2013 IL App (1st) 111295-U

FIFTH DIVISION
March 1, 2013

No. 1-11-1295

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BERNADETA SOWA, Individually and as Special Administrator of the Estate of Jozef Sowa, Deceased,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellant,	)	
v.	)	
KENNY CONSTRUCTION COMPANY, an Illinois Corporation, and PASTOR SARAH L. ALLEN, as Special Administrator of the Estate of Adolph Allen, Individually and as Agent of the Kenny Construction Company,	)	No. 07 L 10232
Defendants-Appellees.	)	Honorable Richard J. Elrod Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice McBride and Justice Taylor concurred in the judgment.

O R D E R

¶ 1 ***Held:*** The trial court's entry of summary judgment in favor of defendants was reversed where there were issues of material fact involving whether defendants' operation of its construction equipment was reasonable and proximately caused the decedent's death in a car accident and whether the decedent was comparatively negligent in causing the collision.

¶ 2 This appeal arises out of an action brought by plaintiff, Bernadeta Sowa, individually and as Special Administrator of the Estate of Jozef Sowa, pursuant to the Illinois Wrongful Death Act (740 ILCS 180/1 (West 2008)). Plaintiff brought this action to recover damages arising from Sowa's death following a collision between his vehicle and a Caterpillar tractor operated by Adolph Allen in the course and scope of his employment for defendant Kenny Construction Company.[1] The trial court granted summary judgment in favor of defendants, and plaintiff now appeals that ruling. For the reasons that follow, we reverse.

¶ 3 The pleadings, depositions and other evidentiary materials of record establish the following undisputed facts. On February 25, 2004, Kenny Construction was working on the East Markham Force Main Project (the Project) for the Metropolitan Water Reclamation District (the District). On that date and during the proceeding six months, work on the project was taking place in the area of 159th street and Interstate 294 (I-294) in Markham, Illinois. 159th is a four-lane divided highway with two lanes running east and two lanes running west. I-294 runs in a north-south direction. The portion of 159th street where the collision occurred, and the area immediately prior thereto, has an uphill grade of approximately 3 percent because 159th street crosses over I-294 on an elevated structure. The posted speed limit on 159th was 45 miles per hour (mph). The tractor was stored overnight at a site located south of 159th street and east of I-294. The construction site was located south of 159th street and west of I-294. Thus, to be

[1]Allen passed away during the pendency of this lawsuit from causes unrelated to the accident.

moved from the storage site to the construction site each day, the tractor had to be driven on 159th street for approximately .7 miles.

¶ 4 The tractor involved in the collision was equipped with headlights, taillights and a triangular slow-moving vehicle emblem affixed to the rear of the tractor. The top of the tractor's cab was equipped with a flashing amber light known as a "Mars light," which is intended to give notice to other vehicles of the tractor's presence on the road. The tractor had a top speed of 26.3 mph.

¶ 5 Allen began work on February 25 between 5:30 and 6 a.m. He parked his vehicle in the lot where the tractor was kept overnight and then drove the tractor north to 159th street. He turned left and drove west on 159th with the intention of crossing over I-294 and then turning south to get to the construction site. At approximately 6 a.m. that same day, Sowa left his job and was his traveling west on 159th street near the I-294 northbound ramp. At some point between 6 and 6:18 a.m., Sowa's vehicle rear-ended the tractor in the left-hand lane of westbound 159th street. Sowa's vehicle went underneath the rear of the tractor and impacted the tractor's right rear tire. Sowa subsequently died of injuries sustained in the collision.

¶ 6 Following Sowa's death, plaintiff brought a negligence and survival action against defendants. Plaintiff claimed that at the time of the collision Allen was operating the tractor in the scope of his employment for Kenny Construction and that defendants therefore owed a duty to operate the tractor in such a manner as to make it reasonably safe for other motor vehicles on the road. Plaintiff asserted that defendants were guilty of numerous negligent acts or omissions that breached the duty of care and that proximately caused Sowa's death. Plaintiff specifically

asserted that defendants operated the tractor without maintaining a proper lookout, failed to place any warning signs, lighted barricades or a flag person at a reasonably safe distance to warn other motorists of the tractor's presence on the road and operated the tractor at such a low speed as to pose a significant risk of injury to other motorists. Plaintiff also asserted that defendants failed to properly signal before stopping or turning when Sowa's vehicle was immediately behind the tractor, turned the tractor onto a public roadway and then switched lanes without first ascertaining that such movements could be done with reasonable safety, failed to yield the right of way to an approaching vehicle and operated the tractor without proper lamps.

¶ 7 Defendants filed a motion for summary judgment on all of plaintiff's claims. Defendants argued that plaintiff could not establish proximate cause because there was no evidence that the tractor was in violation of any applicable laws and because Sowa died within hours of the accident and no one knew what he was doing at the time of the collision or why the accident happened. Accordingly, there were no facts known or that could be established to explain why Sowa's vehicle impacted the tractor and the cause of the accident was a matter of surmise and conjecture. Defendants also argued that Sowa was the sole proximate cause of the accident because he had a legal duty to keep a proper lookout and to avoid the accident. Finally, defendants argued that plaintiff could not establish the legal cause of the accident because the tractor was merely a condition and not a cause of the collision. The discovery depositions that defendants attached to their motion put forth the following facts.

