

No. 1-14-3319

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**IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT**

DANIEL SHALLOO,)	Appeal from the
)	Circuit Court of
)	Cook County
Plaintiff-Appellant,)	
)	
v.)	No. 13 L 00922
)	
ALPHA BAKING CO., INC., an Illinois corporation, and GORDON BROS. STEEL WAREHOUSE, INC., an Illinois corporation,)	Honorable
)	Jeffrey Lawrence,
Defendants-Appellees.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

ORDER

Held: The circuit court's grant of summary judgment in favor of defendant Alpha Baking on plaintiff's negligence complaint is affirmed where the evidence does not show what condition caused plaintiff to fall off the trailer or whether Alpha Baking caused the condition, thereby failing to establish proximate cause.

¶ 1 Plaintiff, Daniel Shalloo, appeals the order of the circuit court granting defendants Alpha Baking Co., Inc. (Alpha Baking) and Gordon Bros. Steel Warehouse, Inc.'s (Gordon Bros.) motions for summary judgment on plaintiff's negligence claim. On appeal, plaintiff alleges that the court erred in granting summary judgment against Alpha Baking¹ where a genuine issue of material fact exists as to whether (1) Alpha Baking was negligent in instructing plaintiff on how to remove steel from the trailer; (2) its negligence proximately caused plaintiff's injuries; and (3) the dangerous condition of the trailer was open and obvious. We affirm.

¶ 2 JURISDICTION

¶ 3 The trial court granted defendant Alpha Baking Co.'s motion for summary judgment on September 24, 2014. Plaintiffs filed their notice of appeal on October 23, 2014. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 4 BACKGROUND

¶ 5 In his deposition, plaintiff stated that on February 8, 2011, he was working as a truck driver for Vanek Brothers. That day he arrived at work and was told take a tractor to Gordon Bros. to pick up the contents of a flatbed trailer for delivery to several locations. When he arrived at Gordon Bros., the trailer was already loaded. He was informed about the various loads he had to deliver and then the loads were covered with tarp and secured with bungee cords. He was to deliver one of the loads to Alpha Baking. Alpha Baking's load consisted of sheet steel, one stack measuring 48 inches by 120 inches and weighing 200 pounds, and the other measuring 60 inches by 120 inches and weighing 150 pounds. The sheet steel was sitting on

¹ Plaintiff appeals only the grant of summary judgment against defendant Alpha Baking.

blocks in front, closest to the tractor, and in the center of the trailer. The delivery to Alpha Baking was plaintiff's second delivery of the morning. Plaintiff had never made a delivery to Alpha Baking before.

¶ 6 When plaintiff arrived at Alpha Baking, he was instructed to drive to the maintenance department in the back of the building. He knocked on the overhead doors and an unidentified Alpha Baking employee came out and informed plaintiff that the trailer would have to be unloaded outside rather than inside the building. Plaintiff asked the employee to bring a forklift and he would get the load "ready," but the employee stated that he would not use a forklift for this load. Plaintiff untied the bungee cords, rolled back the tarp covering the load, and released the ratchets.

¶ 7 Since the load was in the center of the trailer, plaintiff asked the employee, "how are you going to get it off?" The employee told plaintiff that he would have to "walk [the load] from the passenger's side to the driver's side." He also told plaintiff to get up on the trailer because "my insurance company will not allow me to go on your trailer." Plaintiff climbed onto the trailer and proceeded to use a crowbar to "walk" the load to the driver's side. "Walking" the load meant that plaintiff would put the crowbar underneath, wedge it against the floor "and walk it," and then do the same for the other end of the load, repeating the process until the load was moved to its intended destination. Plaintiff stated that in 40 years as a truck driver, he used a crowbar to "walk" a load "maybe once." No employee from Alpha Baking instructed him on how to "walk" the load and it was plaintiff's decision to use a crowbar.

¶ 8 Plaintiff wedged the crowbar underneath the front end and "walked" it, and then he went to the back to "walk" that end of the load. While in the process of wedging the crowbar underneath the back end and lifting, plaintiff fell off the trailer. He stated that he did not "know

if the crowbar slipped or if the material moved." When asked, "What caused you to fall off the trailer?" plaintiff answered, "I have no idea." Plaintiff further stated that the surface of the trailer was not slippery and no gust of wind pushed against him. He did not recall tripping over anything that caused him to fall, nor was he distracted by anything. He did not recall telling the doctor treating him for injuries that he fell off when he was backing up in the trailer. He also did not recall whether the Alpha Baking employee was outside at the time. When asked whether he "appreciated the hazard that [he] could or might fall off" when getting up on the trailer, plaintiff responded "[t]hat was one of my biggest problems with it."

