant stock of beer, wine, or spirits.

¶ 6 That evening, plaintiff was out at a local restaurant with her boyfriend. Plaintiff knew that she and Veronica attended the same school, but she had little to do with Veronica. Plaintiff also did not know defendant, Chelsea, or Lauren. Plaintiff's neighbor had been invited to Veronica's party, and, as neither plaintiff nor her boyfriend were invited, he texted plaintiff and extended her an invitation.

¶ 7 Plaintiff testified that she arrived at Veronica's home shortly before midnight. Plaintiff

testified that she was met at the door by Veronica, who appeared to be drunk, and who flung her arms wide and hugged her, appearing to be pleased that plaintiff had arrived. Plaintiff testified that she immediately asked to use the restroom, and Veronica escorted her to an upstairs restroom. After plaintiff had used the restroom, she returned to the first floor.

¶ 8 Plaintiff testified that defendant, Chelsea, and Lauren approached her and asked if she was Auralia. Plaintiff did not know which one asked her and she only learned their identities after the incident. Plaintiff told the three that she was Auralia, and she was told to leave immediately. Plaintiff testified that she said, "Okay, after I find my boyfriend," because she could not yet drive and her boyfriend could. Plaintiff testified that she was immediately attacked and fell to the ground. She testified that Veronica and Lauren were punching her and defendant was behind her pulling her hair. Specifically, plaintiff testified that she inferred defendant was pulling her hair because she was attacked by defendant, Veronica, Chelsea, and Lauren, and Veronica, Chelsea, and Lauren were in front of her, so "[i]t had to be [defendant]" whom she felt "[p]ulling [her] hair" and "smack[ing her] from behind." Plaintiff additionally stated, "It was Veronica, Chelsea, and Lauren in front of me. [Defendant] was towards my back, and she was pulling my hair, smacking me in the back of my head." Upon further questioning, however, plaintiff conceded that she did not directly observe defendant strike her while she was being attacked inside Veronica's house. Plaintiff maintained, however, that she saw defendant in close proximity and towards her back while the attack was underway.

¶ 9 In contrast to plaintiff's testimony about the attack inside the house, defendant testified that Veronica told her, Chelsea, Lauren, and Mariah (who is not otherwise identified and was not named as a defendant in this matter) that plaintiff was not invited to the party and Veronica wanted plaintiff to leave. Defendant testified that Mariah approached plaintiff and asked

plaintiff to leave the party. Defendant testified that plaintiff refused and shoved Chelsea. When plaintiff shoved Chelsea, Mariah tackled plaintiff, and the four (plaintiff, Chelsea, Lauren, and Mariah) tumbled to the ground in a pile. Defendant testified that she began trying to pull the girls off of plaintiff, but she was struck in the head and walked away.

¶ 10 Plaintiff testified that there was a break in the attack and she was able to exit Veronica's house. Plaintiff testified that her boyfriend exited and plaintiff realized that she did not have her purse, so she asked her boyfriend to go back into Veronica's house and retrieve her purse. Defendant testified that, after plaintiff escaped outside, she and plaintiff's boyfriend retrieved plaintiff's purse.

¶ 11 Plaintiff testified that, as she was waiting for her boyfriend to return with her purse, three of the girls (defendant, Chelsea, and Lauren) came outside after her. Plaintiff attempted to run away through Veronica's snowy yard toward her boyfriend's car, but one of the girls "tackled [her] into the snow" and knocked her to the ground. Plaintiff testified that the girls continued the beating that was started inside the house: "I was getting hit again, the same gestures, you know, punching, pulling hair."

¶ 12 Plaintiff specifically noted that defendant struck her, but she did not recall where on her body defendant struck her. However, when the questioning pushed for specifics, the following colloquy occurred:

"Q. Did you see [defendant] strike you?

A. Yes.

Q. Where did [defendant] strike you?

A. I do not recall.

Q. Did she pull your hair?

A. I do not recall.

Q. Did she kick you?

A. I was not kicked, no.

Q. Did [defendant] punch you or slap you in some way?

A. I do not recall.

Q. How do you know she struck you then?

A. Because I remember feeling her, like, seeing her face, and then her arms were on me.

Q. So you felt [defendant's] arms on you as you were on the ground; is that right?

A. Correct.

Q. And the other girls, there was not only [defendant], but Chelsea and Lauren were also there at that point, right?

A. Correct.

Q. Did you distinguish one person's set of arms from another person's set of arms touching you at that point?

A. Well, I can see. Like, from my memory I can visually see [defendant] and Chelsea and Lauren going at me, so I cannot distinguish the arms from one another, but my flashback memory does remember that.