¶ 8 Two of the District's engineers involved in the project testified that 159th street was not part of the construction zone. David Dragman, Kenny Construction's project safety manager,

testified that Kenny Construction did not use flagmen, lighted barricades, shadow vehicles or other measures when moving the tractor from the storage site to the construction site because 159th street was not part of the construction zone. Dragman went to the scene several hours after the accident, but both vehicles had been removed and Sowa had been taken to the hospital. Dragman went to the construction site and took a statement from Allen. He did not inspect the tractor because he was not asked to do so. Dragman generated an "Accident/Incident Investigation Report" in which he concluded that no action was needed to prevent a reoccurrence of the accident because "everything was in proper working order (tail lights, placard, flashing light on roof of cab) to move equipment to the job site." Dragman acknowledged that he did not inspect the tractor before the accident occurred and that the conclusion in his report was based upon what Allen told him. He also testified that he "saw the flashing light working," but did not testify when this occurred.

¶ 9 Allen testified that he began work between 5:30 and 6 a.m. on the date of the accident and that he initially drove to the lot where the tractor was stored overnight.[2] He first inspected the tractor, which included turning the lights on to see if they all worked. The tractor was

[2]Allen passed away after his discovery deposition was taken. During a later hearing on defendants' motion for summary judgment, the trial court told the parties that Allen's discovery deposition was "not going to be in evidence in this case" because the supreme court rules at the time did not allow Allen's discovery deposition to be used as an evidence deposition. We set forth his deposition to provide context to the collision but do not consider the statements he made therein as part of our review of the issues raised on appeal. See *Complete Conference Coordinators, Inc. v. Kumon North America, Inc.*, 394 Ill. App. 3d 105, 108 (evidence that would be inadmissible at trial is not admissible in support of or in opposition to a motion for summary judgment).

functioning properly and he had no problems maneuvering it. Near the time of the collision, the weather was dry and cold and the light was "breaking." Allen testified that he had been traveling westbound on 159th street for approximately five minutes when he felt a "bump" and was knocked to the side. He did not see the collision and was not aware of it until he walked around to the rear of the tractor and saw Sowa's vehicle. Allen was in the left-hand lane of westbound 159th street at the time of the collision. The record includes a copy of Allen's "Daily Operator/Oiler Report" from the date of the accident in which he noted "lighting OK."

¶ 10 Officer Kenneth Muldrow of the Markham police department was dispatched to investigate the crash at approximately 6:18 a.m. According to Officer Muldrow, it was light outside at the time, the sun was just coming up and visibility was clear. Officer Muldrow testified that the tractor's headlights were on when he arrived at the scene but he did not recall if there were any functioning lights on top of the tractor. Officer Muldrow reviewed a photograph of the tractor taken at the scene of the accident and testified that he did not see any functioning lights on top of the tractor. The officer did not observe any skid marks at the scene, which indicated to him that Sowa did not attempt to stop his vehicle before the collision. Officer Muldrow also testified that he did not issue any citations to Allen and that he would have done so had any of the tractor's lights not been functioning. Officer Muldrow issued traffic citations to Sowa for failure to reduce speed and for no proof of insurance. He explained that failure to reduce speed was simply a "catchall ticket."

¶ 11 Sergeant James Knapp of the Markham police department also responded to the scene shortly after the accident. Sergeant Knapp agreed that the absence of skid marks indicated that

Sowa did not hit his breaks before the collision. The sergeant testified that the tractor's headlights were on when he arrived at the scene but he did not recall if any other lights were functioning on the tractor.

¶ 12 Dr. Larry Auerbach, an ophthalmologist, treated Sowa on August 9, 2002, and August 22, 2003. According to the doctor's records from those visits, Sowa was legally blind in his left eye and suffered from diabetes and hypertension. Based upon his vision in the right eye, however, Sowa was able to obtain a driver's license.

¶ 13 Dr. Marius Katilius treated Sowa at the hospital after the accident. Sowa's laboratory computer tests were "positive or suggestive of a myocardial infarction," which the doctor found consistent with the injuries Sowa suffered in the collision. Dr. Katilius believed it was unlikely that Sowa suffered a heart attack prior to the accident but he could not rule out the possibility.

¶ 14 Defendants also supported their motion for summary with the discovery depositions and reports of two expert witnesses. One of those expert witnesses was John Goebelbecker, a licensed engineer and a certified Collision Data Recorder (CDR) investigator. Goebelbecker offered the expert opinion that the tractor was not a hazard to reasonably attentive drivers at the time of the collision. The tractor was equipped with all required markings and lighting devices, including headlights, taillights, a reflective slow-moving vehicle emblem and a Mars light. Additionally, objects on the ground can be clearly distinguished during "civil twilight" and overhead street lighting on 159th street provided illumination that would have aided approaching

motorists in estimating the rate at which they were closing upon the tractor.[3] Given the lighting conditions as well as the taillights and slow-moving vehicle sign on the tractor, an approaching motorist traveling within the speed limit could have detected the tractor moving at a slower speed in the left lane of westbound 159th street even if the Mars light was not functioning. In fact, Goebelbecker believed that at the time of the accident, the tractor was readily discernible from at least 1,000 feet, even without the use of headlights. Goebelbecker did not believe that the collision damage supported a conclusion that Sowa engaged in an abrupt steering maneuver prior to the collision. Goebelbecker, along with one of plaintiff's experts, removed the electronic data recorder from Sowa's vehicle and shipped it to Ford Motor Company for analysis. He reviewed the data provided by Ford and estimated that Sowa was traveling over 70 mph at the time of the accident. Goebelbecker also concluded that the condition of Sowa's eyesight "more likely than not" contributed to the collision. Finally, Goebelbecker opined that any assertion that a rear bumper would have prevented Sowa's fatal injuries was "speculative."