¶ 9 In his deposition, Mike Stonis stated that he was a mechanic and maintenance purchaser for Alpha Baking, and he worked for the company for 29 years. He is in charge of ordering steel parts for the facility. Gordon Bros. delivers between 15 and 20 loads every year. Stonis stated that Gordon Bros. determines where to place the loads on the trailer. Stonis was not the employee plaintiff met with on the morning of February 8, 2011, and plaintiff was not the usual truck driver making the Gordon Bros. delivery to Alpha Baking. When a load arrives at the facility, the custom and practice was that the truck drivers prepared the contents for unloading, and Alpha Baking would be responsible for the actual unloading. Alpha Baking did not instruct the drivers on how to prepare for unloading. Stonis stated that it was the driver's job to climb onto the trailer to prepare for unloading. However, he was not aware of any restriction, policy, or procedure prohibiting Alpha Baking employees from climbing on to the trailers.

¶ 10 Alpha Baking determined whether to use a forklift to remove the load or whether the load could be pulled off manually. The forklift was used for longer, heavier loads. When asked what would happen if the load could not be reached by hand and it was not loaded on the side of

the trailer, Stonis responded "[t]hen we either have to use a forklift or it has to be moved to a position where we can get it." The truck drivers would have to move the load into position.

¶ 11 Regarding plaintiff's load, Stonis did not remember telling him how the delivery would be unloaded and he did not recall plaintiff asking for a forklift. Stonis did not tell plaintiff to move the steel to one side for loading. He stated that the load would have been removed by hand and he was not aware of any Alpha Baking employee telling plaintiff that the load had to be moved to one side. Stonis first saw plaintiff when he was up in the trailer. Plaintiff removed the tarp and a strap caught on one of the pieces of steel and plaintiff had to release the strap. Stonis stated that as plaintiff removed the strap, he took one or two steps back and tripped over a piece of steel. His momentum carried him backwards and plaintiff's foot hit a piece of iron which was not part of Alpha Baking's load. Stonis did not see plaintiff with a crowbar nor did he see him hit the ground.

¶ 12 Stonis did not know why a report was not filed following plaintiff's fall. Due to plaintiff's claim, Stonis filled out a report on May 2, 2013. In the report, Stonis indicated that he saw plaintiff take one or two steps backwards and trip over a piece of steel before falling off of the trailer.

¶ 13 Rick Gordon, vice president of Gordon Bros., stated that he used Vanek Brothers to make deliveries. Gordon Bros. did not provide plaintiff with training or handbooks regarding the loading and unloading of deliveries from Gordon Bros. trucks. Gordon Bros. determined how to load the trailers, depending on the order in which the deliveries were to be made. He did not have expectations on how the steel would be unloaded. Gordon stated that the driver was responsible for making sure the load was secured, unstrapping the load, and uncovering the tarp. He stated that the removal of the straps and uncovering of the tarp could be done either with the

driver standing on the ground or with him climbing on to the trailer. The custom and practice was for the customer, in this case Alpha Baking, to perform the unloading. Gordon Bros. told its drivers not to unload the deliveries. However, it is not against company policy for a driver to "walk" a load over to the other side of the trailer.

¶ 14 The sheet steel delivered to Alpha Baking consisted of 7 pieces of 11-gauge sheet metal steel, each weighing approximately 70 pounds. The total weight of the delivery was 450 pounds. When asked whether the load, bundled together, could be unloaded manually Gordon answered, "No." Based on the invoices and his knowledge of loading procedures, Gordon expected that a forklift would be used to unload the steel at Alpha Baking.

¶ 15 Plaintiff filed a negligence complaint against Alpha Baking and Gordon Bros. Count I of the amended complaint alleged that Alpha Baking negligently instructed plaintiff to unload the steel in an unsafe manner by telling him "to manually move the steel from the middle of the flatbed to the edge of the flatbed" thereby creating a dangerous condition. Count I further alleged that Alpha Baking was negligent in failing to provide the necessary equipment, such as a forklift or crane, for safe removal of the load. Alpha Baking filed a motion for summary judgment, arguing that since plaintiff testified he had no idea what caused him to fall off the trailer, he cannot establish that Alpha Baking proximately caused his injuries. It also argued that it did not instruct plaintiff on how to prepare a delivery for unloading, and the dangerous condition was open and obvious. On September 24, 2014, the trial court granted Alpha Baking's motion for summary judgment. Plaintiff filed this timely appeal.

¶ 16

ANALYSIS

¶ 17 Plaintiff contends that the trial court erred in granting summary judgment in favor of Alpha Baking on plaintiffs' negligence claim. Summary judgment is proper where the

pleadings, depositions, admissions and affidavits on file, viewed in the light most favorable to the nonmoving party, show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Cochran v. George Sollitt Construction Co.*, 358 Ill. App. 3d 865, 872 (2005). Although plaintiff need not prove his case at the summary judgment stage, he must present probative evidence supporting his position. *Allegro Services, Ltd. v. Metropolitan Pier & Exposition Authority*, 172 Ill. 2d 243, 256 (1996). We review the trial court's grant of summary judgment *de novo*. *Cochran*, 358 Ill. App. 3d at 872.