Q. That [defendant] had her arms on you?

A. Correct.

Q. But you don't know if she slapped you, is that right?

A. I was being hurt.

Q. I know, but you don't know specifically if [defendant] actually slapped you

with her hands; is that right?

A. The second time I do not know if she slapped me, kicked me.

Q. The only thing you know about [defendant] being around you at the second altercation is that she was there, and you felt her presence, and you saw her arms in and around you?

A. And my body was hurting. I was being abused.

Q. Right. Can you separate that abuse coming from Chelsea and Lauren versus [defendant]?

A. Can you rephrase the question?

Q. Can you separate out what type of abuse you were experiencing that was being caused by Chelsea and Lauren versus what was being caused by [defendant]?

A. No."

Plaintiff testified that, when plaintiff's boyfriend returned, the girls beating plaintiff "scattered" and went back inside Veronica's house.

¶ 13 Defendant testified that, after the altercation inside the house stopped, plaintiff was walking out and informed defendant that she did not have her purse. Defendant testified that she looked for plaintiff's purse when she encountered plaintiff's boyfriend coming up the stairs from the basement carrying plaintiff's purse. While defendant was looking for the purse, she lost track of the girls who had beaten plaintiff. Defendant testified that, "by the time me and her boyfriend walked outside to go get her, she was already in the snow like being like tackled [*sic*]." According to defendant, the second altercation involved only Mariah and Lauren; Chelsea was not involved in the second, outside altercation. Defendant was not asked if she participated in the second altercation; however, from defendant's testimony we infer that defendant averred that

she observed the second altercation with plaintiff's boyfriend until he broke it up.

¶ 14 Veronica was questioned about the events at her party. Veronica testified that she did not know plaintiff and plaintiff had not been invited to the party. Veronica testified that she was intoxicated during the party and had no recollection of the specific events. She had learned or been told by unnamed others that plaintiff came to her party and was beaten; Veronica had "no knowledge of [defendant] striking [plaintiff] at [her] home." Veronica testified that she spoke to defendant a "couple of days" after the incident. Veronica related that defendant told her "her story," asserting that "[defendant] told me that her and I were not involved" with beating plaintiff; "it was the other girls" who beat plaintiff at the party. Veronica stated, "I, again, do not recall if any of that is correct."

¶ 15 Defendant obtained affidavits from several of the other partygoers. All of the affiants denied knowledge, either firsthand or secondhand, that defendant struck plaintiff during the party. One affiant averred that she did not attend the party at all.

¶ 16 As a result of the beating, plaintiff was concussed and bruised. Plaintiff testified that she experienced postconcussive syndrome, headaches, balance issues, and other neurological effects which linger to this date. Additionally, plaintiff was traumatized by the incident, reporting that she experienced post traumatic stress disorder. Plaintiff testified that, at the time of her deposition, she was still experiencing some aftereffects of the beating and was unable to participate in the same activities as before the beating.

¶ 17 Following the incident, criminal charges were filed against, among others, Veronica and defendant. On December 14, 2011, defendant pleaded guilty to a charge of attempted mob action (720 ILCS 5/8-4(a), 25-1(a)(1) (West 2010)) stemming from the incident. Defendant received a sentence of community service and fines pursuant to her guilty plea.

¶ 18 On January 14, 2014, plaintiff filed the instant civil action against defendant. On January 15, 2014, plaintiff filed her first amended complaint in which she alleged causes of action for battery (count IX) and negligence (count XII) against defendant. Plaintiff appears to have encountered difficulty in serving process on some of the defendants; on April 9, 2015, defendant appeared in this matter. On August 15, 2017, defendant filed a motion for summary judgment. Following briefing by the parties, on October 3, 2017, the trial court granted the motion for summary judgment and included Rule 304(a) language (Ill. S. Ct. R. 304(a) (eff. Mar. 8, 2016)) in its order.[1] Plaintiff timely appeals.