¶ 15 Joe Zgolina, a civil and traffic engineer, conducted an evaluation of the accident. He offered the expert opinion that the tractor was operated in a safe and proper manner and in compliance with all applicable laws. He also opined that Sowa could have avoided the accident by driving defensively and planning for the unexpected presence of a slow-moving vehicle in his lane of travel on 159th street. Finally, Zgolina concluded that the lighting conditions and roadway characteristics would have allowed Sowa to perceive the tractor's presence and react to

[3]"Civil twilight" is the period 30 minutes before sunrise. On the date of the accident, sunrise was at 6:33 a.m.

it in order to avoid the collision.

¶ 16 Plaintiff filed a response to defendants' motion for summary judgment, arguing that there were multiple issues of material fact that should be decided by a jury. These included the lighting conditions at the time of the accident, whether the Mars light on the tractor was functioning when the accident occurred, whether it was reasonable to operate the tractor in the fast lane of traffic without shadow vehicles, lane closures or other temporary warning devices and whether it was reasonable to operate the tractor without some form of underride protection to prevent another vehicle from impacting and then going underneath the tractor. Plaintiff further argued that the issues of whether Sowa was the sole proximate cause of the collision and whether he was comparatively at fault also involved questions of material fact. The discovery depositions attached to plaintiff's response established the following.

¶ 17 Several of Sowa's co-workers also left work between 6 and 6:10 a.m on the morning of the accident. Each testified that it was dark at that time and that he needed to turn his headlights on. Two co-workers subsequently drove by the accident and testified that it was still dark at that time. One co-worker testified that he did not look to see if any of the tractor's lights were functioning. The other was asked if he looked to see if there lights on the tractor and testified "I did not see. There were no lights on."

¶ 18 Richard Greening, a mechanic for Kenny Construction, inspected the tractor for damage several hours after the accident. When he arrived for his inspection, the tractor was parked on a side street in the area where the construction crew was working. Greening found that the Mars light was not working because of a loose wire connection, which he repaired by tightening a

loose nut. In his experience, the wire or nut could have come loose as a result of vibration or a sudden impact. Greening did not know if the accident caused the wire to come loose, but he agreed that it could have been the cause.

¶ 19 Plaintiff supported her response to defendants' motion for summary judgment with the discovery depositions and reports of four expert witnesses. The first was Kenneth Heathington, a licensed civil engineer and an expert in transportation engineering and roadway safety. Heathington offered the expert opinion that defendants operated the tractor in an unsafe and improper manner and that this caused the accident. Specifically, Heathington explained that the tractor had to be driven approximately 1.6 miles to get from the storage site to the construction site and that the area near the construction site had extensive commercial and residential development which generated a considerable amount of traffic on 159th street. This created a safety hazard to other motorists. He testified that the need to operate the tractor on 159th street could and should have been avoided and that the tractor could have been safely stored at alternative location.

¶ 20 Heathington testified that in his opinion, with "absolute engineering certainty," the Mars light was not operating at the time of the collision. Heathington also opined that defendants failed to use traffic control devices or other precautions to make the tractor conspicuous on the road ("conspicuity") and to warn other motorists of the presence of the slow-moving tractor on 159th street. This included the failure to use a shadow vehicle quipped with an arrow board, lighted barricades or a flagging system. Heathington testified that the tractor's rear ground clearance and the lack of any underride protection explained why the front of Sowa's vehicle

became lodged under the tractor upon impact.

¶ 21 Heathington opined that the difference between the speed of the tractor and other vehicles on the road created a serious hazard because deviation from the average speed of traffic greatly increases the likelihood of a serious accident. Moreover, a driver's judgment of the closing speed between his or her vehicle and a vehicle ahead traveling in the same direction is subject to inaccuracy, particularly when a motorist does not expect to encounter a slow-moving vehicle. He explained that the tractor had four forward speeds of 5, 9, 15.7 and 26.3 mph and that, even at maximum speed, the tractor was moving nearly 19 mph less than the speed limit on 159th (45mph) at the time of the collision. A motorist would not anticipate a tractor operating in the left-hand lane of 159th street that much below the speed limit and Heathington opined that this speed differential was a "major contributing factor" in the accident.

¶ 22 Dr. Heathington also testified that the collision occurred during"civil twilight," the period 30 minutes before sunrise. Heathington explained that basic visual recognition functions such as contrast sensitivity are reduced during civil twilight and that this makes it more difficult for motorists to perceive and react to unexpected hazards such as a slow-moving vehicle in the passing lane of a multilane highway. Heathington testified to the restrictions on the perception-reaction time of a motorist such as Sowa caused by the limited ambient lighting at the time of the collision, the uphill grade of the area on 159th street where the collision occurred and the lack of adequate warning devices such as the Mars lamp, a flagmen or a shadow vehicle. He explained that perception-reaction time is the amount of time that it takes a driver's foot to go from the accelerator pedal to the brake pedal or the amount of time it would take a driver to turn his or her

steering wheel to swerve out of the way of an object. Heathington opined that because of the vertical curvature of 159th street and the low level of ambient lighting at the time, the headlights on Sowa's vehicle would not have illuminated the slow-moving vehicle emblem on the back of the tractor until Sowa's vehicle was in close proximity and that the low levels of illumination and ambient lighting made the slow-moving vehicle emblem itself insufficient to prevent the collision. Heathington also opined that motorists on the roadway during civil twilight would expect a slow-moving vehicle to display a flashing Mars light and to be driving in the right-hand lane and that defendants' operation of the tractor violated these expectations and created an unsafe condition. According to Heathington, the position of Sowa's vehicle and the tractor after the collision suggested that Sowa was attempting to change from the left to the right lane of westbound 159th street at the time of the collision.