¶ 18 To state a cause of action for negligence, plaintiff must show that defendant owed him a duty, defendant breached that duty, and defendant's breach was the proximate cause of plaintiff's injury. *Hills v. Bridgeview Little League Ass'n*, 195 Ill. 2d 210, 228 (2001). "Proximate cause is an essential element of a negligence claim" and therefore plaintiff bears the burden of showing positively and affirmatively that defendant's alleged negligence caused plaintiff's injury. *Bermudez v. Martinez Trucking*, 343 Ill. App. 3d 25, 29 (2003). "[P]roximate cause is established when there is reasonable certainty that the defendant's acts or omissions caused the injury." *Strutz v. Vicre*, 389 Ill. App. 3d 676, 679 (2009). Although proximate cause is a question of fact, it is a question of law where the alleged facts show that a party would never be entitled to recover. *Bermudez*, 343 Ill. App. 3d at 29-30. The fact that an accident occurred does not support an inference of negligence, and without positive proof of causation, plaintiff cannot establish the existence of a genuine issue of material fact. *Strutz*, 389 Ill. App. 3d at 29.

¶ 19 In *Kimbrough v. Jewel Companies, Inc.*, 92 Ill. App. 3d 813 (1981), the plaintiff slipped and fell on a ramp upon leaving defendant's store. She stepped on to the ramp, her feet went out from under her and she fell. When asked what caused her to fall, plaintiff responded that she had no idea why she fell and the only thing she noticed were some grease spots on the ramp.

She did not know what caused the grease spots or if the spots were slippery, and she did not know whether her foot actually touched the grease before she fell. *Id.* at 815-16.

¶ 20 This court determined "that it is not enough for a plaintiff to show that he or she fell on the defendant's flooring. The plaintiff must go further and prove that some condition caused the fall and that this condition was caused by the defendant." *Id.* at 818. Since the plaintiff acknowledged that she did not know what caused her to fall, and no known witnesses observed the accident, this court held that the plaintiff could not prove her negligence case and the trial court properly granted summary judgment in the defendant's favor. *Id.* See also *Bermudez*, 343 Ill. App. 3d at 31 (the record on appeal was devoid of any evidence why or how plaintiff lost control of the truck before colliding with a barrier wall; therefore he failed to show that the defendant's alleged breach of duty was a proximate cause of plaintiff's injuries); *Strutz*, 389 Ill. App. 3d at 681 (decedent stated that he "fell down over the railing," but he never stated what caused him to fall; "[t]herefore, even if we consider [decedent's] statements in the light most favorable to plaintiff, there remains a lack of evidentiary facts on causation to create a genuine issue of material fact").

¶ 21 Here, plaintiff testified that while in the process of wedging the crowbar underneath the back end of the load for lifting, he fell off the trailer and sustained injuries. He did not "know if the crowbar slipped or if the material moved" and when asked, "What caused you to fall off the trailer?" plaintiff answered, "I have no idea." As we stated in *Kimbrough*, it is "not enough for a plaintiff to show that he or she fell on the defendant's flooring. The plaintiff must go further and prove that some condition caused the fall and that this condition was caused by the defendant." *Kimbrough*, 92 Ill. App. 3d at 818. Proximate cause cannot be established by speculation, surmise, or conjecture. *Mann v. Producer's Chemical Co.*, 356 Ill. App. 3d 967,

974 (2005). Without positive proof of causation, plaintiff cannot establish the existence of a genuine issue of material fact and the trial court's grant of summary judgment was proper. *Strutz*, 389 Ill. App. 3d at 29.

¶ 22 Plaintiff disagrees and argues that a genuine issue of material fact as to causation exists. He points to Stonis's incident report which stated that while on the trailer, plaintiff stepped back and his foot hit some angle iron or other material on the trailer causing him to lose balance and fall backward off the trailer. However, this testimony shows only that plaintiff was performing his job in making the delivery to Alpha Baking at the time of the accident. Plaintiff was on the trailer preparing the steel delivery for unloading by Alpha Baking. Alpha Baking's employee Stonis and Gordon agreed that it is the custom and practice for truck drivers to prepare a delivery for unloading, and for the customer to do the actual unloading. Gordon testified that their drivers are responsible for making sure the load is secure on the trailer, and once they have reached the customer, to unstrap the load and uncover the tarp. The removal of straps and uncovering of tarp can be done either with the driver standing on the ground or climbing on to the trailer. Gordon further stated that it is not against company policy for a driver to "walk" a load over to the other side of the trailer in preparing it for unloading. This evidence reveals nothing about what condition on the trailer caused plaintiff to fall or whether Alpha Baking caused the condition. See *Kimbrough*, 92 Ill. App. 3d at 818. We are not persuaded by plaintiff's argument.

¶ 23 Since we have determined that plaintiff cannot show what caused his accident, and therefore cannot establish proximate cause, his other contentions on appeal are likewise without merit. See *Bermudez*, 343 Ill. App. 3d at 29 ("[p]roximate cause is an essential element of a negligence claim").

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¶ 24 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 25 Affirmed.