¶ 19 II. ANALYSIS

¶ 20 On appeal, plaintiff argues that there were genuine issues of fact sufficient to preclude the entry of summary judgment in favor of defendant. Plaintiff contends that her own testimony was sufficient to demonstrate a genuine issue of material fact as to whether defendant directly participated in the battery; alternatively, plaintiff contends that her testimony plus defendant's guilty plea to attempted mob action demonstrated the existence of a genuine issue of material fact as to whether defendant acted together with the other defendants to commit a battery against plaintiff. Plaintiff also contends that the same evidence, namely, plaintiff's testimony and defendant's guilty plea, when properly considered, serves to demonstrate a genuine issue of material fact regarding whether defendant was a proximate cause of plaintiff's injuries. Plaintiff also contends that the evidence in the record established genuine issues of material fact as to the other elements of her negligence claim against defendant, namely existence of a duty and breach

[1] No transcript of the hearing on the motion for summary judgment appears in the record; the trial court's order contains no reasoning or rationale explaining its judgment.

of that duty. Plaintiff also challenges the process the trial court used in reaching its judgment, contending that it strayed into improper fact finding instead of observing the rules surrounding the consideration of summary judgment. We will consider each contention in turn as necessary.

¶ 21 A. Standard of Review

¶ 22 We begin by considering our standard of review. This matter comes before us on the grant of defendant's motion for summary judgment. A motion for summary judgment provides a vehicle for the court to determine whether a genuine issue of material fact exists. *Coleman v. Provena Hospitals*, 2018 IL App (2d) 170313, ¶ 15. A motion for summary judgment should be granted only when the pleadings, depositions, admissions, and affidavits in the record show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2016). In considering a motion for summary judgment, the court must construe the record strictly against the moving party and liberally in favor of the nonmoving party. *Coleman*, 2018 IL App (2d) 170313, ¶ 15. Summary judgment is proper only where the facts are susceptible to a single reasonable inference. *Id.* The trial court's grant of summary judgment should be reversed if the evidence demonstrates the existence of a genuine issue of material fact or if the judgment is incorrect as a matter of law, and we review *de novo* the trial court's judgment on a motion for summary judgment. *Id.*

¶ 23 B. Factual Issue Regarding Defendant's Participation in the Battery

¶ 24 Plaintiff argues that her deposition testimony, viewed in the light most favorable to her as the nonmoving party, establishes the existence of a genuine issue of material fact regarding whether defendant personally participated in the battery of plaintiff at Veronica's house. Alternatively, plaintiff argues that her deposition testimony along with defendant's guilty plea to attempted mob action establishes the existence of a genuine issue of material fact regarding

whether defendant participated in the battery. The tort of battery requires proof that the defendant intended to cause a harmful or offensive contact and that a harmful or offensive contact resulted. *Happel v. Wal-Mart Stores, Inc.*, 316 Ill. App. 3d 621, 630 (2000). Defendant argues that plaintiff's deposition testimony fails to indicate that plaintiff observed defendant strike or touch her.

¶ 25 Defendant's contention is not without considerable force. For example, in *Lanahan v. Taylor*, 8 Ill. App. 3d 482, 483-84 (1972), the plaintiff's jury verdict for a battery was reversed on appeal after the plaintiff testified that he did not know who hit him during a brawl with his neighbors, who were blocking an access road that plaintiff was using to build a house on his own property. The appellate court noted that, while it was "true that [the] plaintiff suffered a fractured jaw[,] he specifically admitted that he did not know how or by whom he got hit." *Id.* at 484. Instead, the brawl "was a general melee with four persons swinging and wrestling, and the injury did not occur until they all fell into the ditch on top of one another." *Id.*

¶ 26 Defendant likens *Lanahan* to this case, where, despite plaintiff's clear testimony that defendant struck her, she also testified that she did not recall observing any contact between defendant and her own body. Defendant urges that we follow *Lanahan*, which she construes to stand for the proposition that, where a plaintiff does not directly observe the defendant commit the unauthorized touching, a cause of action for battery cannot be maintained. See *id.* Nevertheless, while *Lanahan* did note that the plaintiff admitted that he did not know who punched him, that is not the actual rationale driving the decision. Rather, the court held:

> "it is undisputed that [the] plaintiff Lanahan and his brother made the first violent physical contact, without which there would have been no fight. In other words, the Lanahans started the fight, and it is the opinion of this court that if one starts a fight, and

> gets the worst of it, he is in no position to recover damages unless the other party unreasonably and excessively beats him." *Id.*

It was only in the context of determining whether the defendant had unreasonably and excessively beaten the plaintiff that the *Lanahan* court noted that the plaintiff did not know who punched him. *Id.* The court concluded that the injury the plaintiff suffered was commensurate with the melee that the plaintiff initiated, and the brawl stopped as soon as the plaintiff "hollered that he was hurt." *Id.* The court concluded that the plaintiff had no justification to initiate the brawl (no matter how aggravating the defendants' tactics might have been), and the defendants did not unreasonably and excessively beat the plaintiff once the brawl had commenced. *Id.* at 484-85.