¶ 23 Jerry Wallingford, a design engineer with experience in accident investigation and failure/safety analysis, opined that defendants failed to employ adequate and necessary safety measures to warn motorists of the tractor's movement on 159th street. Wallingford further opined that defendants failed to operate the tractor in a safe and prudent manner at the time of the accident. He estimated that the tractor's speed at impact was likely less than 25 miles per hour based upon the incline on which the tractor was traveling. Wallingford testified that in his opinion, to a reasonable degree of engineering certainty, the Mars light on the tractor was not functioning at the time of the collision and that this reduced the warning available to other motorists of the slow-moving tractor in the passing lane of westbound 159th street. Based upon his tests of various Mars lights, Wallingford determined that the impact load in the collision was

insufficient to cause the bulb in the Mars light to fail. Wallingford also opined that the impact load of the collision was insufficient to cause the loose wire connection on the Mars light that was discovered by Greening after the accident.

¶ 24 Wallingford testified that the key elements for moving operations in and around construction sites are sufficient warning and visibility. Vehicles used for construction operations should be made highly visible with equipment such as flashing lights, rotating beacons, flags, signs and flashing or sequencing arrow panels. Further, such vehicles should be followed by a shadow vehicle with flags, flashing lights and a sign or arrow panel to warn other motorists of the vehicle's presence. Finally, Wallingford opined that defendants failed to employ commercially available underride or attenuation devices that can reduce the severity of rear-end crashes such as the one in this case.

¶ 25 Dr. Marius Ziejewski provided expert accident-reconstruction analysis. Dr. Ziejewski testified that Sowa's vehicle struck the right rear tire of the tractor at approximately 3 inches from the middle of his car at a 20 degree angle. In Dr. Ziejewski's opinion, this demonstrated that Sowa took "evasive" action to avoid the collision. Dr. Ziejewski also opined that based upon the top speed of the tractor and the change in velocity of Sowa's vehicle at the time of impact, Sowa's approach speed was within the speed limit of 45 miles per hour.

¶ 26 Dr. Joseph Burton, a forensic pathologist, provided his expert opinion on medical causation. According to Dr. Burton, Sowa suffered a fatal brain injury when his head struck either the part of his vehicle that holds the windshield in place or some part of the tractor in the underride sequence. The doctor explained that an underride is when some part of a vehicle

impacts and goes underneath some part of another vehicle. In this case, some part of Sowa's windshield and occupant space was compromised when his vehicle went underneath the rear of the tractor and impacted the tractor's right rear tire. The doctor further explained that underride protection can take many forms, such as a bar or a structure that drops down in the back of a vehicle, but that underride protection generally is a structure that prevents one vehicle from going underneath another. Dr. Burton opined that the lack of underride protection on the tractor caused Sowa's fatal injuries and that Sowa would not have sustained serious injuries had the tractor been equipped with an underride bar.

¶ 27 The trial court held a hearing on defendant's motion for summary judgment. During that hearing, both parties acknowledged, and the court held, that the tractor was required to have a triangular slow-moving vehicle emblem and a functioning Mars light for it to be lawfully operating on 159th street at the time of the collision. The court found that there were no issues of material fact as to whether defendants were reasonable in failing to equip the tractor with underride protection and failing to employ safety precautions such as a flagmen, lane closures, lighted barricades or a shadow vehicle because none of those devices or precautions were legally required to operate the tractor and therefore defendants were entitled to summary judgment on those issues. On the other hand, the court found that there were issues of material fact as to whether defendants were reasonable in operating the tractor at a subnormal speed in the left-hand lane of 159th street at the time of the collision and whether Sowa was comparatively negligent. The court found, however, that the resolution of those issues was "inextricably intertwined" with whether the Mars light was functioning. The court found that neither plaintiff nor defendant

could prove whether the Mars light was working at the time of the collision. The court then granted summary judgment on the case in its entirety so that this court could address the question of whether there is an issue of material fact as to whether there was a working Mars light on the tractor at the time of the collision. This appeal followed.

¶ 28 Plaintiff contends that the trial court erred by entering summary judgment in favor of defendants. As a procedural matter, plaintiff initially claims that the court should have only entered partial summary judgment because the court recognized the existence of issues of material fact on some of plaintiff's claims. As noted above, our review establishes that while the trial court found no question of material fact on some issues, it found that there were issues of material fact as to whether defendants were reasonable in operating the tractor at a subnormal speed in the passing lane of 159th street at the time of the collision and as to whether Sowa was comparatively at fault in causing the accident. Given these findings, we agree that summary judgment should not have been granted with respect to those issues. In the event that the court determined that defendants were entitled to summary judgment on the issues of the Mars light and safety precautions, the better practice would have been to grant partial summary judgment on those issues and to make a finding that there was no just reason for delaying either enforcement or appeal of that ruling. See Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). For this reason, we find that summary judgment on the issues of operating the tractor in the passing lane at a subnormal speed and Sowa's comparative fault should not have been entered.

