2016 IL App (1st) 150427-U
No. 1-15-0427

FIFTH DIVISION
March 31, 2016

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

SUSAN BUCKEL,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 13 L 116
	)	
TUBE PRO INC.,	)	The Honorable
	)	Kathy M. Flanagan,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Reyes and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Where plaintiff did not and cannot produce the allegedly defective snow tube involved in her snow tubing accident or produce any photographs of the snow tube itself, and where the subject snow tube was never retrieved or examined for defects, plaintiff cannot establish a genuine issue of material fact that defendant was the manufacturer and thus the trial court did not err in granting summary judgment in favor of defendant.

¶ 2 Plaintiff Susan Buckel brought this products liability action based on a negligence theory against defendant Tube Pro Inc., seeking damages for injuries she sustained during a snow tubing accident at the Villa Olivia ski facility in Bartlett, Illinois, on January 17, 2011. Plaintiff alleges that she was injured as a result of a defective snow tube manufactured by defendant. Defendant moved for summary judgment, claiming that plaintiff provided insufficient evidence to raise a genuine issue of material fact regarding the identity of the manufacturer of the snow tube in question. Defendant further argued that, without the claimed defective snow tube, plaintiff could not prove the necessary elements to establish a *prima facie* case of products liability against defendant. The trial court granted defendant's motion, and plaintiff now appeals.

¶ 3 For the reasons that follow, we affirm the trial court's grant of summary judgment in favor of defendant.

¶ 4 BACKGROUND

¶ 5 I. Pleadings

¶ 6 A. Complaint

¶ 7 On January 4, 2013, plaintiff filed a complaint against defendants: (1) Daniel Corrado; Greater Chicago Distribution Corporation, individually and

doing business as Villa Olivia; and Villa Olivia[1]; (2) Tube Pro; (3) "Unknown Snow Tube Manufacturer"; and (4) "Unknown Owners and Non-Record Claimants."

¶ 8 In her complaint, plaintiff made the following allegations:

¶ 9 Plaintiff alleged that she was at Villa Olivia on January 17, 2011, and purchased a ticket to snow tube on the premises of Villa Olivia. Villa Olivia provided her with a snow tube to use, which was manufactured by defendant. As she descended down the hill using the snow tube provided by Villa Olivia, a sharp object stuck out of the tube, dug into the ground, and caused the snow tube to stop on the hill. While her snow tube was stopped on the hill, she was struck by another snow tube from behind and was injured. Plaintiff alleged her snow tube was defective.

¶ 10 Only count II of plaintiff's complaint, which is entitled "Negligence," is directed at defendant. Plaintiff alleged that the snow tube she used at Villa Olivia was designed, manufactured, assembled, distributed, and sold by defendant. Plaintiff further alleged that defendant negligently designed, manufactured, distributed, and sold the snow tube equipment without appropriate safeguarding and an adequate warning label. Plaintiff also

[1] On July 24, 2013, the trial court granted plaintiff's motion to voluntary dismiss without prejudice, Daniel Corrado, Greater Chicago Distribution Corporation, individually and doing business as Villa Olivia. The record does not contain a copy of plaintiff's motion, but includes the trial court's order granting it.

contended that defendant failed to adequately warn users of the dangers of the snow tube, to design and manufacture the snow tube safely, or to properly inform or instruct the purchaser of the snow tube's use. Plaintiff alleged that defendant negligently tested and inspected or failed to test, inspect, and heed the test results of the subject snow tube involved in her accident. Plaintiff claimed that, as a result of defendant's "careless and negligent acts and omissions," she "was severely and permanently injured both internally and externally."

¶ 11 B. Answer

¶ 12 On April 18, 2013, defendant filed its "Answer and Affirmative Defense" to plaintiff's complaint. Defendant admitted that it manufactured snow tubes, including certain snow tubes used at Villa Olivia and that, on or before January 17, 2011, it engaged in the business of designing, manufacturing, assembling, distributing, and selling snow tubes. Defendant answered that it had no knowledge regarding the truth or falsity of plaintiff's statement that the snow tube she used at Villa Olivia was designed, manufactured, assembled, distributed, or sold by defendant. Defendant denied it had negligently designed, manufactured, distributed, and sold snow tube equipment without appropriate safeguarding and an adequate warning label. Defendant also denied plaintiff's allegation that it failed to adequately warn users of the dangers of the snow

tube, to design and manufacture the snow tube safely, or to properly inform or instruct the purchaser of the snow tube's use. Defendant also denied that it negligently tested and inspected or failed to test, inspect, and heed the test results of the subject snow tube involved in plaintiff's accident.