¶ 27 *Lanahan*, then, is distinguishable from this case. Here, there is a genuine issue of fact as to who started the brawl inside Veronica's house: plaintiff testified that defendant, Veronica, Chelsea, and Lauren initiated it while defendant testified that defendant shoved Chelsea. In *Lanahan*, it was undisputed that the plaintiff and his brother initiated the melee. *Id.* at 484. Likewise, there is a genuine issue of material fact whether plaintiff's beating in this case was unreasonable and excessive. Even if the evidence were ultimately held to demonstrate that plaintiff initiated the brawl, she escaped outside of Veronica's house. Once outside, however, the beating continued, and plaintiff was bruised and concussed. Thus, once the conflict was apparently over, the question would become whether it was unreasonable and excessive for the brawl to continue once plaintiff had broken it off and escaped from Veronica's house (and there does not appear to be a dispute that the continuation was initiated by one of the girls tackling or shoving plaintiff in the snowy yard). Thus, where there was clarity in *Lanahan*, there are

conflicting facts and inferences to be drawn from the facts here. Accordingly, *Lanahan* is distinguishable.

¶ 28 Continuing our analysis of the first phase of the fight, plaintiff testified, "[defendant] was pulling my hair," and she testified that she saw defendant pull her hair, and she "saw [defendant] hurting her." Plaintiff also testified that she saw the three other girls when she "felt a smack from behind," so she reasoned "[i]t had to be [defendant]." Amplifying, plaintiff testified that "Veronica, Chelsea, and Lauren [were] in front of me. [Defendant] was towards my back, and she was pulling my hair, smacking me in the back of my head." Finally, plaintiff was asked this question and gave this response:

> "Q. And did you see [defendant] strike you in the back of the head with either an open hand or a fist or something else?
>
> A. I could see the side of her body doing it."

As defendant's attorney pursued the line of questioning, plaintiff stated that she saw defendant's body as defendant was smacking her in the back of the head, but she did not see defendant's face as that was happening. From this, defendant's attorney attempted to conclude that "[plaintiff] didn't see [defendant]" striking plaintiff in the back of her head, but plaintiff did not provide an answer to that question, and defendant's attorney moved on.

¶ 29 Contrary to defendant's representation, we conclude that, regarding the phase of the brawl that occurred inside Veronica's house, plaintiff adequately testified that she directly observed defendant make contact with her. First, we note that plaintiff's description of the beating reflects a chaotic melee which she could not process into discrete and orderly contacts from one participant followed by the next, and so forth. Instead, plaintiff testified that three of the participants, Veronica, Chelsea, and Lauren, were ranged in front of her, and defendant had

moved to a position behind her, where she felt her hair being pulled and blows to the back of her head. We believe, given the positioning of the participants and plaintiff's statement that only defendant, Veronica, Chelsea, and Lauren were involved, that it is a reasonable inference from plaintiff's testimony that the person behind her pulled her hair, and that person was defendant. In addition, plaintiff testified that she saw defendant's body as defendant was striking her in the back of the head. In other words, plaintiff saw defendant's body moving at the same time she was feeling the blows to the back of her head, and this constitutes sufficient direct observation to support plaintiff's inference that defendant was responsible for the contact occurring to plaintiff's rear.

¶ 30 We also note that defendant's own testimony placed her in the middle of the brawl. Defendant testified that she attempted to pull the other participants off of plaintiff, thereby placing her squarely in the melee, at least until defendant was struck in the head and walked away. Because defendant admits she was in the middle of the action, it is for the trier of fact to determine whether defendant was indeed acting to stop the fracas or if she was an active participant.