¶ 29 We next consider plaintiff's substantive challenge to the trial court's entry of summary judgment in favor of defendants. "Summary judgment is a drastic measure and should only be

granted if the movant's right to judgment is clear and free from doubt." *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2008). In determining whether the moving party is entitled to summary judgment, the court must construe the pleadings and evidentiary material in the record strictly against the movant and liberally in favor of the nonmoving party. *American States Insurance Co. v. Hamer*, 352 Ill. App. 3d 521, 525 (2004). A genuine issue of material fact exists where the facts are in dispute or where reasonable minds could draw different inferences from the undisputed facts. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008); *In re Estate of Ciesiolkiewicz*, 243 Ill. App. 3d 506, 510 (1993). The circuit court's decision to grant or deny a motion for summary judgment is reviewed *de novo*. *Harrison v. Hardin County Community Unit School District No. 1*, 197 Ill. 2d 466, 470-71 (2001).

¶ 30 In this case, plaintiff sought to hold defendant liable for Sowa's death under a negligence theory and defendants moved for summary judgment primarily on the issue of proximate cause. To prevail on a claim of common law negligence, a plaintiff must show a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by the breach. *Schultz v. Hennessy Industries, Inc.*, 222 Ill. App. 3d 532, 540 (1991). A proximate cause is one that produces an injury through a natural and continuous sequence of events unbroken by any effective intervening cause. *Kleen*, 321 Ill. App. 3d at 641. Proximate cause is composed of two distinct requirements: legal cause and cause in fact. *First Springfield Bank & Trust v. Galman*,

188 Ill. 2d 252, 257-58 (1999). "A defendant's conduct is a cause in fact of the plaintiff's injury only if that conduct is a material element and a substantial factor in bringing about the injury." *First Springfield Bank & Trust*, 188 Ill. 2d at 258. Legal cause is a question of foreseeability, and the inquiry is whether the injury is of a type that a reasonable person would see as a likely result of his or her conduct. *First Springfield Bank & Trust*, 188 Ill. 2d at 258.

¶ 31 Proximate cause may be established by inferences drawn from circumstantial evidence. *Housh v. Swanson*, 203 Ill. App. 3d 377, 381-82 (1990). Circumstantial evidence can support an inference which is reasonable and probable, but not one that is merely possible or speculative. *Mann v. Producer's Chemical Co.*,356 Ill. App. 3d 967, 974 (2005). Whether a defendant's action or omission represented a breach of duty and whether such action or omission proximately caused the plaintiff's injury or death are generally issues of fact to be decided by a jury. *Thompson v. Gordon*, 241 Ill.2d 428, 439 (2011). The proximate cause of an injury can become a question of law only when the facts are not only undisputed but are also such that there can be no difference in the judgment of reasonable people as to the inferences to be drawn from them. *Zerbenski v. Tagliarino*, 67 Ill. App. 3d 166, 172, 23 (1978).

¶ 32 In urging us to reverse the trial court's entry of summary judgment, plaintiff claims that there are issues of material fact as to whether defendants' acts or omissions were reasonable under the circumstances and whether those acts or omissions were the proximate cause of the collision and ultimately Sowa's death. Defendants respond, as they did in their motion for summary judgment, by arguing that discovery by the parties has established that there are no facts known or that can be established to explain why Sowa's vehicle impacted the rear of the

tractor and the cause of the accident is a matter of surmise and conjecture. See *Kimbrough v. Jewel Companies, Inc.*, 92 Ill. App. 3d 813, 819 (1981) (noting that while the nonmovant is not required to prove her case at the summary judgment stage, she is required to present some evidentiary facts to support the elements of his claim). As such, defendants assert that proximate cause in this instance should be decided as a matter of law.

¶ 33 We must first address the parties' respective burdens at the summary judgment stage of proceedings. As the party moving for summary judgment, defendants had the burden of proof and the initial burden of production. *Pecora v. County of Cook*, 323 Ill. App. 3d 917, 933 (2001). The moving party can meet the initial burden of production either "(1) by affirmatively disproving the plaintiff's case by introducing evidence that, if uncontroverted, would entitle the movant to judgment as a matter of law (traditional test) [citation], or (2) by establishing that the nonmovant lacks sufficient evidence to prove an essential element of the cause of action (*Celotex* test[4]) [citations]." *Williams v. Covenant Medical Center*, 316 Ill. App. 3d 682, 688–89 (2000). If the moving party meets the initial burden of production, then the burden of production shifts to the nonmoving party, who must then present some factual basis that would arguably entitle it to judgment as a matter of law. *Pecora*, 323 Ill. App. 3d at 933. A court should grant summary judgment on a *Celotex*-type motion "only when the record indicates that a plaintiff has had

[4]In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the United States Supreme Court recognized that a defendant moving for summary judgment could meet its initial burden of production by " 'pointing out to the * * * court * * * that there is an absence of evidence to support the nonmoving party's case.' " *Pecora*, 323 Ill. App.3d at 934 (quoting *Celotex*, 477 U.S. at 325).

extensive opportunities to establish her case but has failed in any way to demonstrate that she could [do so]." *Williams*, 316 Ill. App. 3d at 694.

¶ 34 Neither party in this case addresses what type of summary judgment motion defendants filed. Regardless, viewed as either a traditional or a *Celotex*-type motion, we find that there are issues of material fact on plaintiff's claims that preclude the entry of summary judgment.

¶ 35 We first observe that the parties agree that in order to have been lawfully operating on 159th street, the tractor was required to have the slow-moving vehicle emblem and a functioning Mars light. The issue here is confined solely to the Mars light, as there is no dispute that the tractor was equipped with the slow-moving vehicle emblem. Plaintiff claims that there is an issue of material fact as to whether the Mars light was functioning at the time of the collision. We agree.