¶ 13 Defendant also asserted the affirmative defense of comparative negligence, claiming plaintiff was negligent in failing to observe and avoid the snow tube which allegedly struck her and was negligent in failing to move from the middle of the hill, when she knew, or in the exercise of ordinary care, should have known, that other snow tubes were descending down the hill. Defendant also claimed plaintiff was negligent in failing to properly inspect the subject snow tube prior to riding in it and was negligent in failing to keep a proper lookout. Defendant also alleged plaintiff was inattentive and unobservant to surrounding conditions and was the sole proximate cause of her alleged injuries and damages.

¶ 14 C. Plaintiff's Reply

¶ 15 In response to defendant's affirmative defense of comparative negligence, plaintiff denied she was negligent in failing to observe and avoid the snow tube which allegedly struck her or negligent in failing to move from the middle of the snow tube hill. Plaintiff also denied that she was negligent in failing to properly inspect the subject snow tube prior to riding it or that she was

negligent in keeping a proper lookout. Plaintiff denied she was inattentive or unobservant to surrounding circumstances.

¶ 16 D. Amended Complaint and Answer

¶ 17 On July 8, 2013, plaintiff filed an amended complaint against defendant, naming as additional defendants "Village of Bartlett and the Bartlett Park District."[2] The allegations of count II, which were directed at defendant, remained substantially the same.

¶ 18 On July 12, 2013, defendant filed its "Answer and Affirmative Defense to Plaintiff's Amended Complaint," which asserted the same affirmative defenses and denied the same allegations.

¶ 19 On March 25, 2014, defendant filed a motion for leave to file an amended answer and affirmative defenses, which included the defense of comparative negligence pled in its prior answer plus additional affirmative defenses. Defendant raised the additional affirmative defense of joint and several liability and further contended that the exculpatory clause included on the snow tubing ticket plaintiff purchased from Villa Olivia barred plaintiff's

[2] On October 28, 2013, plaintiff filed a motion to voluntarily dismiss, without prejudice, the Village of Bartlett, which the trial court granted on November 1, 2013. 735 ILCS 5/2-1009 (West 2010). Additionally, on November 1, 2013, the trial court granted defendant Bartlett Park District's section 2-619(a)(5) motion to dismiss count V of plaintiff's amended complaint, without prejudice. 735 ILCS 5/2-619(a)(5) (West 2010). Tube Pro is the only remaining defendant on appeal.

cause of action against defendant. Defendant also raised as an affirmative defense that the negligent act of the snow tube rider who struck plaintiff was an intervening or superseding cause of her accident, which barred recovery against defendant. The trial court granted the motion on March 25, 2014.

¶ 20 On April 30, 2014, plaintiff filed a motion for leave to file answers to defendant's amended affirmative defenses to plaintiff's amended complaint.[3]

¶ 21 While plaintiff admitted that she paid for a ticket to engage in snow tubing at Villa Olivia, she denied defendant's allegation that, by purchasing the snow tubing ticket, she agreed to the terms and conditions of the exculpatory clause contained on the ticket. Plaintiff denied the allegation that the parties to the exculpatory clause intended that the terms and conditions of the exculpatory clause apply to defendant. Plaintiff further denied that defendant was a third-party beneficiary of the exculpatory clause and that the exculpatory clause included on the snow tubing ticket plaintiff purchased from Villa Olivia barred plaintiff's cause against defendant.

¶ 22 As to defendant's additional affirmative defense of joint and several liability, plaintiff denied the allegation that the sole proximate cause of plaintiff's accident was the negligent acts or omissions, or intentional, reckless,

[3] There is no order in the record indicating whether the trial court granted plaintiff's motion for leave to file answers to defendant's amended affirmative defenses to plaintiff's amended complaint.

willful, and wanton acts or omissions, of other persons or entities not presently parties to the lawsuit, including, but not limited to, Bartlett Park District and the snow tube rider who struck her. Plaintiff further denied defendant's allegation that, pursuant to section 2-1117 of the Illinois Code of Civil Procedure, any fault, which it specifically denied, was less than 25% of the total fault. 735 ILCS 5/2-1117 (West 2010).