¶ 31 Viewing the evidence in the light most favorable to plaintiff, as we must, defendant's own testimony supports plaintiff's contention that defendant was a direct participant in the portion of the incident occurring inside Veronica's home. Accordingly, we determine that defendant's testimony, along with plaintiff's testimony, supports plaintiff's claim that defendant made unauthorized contact with plaintiff of a harmful or insulting and provoking nature.

¶ 32 Turning to the second phase or continuation of the incident outside of Veronica's house, plaintiff testified that defendant, Chelsea, and Lauren exited the house as plaintiff was standing in front of it, prompting plaintiff to flee across the snowy yard. As she fled, she was brought to

the ground by a shove from behind, but did not know which of the three participants shoved her. Plaintiff testified that, until her boyfriend came out, for a period she estimated to be 45 seconds, the three participants, defendant, Chelsea, and Lauren, were on top of her. While defendant could not provide details about the brief chase across the yard, because she "had [her] back to them," plaintiff testified that she saw Chelsea and defendant strike her, although she did not recall where they struck her.[2] Defendant asked plaintiff how she knew that defendant struck her, since she could not recall where she was struck, or whether defendant pulled her hair; plaintiff replied, "[b]ecause I remember feeling her, like, seeing her face, and then her arms were on me." Plaintiff elaborated, conceding that she could not distinguish each individual's arms, but she stated that she saw all three of the participants "going at" her even though she could not necessarily distinguish each person's arms.

¶ 33 Defendant contends that plaintiff admitted that she did not see defendant strike her in any way. We disagree. First, we note that the pages of the record cited by defendant do not contain any admission by plaintiff that she did not see defendant strike her. Instead, the first page contains a description of plaintiff's flight across the yard and the concession that she did not know who brought her to the ground. The second page cited includes plaintiff's explanation of how she was brought to the ground, again with the concession that she did not see who pushed her because her back was turned. However, two pages after those cited by defendant to support plaintiff's purported admission, plaintiff was asked, "[d]id you see [defendant] strike you?" and she replied, "[y]es." Plaintiff could not recall where defendant struck her, or whether defendant

[2] We note that defendant did not ask any questions about whether plaintiff observed Lauren strike her during the continuation of the incident in the yard of Veronica's house.

punched, slapped, or pulled her hair, and plaintiff consistently denied that defendant kicked her, but she did "remember feeling her, like, seeing her face, and then her arms were on" her. Indeed, defendant's attorney asked plaintiff: "The only thing you know about [defendant] being around you at the second altercation is that she was there, and you felt her presence, and you saw her arms in and around you?" Plaintiff did not directly answer the question, responding instead that she was being hurt and she was being abused. We note that defendant's question appears to be mistranscribed, or else it misstates plaintiff's testimony that she saw defendant's arms *on* her. In any event, the thrust of the question is that defendant was in contact with plaintiff, and plaintiff appears to agree and amplify her testimony with the information that defendant was hurting and abusing her. Further, plaintiff's overall description of the contact that occurred outside clearly describes that it was of a harmful or insulting or provoking nature. Defendant's contention, therefore, does not jibe with the record.

¶ 34 Defendant also contends that her "mere presence" at the scene of the battery is an insufficient foundation for liability for battery in this case. In support, defendant cites *Sklan v. Smolla*, 95 Ill. App. 3d 658, 664 (1981), for the proposition that the plaintiff's presence alone at the scene of a battery does not give rise to liability for the battery absent some evidence that the plaintiff had planned or joined in the plan to commit a battery. Defendant's reliance on *Sklan* is inapt. In *Sklan*, the defendant was alleged to have driven the tortfeasors to a park where they beat the plaintiff, and the defendant then drove the tortfeasors away from the park. *Id.* at 659. The defendant's uncontroverted deposition testimony showed, however, that he knew the tortfeasors and met them by chance on the night of the beating and there was no evidence in the record that he was aware of the tortfeasors' plan to beat the plaintiff. *Id.* at 660-61. The court held that, in the absence of some sort of evidence of awareness of the source of the purported

conflict between the tortfeasors and the plaintiff, the defendant could not reasonably foresee the tortfeasors' actions and the fact that the defendant provided a ride to and from the scene of the beating was insufficient to impose liability upon the defendant for the actions of the tortfeasors. *Id.* at 663-64. The primary problem with *Sklan* in this context is it is not applicable to a case wherein the defendant is alleged to have personally participated in the battery, as here. Plaintiff did allege, alternatively, that defendant's guilty plea to attempted mob action is sufficient to serve as a judicial admission of defendant's indirect participation in the battery, and *Sklan* is applicable to this situation, but we have not reached that point in our analysis and will address the argument below. Additionally, we note that defendant appears to conflate direct and indirect participation throughout her argument. Thus, we conclude that *Sklan* is not applicable to the portion of plaintiff's contention that defendant directly and personally committed a battery upon her.