¶ 36 First, under the traditional summary judgment test, defendants did not introduce evidence that was uncontroverted and that established that the Mars light was working at the time of the accident. Officer Muldrow testified that he would have issued a ticket to Allen had all of the tractor's lights not been working and that he did not issue any such ticket. However, neither Officer Muldrow nor Sergeant Knapp, the other responding officer, recalled whether the Mars light was functioning when they arrived at the scene. Dragman, Kenny Construction's project safety manager, generated an accident report concluding that "everything was in proper working order (tail lights, placard, flashing light on roof of cab) to move equipment to the job site." He acknowledged that he did not inspect the tractor on the morning of the accident and that this conclusion was based on what Allen told him when Dragman interviewed Allen several hours

after the accident. Additionally, Allen is deceased and the trial court ruled that his discovery deposition could not be converted to an evidentiary deposition for trial. Although Dragman testified that he "saw the flashing light," this was several hours after the accident and it is unclear whether he saw the light before or after Greening fixed the loose wire on the Mars light during his inspection.

¶ 37 Even if the above evidence was uncontroverted, which it was not, the evidence does not conclusively establish that the Mars light was functioning because these witnesses either did not see the Mars light at the time of the collision or did not recall whether the light was functioning when they saw the tractor immediately after the collision. At most, this circumstantial evidence raises a question of fact on the issue. Therefore, defendants did not carry their initial burden as the party moving for summary judgment.

¶ 38 Moreover, plaintiff responded by presenting circumstantial evidence upon which a reasonable inference could be drawn that the Mars light was not working. Both of the responding officers reviewed photographs of the tractor at the scene and testified that they did not see a functioning light on top of the tractor. Additionally, Greening, a Kenny Construction mechanic, inspected the tractor several hours after the accident and found that the Mars light was not working because of a loose wire connection. Finally, plaintiff's retained experts, Heathington and Wallingford, opined that the Mars light was not functioning at the time of the collision and that this reduced the tractor's visibility to other motorists. Wallingford also offered the expert opinion that the impact of the collision was insufficient to cause the wire connection on the Mars light to come loose.

¶ 39 We find that through this circumstantial evidence, plaintiff provided a sufficient factual basis upon which a jury could reasonably conclude that the Mars light was not functioning at the time of the collision. We reach the same holding even if defendants filed a *Celotex*-type motion and met their initial burden by pointing out that there were no surviving witnesses to the accident and therefore there was no one who could testify that he or she saw the Mars light working at the time of the collision. In either case, the evidence of record allows for competing reasonable inferences on this issue that should be decided by the trier of fact and not on a motion for summary judgment. As another district of this appellate court has observed:

> "The resolution of the conflicting testimony on such matters as the parties' ability to see, the presence or absence of a flashing yellow light on the fender of the tractor, the visibility of the flashing light if in fact it was operating and the visibility of the trailer, would certainly have a substantial, if not conclusive, impact on the outcome of the controversy. In a case where substantial factual disputes arise concerning either defendant's negligence or plaintiff's exercise of due care, it is the function of the jury to reconcile the conflicting testimony of the witnesses." *Comper v. Jones*, 80 Ill. App. 3d 850, 855 (1980).

¶ 40 Defendants nevertheless argue that the opinions of plaintiff's expert witnesses are not competent. Specifically, defendants argue that the opinions of Wallingford and Heathington lack the requisite foundation and are therefore insufficient to create an issue of material fact.

¶ 41 In advancing this argument, defendants essentially ask this court to make an evidentiary ruling for the first time on appeal. We decline to do so. No motion was filed in the trial court

seeking to bar the experts and no evidentiary hearing was ever held regarding the admissibility of their opinions. To rule on the admissibility of the expert opinions at this time, where there has been no briefing on a motion or testimony at a hearing, would deprive plaintiff of the opportunity to make its case for admissibility in the trial court and to develop a sufficient record for an appeal of this issue. As the case currently stands, the expert opinions are properly before us and can be considered in evaluating whether summary judgment was proper. See *Rogers v. Matanda*, 393 Ill. App. 3d 521, 530 (2009) (court should not assign weight to evidence or make credibility determinations when deciding a motion for summary judgment); *AYH Holdings, Inc. v. Avreco, Inc.*, 357 Ill. App. 3d 17, 31 (2005) (the court does not decide a question of fact when a considering a motion for summary judgment but, rather, determines whether one exists); *Lazenby v. Mark's Construction, Inc.*, 236 Ill. 2d 83, 93 (2010) (at the summary judgment stage, evidence should be viewed in the light most favorable to the nonmoving party).

¶ 42 Plaintiff next contends that there is an issue of material fact as to whether it was reasonable under the circumstances for defendants to operate the tractor without underride protection and safety precautions such as a flagmen, a shadow vehicle lane closures or lighted barricades. Plaintiff claims that, regardless of whether the Mars lights was functioning, the jury could find that defendants' failure to employ these devices was unreasonable and impose liability on any of these bases. Defendants respond that plaintiff did not allege any of these omissions as a basis of liability in the complaint. Defendants also claim that these precautions are not required by the Illinois Vehicle Code (the Code) (625 ILCS 5/1–100 et *seq*. (West 2008)) and therefore the failure to employ them cannot provide a basis upon which to impose liability. We agree with

plaintiff.