¶ 23 Plaintiff denied defendant's affirmative defense that the negligent act or omission of the snow tube rider who struck her was an intervening or superseding cause of her accident, which barred recovery against defendant. Plaintiff also denied defendant's allegation that the intervening or superseding negligent acts or omissions of the snow tube rider who struck her barred her recovery against defendant.

¶ 24 On May 23, 2013, defendant filed answers to plaintiff's interrogatories. Defendant named its president and co-founder, William Pawson, and its co-founder, Annie Pawson, as witnesses who would testify to the design, manufacture, and sale of snow tubes by defendant. Defendant also stated that William Pawson and Annie Pawson would testify that defendant manufactures snow tubes for sale and does not inspect or maintain products subsequent to sale to a customer.

¶ 25 Plaintiff filed answers to defendant's interrogatories.[4] Plaintiff named certain of defendant's employees as witnesses who would testify regarding their knowledge of the occurrence alleged in her complaint, including their observations and the policies of defendant. The witnesses included William Pawson, Annie Pawson, Victor Clark, Rick Root, Jennifer Huras, and Abby Pawson.[5]

¶ 26 On December 10, 2013, the trial court ordered party depositions to be completed by January 28, 2014. The depositions of William Pawson[6] and Annie Pawson[7] were discovery depositions.

[4] Exhibit "A" to defendant's motion for authorization regarding mental health records, subpoenas, and testimony contains plaintiff's answers to defendant's interrogatories, but it does not provide a date of filing.

[5] The record does not contain a copy of the depositions of Victor Clark, Rick Root, Jennifer Huras, and Abby Pawson.

[6] Plaintiff attached an excerpt of William Pawson's deposition in her response to defendant's motion for summary judgment, and defendant attached the entire transcript of William Pawson's deposition in its motion for summary judgment.

[7] Plaintiff attached the entire transcript of Annie Pawson's deposition as Exhibit "D" to her response to defendant's motion for summary judgment.

¶ 27 II. Motion for Summary Judgment

¶ 28 A. Defendant's Motion

¶ 29 On September 15, 2014, defendant moved for summary judgment, claiming that plaintiff provided insufficient evidence to raise a genuine issue of material fact regarding the identity of the manufacturer of the snow tube in question. In its motion, defendant claimed that, because the snow tube was never inspected or retained after the accident, plaintiff could not prove the necessary elements to establish a *prima facie* case of product liability against defendant.

¶ 30 In support of its motion for summary judgment, defendant relied on invoices indicating that Villa Olivia purchased snow tubes from two different companies: (1) defendant; and (2) Tough Tube Manufacturing Inc. (Tough Tube). An invoice showed that in September 2000, Villa Olivia purchased 100 snow tubes from Tough Tube. Another invoice showed that in December 2012, Villa Olivia purchased 14 refurbished snow tube covers from defendant. The invoices also showed that in 2008, Villa Olivia purchased 5 red snow tubes, 1 navy blue snow tube, and 10 refurbished snow tube covers from defendant. The invoices showed that in 2009, Villa Olivia purchased 10 royal blue snow tubes and 36 refurbished covers from defendant.

¶ 31 Defendant attached the deposition of plaintiff, who testified that the colors of the tubes at Villa Olivia on the date of her accident were "red, green, and blue." Defendant also relied on the deposition of plaintiff to establish that the snow tube she used at the time of her accident was red. Plaintiff testified, "I believe it was red."

¶ 32 Defendant also attached the deposition transcript of William Pawson, who testified that the snow tubes purchased by Villa Olivia from defendant were red and blue. William Pawson testified that he believed "those [were] the only two colors that we sold them." Defendant also relied on William Pawson's testimony that Villa Olivia purchased Tough Tube snow tubes that were "a mix of red, blue, maybe some green and plum, I would imagine, but red and blue for sure." Defendant argued that the evidence showed that defendant was just one of the possible manufacturers which may have sold the red snow tube in question.

¶ 33 William Pawson also testified that defendant never experienced any reports that its snow tubes were defective. William Pawson testified that he was not sure "how" or "why" a protruding object could come out of plaintiff's snow tube. He testified that: "There is just the inner tube. It's the only accessory item inside the actual tube cover. And the valve is welded to the tube itself. So I don't understand. I'm not sure how that could occur."