¶ 35 Defendant also argues that plaintiff "has failed to establish that her claimed injuries were due to the alleged actions of [d]efendant." This is in line with defendant's overall argument on this point, that plaintiff did not prove proximate causation in her claim. However, defendant appears to be deliberately vague about which claim and elides her argument to encompass both the negligence claim as well as the battery claim. The problem with defendant's argument with respect to the battery claim is there simply is no physical injury element required to be pleaded in a battery claim. *Doe v. Bridgeforth*, 2018 IL App (1st) 170182, ¶ 74 ("Damages—in the sense of a manifested physical injury—are not an element of the tort of battery."). With regard to the negligence claim, we address it below.

¶ 36 Defendant also argues that plaintiff's deposition testimony was insufficient to demonstrate the existence of a genuine issue of material fact because plaintiff admits that she did

not know defendant before the incident and that some of plaintiff's testimony during the deposition conflicts with other testimony given during the deposition. Defendant's argument fails due to the procedural posture of the case, namely, consideration of her motion for summary judgment. A court passing on such a motion does not judge the credibility of witnesses or make any factual determinations; rather it considers only whether a genuine issue of material fact exists. *Kopolovic v. Shah*, 2012 IL App (2d) 110383, ¶ 15. Moreover, as stated above, the court must construe the motion strictly against the moving party and liberally in favor of the nonmoving party. *Coleman*, 2018 IL App (2d) 170313, ¶ 15. While plaintiff did admit that, before the party, she had not previously met defendant, Chelsea, or Lauren, we note that defendant identified that defendant had longer hair and a round nose. Moreover, plaintiff distinguished between the appearances of defendant, Veronica, Chelsea and Lauren during her deposition, so it appears from her testimony that, despite not encountering them before the incident, she understood who was who and could identify each participant individually, thereby demonstrating the existence of a factual issue on the sufficiency of any identification she might be able to make.

¶ 37 The issue of whether plaintiff's deposition testimony was consistent throughout the course of the deposition is simply an issue of credibility incapable of resolution on summary judgment. Even if deposition testimony is not internally consistent throughout the course of the deposition, the inconsistency goes to the deponent's credibility before the trier of fact and does not subject the deponent to summary judgment. *Caburnay v. Norwegian American Hospital*, 2011 IL App (1st) 101740, ¶ 32. Thus, any inconsistency in plaintiff's deposition testimony is to be resolved by the trier of fact and not by the court during the determination of defendant's motion for summary judgment. We therefore reject defendant's contentions in this regard.

¶ 38 Defendant also points out testimony and affidavits that suggest that defendant was not involved in the altercation on the night in question. At this stage of the proceedings, this evidence in the record does not result in the grant of summary judgment in plaintiff's favor; rather the evidence contradicting this testimony demonstrates the existence of a material factual issue for the trier of fact to resolve. We reject defendant's contention.

¶ 39 Based on the foregoing, then, we conclude that plaintiff's deposition testimony demonstrates the existence of a genuine issue of material fact regarding whether defendant directly and personally participated in the altercations at Veronica's home. Accordingly, we reverse that portion of the trial court's judgment granting summary judgment in favor of defendant on the issue of whether she personally participated in the battery against defendant and remand the matter for further proceedings.

¶ 40 C. Factual Issue Regarding Defendant's Guilty Plea to Attempted Mob Action

¶ 41 Plaintiff also argues, alternatively, that defendant's plea of guilty to attempted mob action is evidence that she acted together with Veronica, Chelsea, and Lauren in the commission of the battery even if defendant did not personally participate in it. Defendant argues only that, because the offense of mob action does not have an element of bodily injury, it does not establish any of the elements of negligence, namely, duty, breach of duty, proximate causation, and damages. Defendant offers no argument as to whether the guilty plea can be used in any way in plaintiff's battery claim.