¶ 43 First, plaintiff alleged in her complaint that defendants had a duty to operate the tractor on 159th street in a manner reasonably safe for other motorists. Plaintiff then specifically alleged that defendants breached this duty in that they failed to "place any warning signs [or] lighted barricades" to slow down oncoming traffic, failed to "provide a flag person" to warn oncoming traffic of the tractor's presence on the road and that defendants "were otherwise careless and negligent." We find that these allegations sufficiently raised the issue of whether defendants were negligent by failing to employ safety devices and precautions.

¶ 44 Second, compliance with applicable law does not preclude a finding of negligence or conclusively prove that a party met the relevant standard of due care. See, *e.g.*, *Vancura v. Katris*, 238 Ill. 2d 352, 377 (2010) (compliance with a statute does not preclude a finding of negligence); 65 C.J.S. *Negligence* §25 (2012) ("In order to constitute an action in negligence, an act or omission need not involve an element of illegality; compliance with the law is not conclusive that there was no negligence"); *DePaepe v. Walter*, 68 Ill. App. 3d 757, 760 (1979) (in case involving a motor vehicle collision at an intersection, court noted that "[a] green light does not give an absolute right to enter an intersection without maintaining a proper lookout and does not prevent a finding of negligence against a driver" and that "violation of a traffic ordinance is but one factor to be considered by the finder of fact in deciding the issue of liability"); *Klien v. Pritikin*, 6 Ill. App. 3d 323, 327 (1972) (possession of the right-of-way does not relieve a motorist from the duty of exercising due care to avoid injury).

¶ 45 Therefore, in this case, compliance with the requirements of the Code does not establish

as a matter of law that defendants operated the tractor in a reasonably safe manner under the circumstances. Instead, the fact that the Code does not require these precautions, the actual requirements of the Code and any evidence that defendants adhered to those requirements are factors to be considered by the trier of fact in evaluating plaintiff's claims.

¶ 46 Given this conclusion, and considering the evidence in the record, we find that there is a question of material fact as to whether defendant's failure to use these safety devices and precautions breached the standard of care and proximately caused Sowa's death. Plaintiff introduced expert testimony that defendants failed to use these devices to warn approaching motorists of the tractor's presence on the road in order to avoid the collision. Plaintiff also introduced expert testimony that defendants failed to use commercially available devices to prevent a rear underride of the tractor in order to reduce the severity of a rear-end collision and that Sowa would have sustained no serious injuries had the tractor been equipped with underride protection. On the other hand, defendants introduced expert testimony that the tractor's taillights and slow-moving vehicle emblem should have made it visible to approaching motorists and that it was speculative to assert that a rear bumper would have prevented Sowa's fatal injuries. Considering this evidence, reasonable minds could draw different inferences as to whether defendant's failure to employ underride protection and safety precautions proximately caused Sowa's death. Accordingly, we reverse the entry of summary judgment on these issues.

¶ 47 Plaintiff next claims that there is an issue of material fact as to whether defendants were reasonable in operating the tractor at a subnormal speed in the left lane of westbound 159th street

at the time of the collision.[5]

¶ 48 It is undisputed that the tractor had a maximum speed of 26.3 mph and that the speed limit on 159th street was 45 mph. It is also undisputed that the tractor was required to travel .7 miles on 159th street to get to the construction site and that the collision occurred in the passing lane of westbound 159th street. The parties presented conflicting evidence as to the lighting conditions at the time of accident, the tractor's visibility under those conditions and whether operating the slow-moving tractor in the passing lane caused the accident. Officer Muldrow testified that it was light outside and that the sun was coming up when he arrived at the scene shortly after the accident. Goebelbecker testified that the lighting conditions at the time and the markings on the tractor were such that a reasonably attentive driver moving at the speed limit would have been able to perceive the tractor and estimate the rate they were closing upon it. Zgolina, another of defendants' experts, offered a similar opinion that Sowa should have been able to see the tractor on the road and react to it in order to avoid the collision.

¶ 49 On the other hand, plaintiff controverted this evidence with testimony from Sowa's co-workers that it was dark outside when they left work and that it was still dark when they passed the scene of the accident. Heathington explained how deviation from the average speed of traffic increases the risk the risk of an accident. He also explained that motorists would not anticipate a tractor moving at least 20 mph less than the speed limit and that this speed differential was a

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[5]As we noted above in paragraph 28, as a procedural matter summary judgment as to this issue and the issue of comparative negligence should not have been granted once the court found that questions of material fact existed with regard to these issues. However, we review these issues here *de novo*.

major contributing factor in the collision. Heathington testified to the increased perception-reaction time of drivers such as Sowa caused by the limited ambient lighting during civil twilight, the uphill grade of 159th street and the lack of warning devices such as a Mars light, shadow vehicle or flagmen. Wallingford similarly opined that defendants failed to operate the tractor in a safe and prudent manner by driving in the left-hand lane of 159th street at a speed that impeded the normal flow of traffic.

¶ 50 Moreover, as plaintiff points out, Illinois law provides that no person shall drive a motor vehicle at such a slow speed as to impede or block the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation of his vehicle or in compliance with the law. 625 ILCS 5/11-606(a) (West 2008). Illinois law also provides that "a vehicle shall be driven in the right-hand lane available for traffic *** except when overtaking and passing another vehicle proceeding in the same direction or when preparing for a left turn at an intersection or into a private road or driveway." 625 ILCS 5/11-701(b) (West 2008).