¶ 34 Defendant further relied on plaintiff's deposition that the snow tube involved in her accident did not have a plastic bottom. Plaintiff testified that the type of material she observed on the bottom of her snow tube "[was] not plastic," but a normal inner tube material, which she assumed was rubber. Defendant also referenced William Pawson's testimony to show that the bottom of defendant's snow tubes were plastic. He testified that one of defendant's component parts for its snow tubes is a "plastic bottom."

¶ 35 Defendant cited plaintiff's deposition to show that she could not say for certain who the manufacturer of the snow tube was. Plaintiff testified that "[she] did not look at the markings on the tube" she used at the time of her accident and, therefore, was uncertain as to its manufacturer. Plaintiff testified, while looking at photographs that showed different snow tubes in use at Villa Olivia "before her accident," she could not say for certain that they showed the name of defendant. Plaintiff testified:

> "I can't tell you the exact letters; but I can tell you how when you blow it up that it looks like two words, okay. And I can kind of make out certain letters; but could I clearly say it was a T or a P or a B or what, no."

Plaintiff also testified she did not take any photographs of the exact snow tube involved in her accident.

¶ 36 In sum, defendant argued that it was entitled to summary judgment as a matter of law because the snow tube involved in plaintiff's accident was no longer available and, therefore, plaintiff could not identify the manufacturer of the snow tube nor support a reasonable inference that defendant manufactured the snow tube she used at the time of her tubing accident. In addition, defendant argued plaintiff could not prove a *prima facie* case without the allegedly defective snow tube.

¶ 37 B. Plaintiff's Response

¶ 38 On December 1, 2015, plaintiff filed a response to defendant's motion for summary judgment. In her response, plaintiff argued both: (1) that defendant was the manufacturer of the plaintiff's defective snow tube; and (2) that genuine issues of material fact existed as to whether defendant's defective snow tube was the proximate cause of plaintiff's injuries.

¶ 39 Plaintiff alleged that her snow tube was defective. Attaching excerpts of her deposition transcript, plaintiff described the defect as follows:

> "DEFENDANT'S ATTORNEY: When is the first occasion you had to look at the tube after the accident?"
>
> PLAINTIFF: The minute I came to a stop.
>
> DEFENDANT'S ATTORNEY: While you were on the hill?
>
> PLAINTIFF: While I'm on the hill.

DEFENDANT'S ATTORNEY: What did you see?

PLAINTIFF: I wanted to know why I was stuck. So I lifted up the tube, and I could see a 5-inch slash and this hard spiky thing sticking out of the tube *** It was a solid, a sharp object."

Plaintiff further described the defect as follows:

"DEFENDANT'S ATTORNEY: Before the operator came up to you and upon you, did you look at the tube?

PLAINTIFF: Yes.

DEFENDANT'S ATTORNEY: And this–whatever you observed on the bottom of the tube, was it the material of the bottom of the tube?

PLAINTIFF: It looked like the insides of the tube.

DEFENDANT'S ATTORNEY: Well, the tube you told me was kind of like, in your mind at least, a standard rubber inner tube, correct?

PLAINTIFF: Well, I kind of remember–it could have been–I don't recall the exact material of the tube, the outside of the tube; but the frozen object looked like it was coming out of the tube.

DEFENDANT'S ATTORNEY: This frozen object, was it part of the material of the tube or some foreign object?

PLAINTIFF: I thought maybe it was a metal piece or something, and it wasn't. It was the innards of the tube, and I couldn't even move it with my glove. It was shaped as if it was, like, a knifish form coming out.

DEFENDANT'S ATTORNEY: And how long was this shape?

PLAINTIFF: I know that the slash in the tube was about that big (indicating), so 5 inches, and then this item was coming out of it."

¶ 40 Plaintiff also attached the deposition transcript of Villa Olivia employee, Michael Conrardy, who worked on the snow tube hill for multiple winter seasons. Conrardy testified that during the 2010-2011 winter season, he found one snow tube in their "tube shack" that had a crack in it. Conrardy testified:

"DEFENDANT'S ATTORNEY: Did you ever become aware of cracking, cracks in the bottom of any snow tubes?

CONRARDY: Yeah, that was one thing that I noticed when I was working. I was bringing out the tubes out of the tube shack in the morning and there was quite a decent crack in the bottom."

Conrardy further described the snow tube as follows:

"PLAINTIFF'S ATTORNEY: In as much detail as you can, can you describe to me first where the slit was?