¶ 42 Defendant pleaded guilty to attempted mob action. Mob action, as is pertinent here, is defined as "the knowing or reckless use of force or violence disturbing the public peace by 2 or more persons acting together and without authority of law." 720 ILCS 5/25-1(a)(1) (West 2010). The inchoate offense of attempt is defined: "A person commits the offense of attempt when, with

intent to commit a specific offense, he or she does any act that constitutes a substantial step toward the commission of the offense." 720 ILCS 5/8-4(a) (West 2010). Attempt lowers the classification of the specific offense one step; here, the offense of mob action is a class 4 felony, but the offense of attempted mob action is a class A misdemeanor. 720 ILCS 5/25-1(b)(3), 8-4(c)(5) (West 2010).

¶ 43 Plaintiff argues that the guilty plea establishes that defendant acted together with Veronica, Chelsea, and Lauren in committing the battery against plaintiff. See *Spircoff v. Stranski*, 301 Ill. App. 3d 10, 15 (1998) (a guilty plea is a judicial admission and withdraws the fact from contention). In this way, even if there is no or insufficient evidence that defendant directly and personally participated in the battery, by acting together with the others, she would be liable for their actions and would thus be deemed to have indirectly committed the battery.

¶ 44 In *Sklan*, the court observed that "[a]n individual may be found liable of civil battery where he has not actually physically come into contact with another but has acted to incite, aid or abet the actual assailant or has acted in furtherance of a common plan or design with the assailant." *Sklan*, 95 Ill. App. 3d at 662. This statement from *Sklan* would seem to be fully applicable to the circumstances in this case. Moreover, in *Jaffray v. Hill*, 41 Ill. App. 2d 460, 465 (1963), relied on in *Sklan*, the court expressly held that a person could be held liable for battery even if he or she had no physical contact with the victim. In *Jaffray*, the defendant drove a car with his companions, participated with the companions in obtaining and drinking a case of beer, roamed about in the defendant's car, drove them to the place where the battery was accomplished, let the companions out of the car to make the attack, waited for them, and drove them away. *Id.* at 464. This evidence was enough to demonstrate the existence of a common

plan or design with the assailants and sufficient to establish the defendant's accountability his companions' actions. *Id.* at 465.

¶ 45 Similarly, in this case, defendant pleaded guilty to the offense of attempted mob action, thereby admitting that she, with the intent to commit the offense of mob action, completed a substantial step toward the offense of mob action, the elements of which are the knowing or reckless use of force of violence disturbing the peace by 2 or more persons acting together without authority of law. Thus, defendant admitted that she acted together with Veronica, Chelsea, and Lauren in accomplishing the battery of plaintiff. Even if defendant did not touch plaintiff in any way (and we have determined above that there is a genuine issue of material fact regarding defendant's direct and personal participation in the battery), by acting together with her codefendants, she became responsible for their actions as if she had done them herself. *Id.*

¶ 46 Defendant does not gainsay this analysis; rather, defendant argues only that the guilty plea to attempted mob action could be potentially admissible for the purpose of attacking her credibility during trial, but concludes that, because she pleaded guilty to a misdemeanor, it would not be properly admissible for impeachment purposes. This argument is wide of the mark. The significance of the guilty plea is the admission of each of the essential factual elements of the offense, specifically, that defendant acted together with her codefendants to accomplish the battery of plaintiff. Defendant does not contest that at least one of her codefendants committed a battery of plaintiff, and her guilty plea establishes sufficient accountability for her codefendant's actions to possibly hold defendant liable for battery as well. Therefore, we reject defendant's misplaced argument.

¶ 47 Accordingly, we conclude that defendant's guilty plea establishes as a judicial admission that she acted together with her codefendants to commit a battery against plaintiff. Thus, there is

at least a genuine issue of material fact regarding whether defendant is accountable for the actions of her codefendants and thus liable for the battery against plaintiff. We therefore reverse the portion of the trial court's judgment on this point and remand the cause for further proceedings.

¶ 48 D. Negligence

¶ 49 Plaintiff next argues that the trial court erred in granting summary judgment in favor of defendant on her negligence claim against defendant. In order to maintain a cause of action in negligence, the plaintiff must prove that the defendant had a duty to the plaintiff, that the defendant breached that duty, and that the plaintiff's injury proximately resulted from the breach. *Topps v. Ferraro*, 235 Ill. App. 3d 43, 47 (1992). Plaintiff argues that the evidence in the record demonstrates at least a genuine issue of material fact regarding all of the elements, but plaintiff does not elaborate. Defendant, for her part, argues that plaintiff's position regarding duty in the trial court was derived from statute, but plaintiff's argument is not specifically raised on appeal; instead plaintiff simply argues an amorphous duty existed and was breached by defendant's actions. Defendant also makes a number of arguments regarding proximate causation.