¶ 51 We find that by presenting the above evidence, plaintiff established a factual basis upon a reasonable person could conclude that defendants' operation of the tractor in the passing lane at a subnormal speed was unreasonable. As has been observed:

> "A vehicle being operated at a subnormal speed may very well create a hazard upon a highway designed and customarily used to carry fast-moving traffic, even though no vehicle may be approaching upon the road from the opposite direction so as to prevent a passing of the slow-moving vehicle overtaken. Distances are deceptive at high speeds and mental calculations of braking distances and

> stopping times are apt to prove faulty at such higher velocities. *** It is but the recognition of human frailties in such regards that might well have impelled the Legislature to enjoin any slow-moving traffic which would result in hazard to life, limb or property, regardless of whether the traffic it impedes be approaching from the front or rear, or from both directions." *Griffin v. Illinois Bell Telephone Co.*, 34 Ill. App. 2d 87, 93 (1962).

¶ 52 Defendants argue that plaintiff cannot establish proximate cause because the tractor was in compliance with all applicable laws. Defendants further claim that liability cannot be predicated solely on the fact that a collision occurred and that in this case no one saw the accident happen and no amount of "surmise or conjecture" by plaintiff's experts can establish proximate cause. We disagree.

¶ 53 First, as noted above, there is a question of fact as to whether the Mars light was functioning at the time of the collision. Therefore, at this stage of proceedings, it cannot be said as a matter of law that defendants were in compliance with the Code. Second, even if defendants were in compliance with the Code, this would not preclude a finding of negligence but instead would be one factor to be considered by the trier of fact. See *Vancura*, 238 Ill. 2d at 377. Third, we view the experts' opinions in the light most favorable to the plaintiff at this point and we will not evaluate those opinions for the first time on appeal to determine whether they are improper "surmise and conjecture." Finally, the fact that no one saw the accident does not mean that plaintiff could never establish proximate cause because the circumstantial evidence and expert testimony in the record could lead a reasonable person to conclude that defendants' acts and/or

omissions were the proximate cause of the Sowa's death. See *Westlake v. C. House Corp.*, 2011 IL App (1st) 100653, ¶ 18 (circumstantial evidence that permits an inference that is reasonable and probable can be used to establish proximate cause); *Olson v. Williams All Seasons Co.*, 2012 IL App (2d) 110818, ¶ 25 ("[p]roximate cause ordinarily is a question of fact for the jury").

¶ 54 Defendants also claim that Sowa was the sole proximate cause of the collision because he had a legal duty to keep a proper lookout and avoid the accident. In a related argument, defendants claim that plaintiff cannot establish the legal cause of the accident because it is not foreseeable that another (in this case Sowa) will act negligently. Plaintiff responds that these issues present questions of fact that should not be decided on summary judgment. We agree with plaintiff.

¶ 55 The issues of whether Sowa was the sole proximate cause or whether he was comparatively at fault involve many of the same considerations as the issue of whether it was reasonable to operate the tractor in the passing lane at a subnormal speed. These include the ambient light conditions at the time and whether Sowa could have reasonably perceived the slow-moving tractor's presence on the road under the circumstances that existed at the time of the collision. In addition to the conflicting evidence on these issues, there was conflicting evidence as to how fast Sowa was traveling and whether he attempted to avoid the collision. Testimony was presented that the lack of skid marks indicated that Sowa did not attempt to break before he collided with the tractor. However, testimony was also presented that the angle of impact indicated that Sowa did attempt to swerve and avoid the collision. Likewise, Geobelbecker estimated that Sowa was traveling over 70 mph while and that Sowa's poor eyesight "more likely

than not" contributed to the collision. However, plaintiff's expert, Ziejewski, opined that Sowa's approach speed was withing the posted speed limit of 45 mph.

¶ 56 Conflicting evidence was also presented on Sowa's health at the time of the collision. The doctor who treated Sowa at the hospital after the collision acknowledged that Sowa's laboratory computer tests were "positive or suggestive of a myocardial infarction." The doctor testified, however, that this was consistent with the injuries Sowa suffered in the collision and that it was unlikely that Sowa suffered a heart attack prior to the accident. Evidence was also presented that Sowa suffered from diabetes and hypertension and that he was legally blind in his left eye. On the other hand, evidence was presented that Sowa had excellent vision in his right eye, which enabled him to obtain a driver's license.

¶ 57 Because this evidence raises a question of fact as to whether Sowa was comparatively negligent, the issue should be decided by a jury and not on summary judgment. See *Wagner v. City of Chicago*, 254 Ill. App. 3d 842, 848 (1993) (plaintiff's negligence in allegedly failing to maintain a proper lookout is an issue of fact to be determined by the jury); *Burgdorff v. I.B.M. Corp.*, 74 Ill. App. 3d 158, 163 (1979) ("It is the responsibility of the trier of fact to determine whether the rear driver, in [a rear-end collision], was acting reasonably under the circumstances, or that the accident was unavoidable").

¶ 58 We also note that in their briefs before this court, the parties debate whether defendants spoliated evidence by repairing the wiring on the Mars light and whether plaintiff is entitled to an adverse inference instruction. However, the trial court has not yet had the opportunity to address this issue. In fact, the court noted during the summary judgment hearing that it would have to

consider at a later time whether plaintiff was entitled to such an instruction. Again, because the trial court has not yet had the chance to address the issue, it would be premature to consider it for the first time on appeal.

¶ 59 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County on all issues and remand the cause for further proceedings consistent with this order.

¶ 60 Reversed and remanded.