CONRARDY: It was like the side. I don't remember if it was the side near to where the rope connected or not, but it was just on the general

like circumference of it, you know, and it was like a rounded slit that went–it was about eight inches long, and it wasn't protruding in. It was more protruding out.

PLAINTIFF'S ATTORNEY: Okay.

CONRARDY: So if someone went down the hill, as a safety issue, if it was protruding out and they caught an edge they could just flip ***."

¶ 41 Plaintiff highlighted Conrardy's testimony where he stated that "It would have caught snow and that's what I'm saying. It wouldn't protrude into the tube where it could hurt the person, like their bottom. It would literally protrude down and out." Conrardy further stated that the slit "was on the bottom plastic part like right at the edge." Conrardy recalled the tube with the slit "was just one of the ordinary tubes."

¶ 42 Plaintiff also attached the deposition transcript of Edward Jorens, Villa Olivia superintendant of golf and skiing, who was involved in the initial procurement and purchase of snow tubes for the facility. Jorens testified that "once in a while there's cracks" in the plastic bottoms of the snow tubes. Jorens also testified that cracks "bigger than 2 or 3 inches or so" on the bottom of the snow tubes would "[t]o a certain degree" affect the speed of the tube going down the hill. Jorens also testified that he discussed the cracking at the bottom

of the tubes with defendant and that "Annie [Pawson] [was] usually the person I talked to from Tube Pro."

¶ 43 In her response, plaintiff attached the deposition of Annie Pawson, who testified that defendant receives yearly complaints "in general" from customers about the bottom of their snow tubes being cracked. Annie Pawson testified that she has personally seen a bottom of a defendant snow tube being cracked and described it "as a slit, like a little slit, a scoring, just a little slit." Annie Pawson also testified, "I don't recall specifically my customer mentioning cracks, per se. I just recall them requesting that we refurbish some of their old stock that they had purchased in the past."

¶ 44 Plaintiff further claimed in her response that it was highly unlikely that Tough Tubes were being used at Villa Olivia at the time of her accident. In support of this claim, plaintiff attached testimony by Jorens, who testified that "an average of four or five" snow tubes were stolen per year. Jorens further testified:

> "DEFENDANT'S ATTORNEY: With regard to the 100 tubes purchased from Tough Tube in September 2000, by the time you retired in December of 2010, do you know how many of those tubes were still left at Villa Olivia?
>
> JORENS: Not very many. I'm sure of that.

DEFENDANT'S ATTORNEY: Why do you say that?

JORENS: Well, in other words, every year we'd send them back to get refurbished. Probably anywhere from I'm guessing 10, 10 of the tubes."

DEFENDANT'S ATTORNEY: Did you send tubes to be refurbished to any company other than Tube Pro?

JORENS: No."

¶ 45 Plaintiff also relied on Jorens's testimony to show that more defendant snow tubes were being used at Villa Olivia at the time of her accident than Tough Tube snow tubes. Jorens testified that, from 2000 to when he retired in 2010, Villa Olivia continued to purchase snow tubes from defendant. Jorens did not believe Villa Olivia purchased snow tubes from any other company from 2000 to 2010. Plaintiff also attached invoices showing that, from 2002 to 2009, Villa Olivia purchased 60 refurbished snow tube covers from defendant. The invoices also show that Villa Olivia purchased "5 red snow tubes," "1 double rider snow tube," "10 royal blue snow tubes," and 27 inner tubes from defendant in the same period. Plaintiff also relied on Annie Pawson's testimony and a "Customer Sales Ordering Info Sheet" to show that, in November 2002, defendant purchased 30 defendant snow tubes with Pepsi logos on them. Pawson testified as follows:

"PLAINTIFF'S ATTORNEY: Okay. And then the number of tubes, 30 and it has Pepsi. Do you know what the word next to Pepsi–is that tubes?

ANNIE PAWSON: Tubes, yes sir.

PLAINTIFF'S ATTORNEY: Is that a purchase by Villa Olivia, 30 new Pepsi tubes?

ANNIE PAWSON: Yes, it is."

¶ 46 Plaintiff also argued in her reply that "she was not an expert on materials or plastics" and therefore, her testimony about how her tube did not have a plastic bottom was immaterial in determining the identity of the manufacturer. Plaintiff relies on Conrardy's testimony to show that he, too, was uncertain as to what the material of the tube bottoms were. Plaintiff points out that Conrardy testified that he believed the bottom of the tube was made of rubber, but then said it could be made of plastic after defendant counsel "raised the possibility of the bottom being plastic." Conrardy testified:

"DEFENDANT'S ATTORNEY: And is it possible that the bottom may have been plastic as opposed to rubber, if you know?