¶ 50 Regarding the existence of the duty and the breach of duty, plaintiff alleged that defendant "had a duty to exercise ordinary care to [plaintiff] and to the public generally." Plaintiff also alleged that the duty was breached by defendant striking plaintiff, acting in a physically dangerous manner in the area of innocent members of the public, especially plaintiff, and failing to warn plaintiff of imminent physical danger. Based on the evidence adduced as we have discussed above, we hold that plaintiff has adequately demonstrated the existence of a duty from defendant to plaintiff and a breach of that duty. Defendant's sole argument regarding duty is one of forfeiture: plaintiff did not repeat her argument that the duty arose from defendant's

status as an occupier of the premises pursuant to section 130/2 of the Premises Liability Act (740 ILCS 130/2 (West 2010)) thereby forfeiting it on appeal. While we agree that the argument from below is forfeited, considering the evidence along with the allegations of the complaint strictly against defendant and liberally in favor of plaintiff, as we must (*Coleman*, 2018 IL App (2d) 170313, ¶ 15), we hold that the record, properly considered, supports the allegations of duty and breach of that duty such that the grant of summary judgment in favor of defendant on those issues was improper. We now turn to defendant's arguments regarding proximate cause.

¶ 51 Proximate cause consists of cause in fact and legal cause. *Berke v. Manilow*, 2016 IL App (1st) 150397, ¶ 33. Cause in fact is the "but for" test: the defendant's conduct forms a material element and substantial factor in bringing about the injury. *Id.* Legal cause is determined by the foreseeability of the injury based on the defendant's conduct. *Id.*

¶ 52 Defendant first argues that proximate cause cannot be established based on speculation, surmise, and conjecture. *Id.* ¶ 34. Defendant argues that, in other words, the occurrence of an accident does not entitle a plaintiff to recover. *Payne v. Mroz*, 259 Ill. App. 3d 399, 403 (1994). Under the circumstances thus far established, plaintiff has demonstrated the existence of a factual issue precluding summary judgment. Defendant's contention is based primarily on the conclusion that plaintiff's deposition testimony was inconsistent, whereas defendant's deposition testimony and affidavits all averred that defendant did not participate in the fighting. However, as we determined above, plaintiff's testimony established that, according to plaintiff, defendant participated, and defendant's own testimony placed defendant squarely within the brawl. Thus, plaintiff's testimony and defendant's testimony established the existence of a genuine issue of material fact regarding whether defendant's conduct led to plaintiff's injuries. Accordingly, we reject defendant's contention.

¶ 53 Defendant also argues that her guilty plea is not evidence of causation. In light of our determination that there is a factual issue regarding proximate causation based on plaintiff's and defendant's deposition testimony, we need not further address this issue because, even if we fully agree with defendant, it does not disturb the genuine issue of material fact regarding causation already established. We do note, however, that defendant's argument depends on lining up the elements of mob action and comparing them to the elements of negligence. While we do not necessarily fault the methodology, we note that defendant overlooks that her guilty plea establishes that she acted together with Veronica, Chelsea, and Lauren, and defendant does not analyze whether that concerted action may be sufficient to impose liability for her codefendants' negligent actions. Moreover, because there is a genuine factual issue regarding defendant's direct participation, it vitiates her contention that her guilty plea to mob action has no bearing on the negligence claim due to the fact that physical injury is not an element of mob action. Accordingly, we reject defendant's contentions.

¶ 54 For the foregoing reasons, we hold that the trial court erred in granting summary judgment in favor of defendant on plaintiff's claim of negligence. Accordingly, we reverse its judgment and remand the matter for further proceedings. Moreover, in light of our conclusions above, we need not further address plaintiff's arguments.

¶ 55 III. CONCLUSION

¶ 56 For all of the foregoing reasons, we reverse the judgment of the circuit court of Kane County granting summary judgment to defendant. We remand the cause for further proceedings consistent with this order.

¶ 57 Reversed and remanded.