CONRARDY: Actually, yeah, that's a good point. I could see it being plastic because it just seemed more hard and thicker than the inside, so

that actually makes sense because the inside was more cushiony than the bottom."

¶ 47 Plaintiff also attached an excerpt of William Pawson's deposition transcript where he described Tough Tube and defendant as both having plastic bottoms. Pawson testified that they both had the "same sewing design premise whereby you have a sewn canvas top that's pleated into the plastic bottom with the seatbelt based trim."

¶ 48 Finally, in her response, plaintiff claimed that she could still prove a *prima facie* case without the defective snow tube because the defect at issue was known to defendant.

¶ 49 C. Trial Court's Ruling

¶ 50 On January 21, 2015, the trial court granted defendant's motion for summary judgment. In its five-page memorandum opinion, the trial court held that defendant was entitled to summary judgment because "[p]laintiff [could not] establish, or even raise a question of fact that, defendant was the manufacturer of the subject snow tube." The trial court noted that the "subject snow tube [was] no longer in existence" and, therefore, plaintiff could not "meaningfully identify the specific snow tube" that "she rode on the day of the accident." The trial court stated that: "[n]either the Plaintiff nor any other evidence in the record can identify anything about the subject snow tube which

distinguishes it from others in such a way that a reasonable inference can be made that defendant was the manufacturer of it." The trial court found:

> "[T]he evidence does not show that the specific defective condition complained of- that the tube bottom contained a 4 to 5 inch hard and sharp protrusion poking through a 5 inch slash which caused the tube to completely stop while going down the hill was known to be a common defect in a Tube Pro snow tube."

The trial court reasoned: "The circumstantial evidence here may raise a *possibility* that defendant was the manufacturer of the snow tube, but it does not justify an inference of a *probability* that it was the manufacturer." (Emphasis in original.) Based upon the foregoing, the trial court found that defendant was entitled to summary judgment.

¶ 51 On February 12, 2015, plaintiff filed a notice of appeal, and this appeal followed.

¶ 52 ANALYSIS

¶ 53 In this direct appeal, plaintiff appeals the trial court's grant of summary judgment in favor of defendant. Plaintiff argues that the evidence demonstrates a genuine issue of material fact about whether defendant was the manufacturer of the snow tube that caused her injuries. For the following reasons, we affirm the trial court's grant of summary judgment.

¶ 54 I. Standard of Review

¶ 55 Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, when viewed in the light most favorable to the nonmoving party, indicate 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 2014). When determining if the moving party is entitled to summary judgment, the court construes the pleadings and evidentiary material in the record strictly against the movant. *Happel v. Wal–Mart Stores, Inc.*, 199 Ill. 2d 179, 186 (2002). We review a trial court's decision on a motion for summary judgment *de novo. Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). *De novo* consideration means the reviewing court performs the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 56 "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.*, 154 Ill. 2d at 102. "Mere speculation, conjecture, or guess is insufficient to withstand summary judgment." *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313, 328 (1999). The party moving for summary judgment bears the initial burden of proof. *Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 624 (2007).

The movant may meet its burden of proof either "by affirmatively showing that some element of the case must be resolved in its favor" or by " 'establishing that there is an absence of evidence to support the nonmoving party's case.' " *Nedzvekas,* 374 Ill. App. 3d at 624 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). To prevent the entry of summary judgment, the nonmoving party must present a *bona fide* factual issue and not merely general conclusions of law. *Caponi v. Larry's 66,* 236 Ill. App. 3d 660, 670 (1992)). Therefore, while the party opposing the motion is not required to prove her case at the summary judgment stage, she must provide some factual basis to support the elements of her cause of action. *Illinois State Bar Ass'n Mutual Insurance Co. v. Mondo*, 392 Ill. App. 3d 1032, 1036 (2009); *Ralston v. Casanova*, 129 Ill. App. 3d 1050, 1059 (1984). On a motion for summary judgment, the court cannot consider any evidence that would be inadmissible at trial. *Brown, Udell & Pomerantz, Ltd. v. Ryan,* 369 Ill. App. 3d 821, 824 (2006). Thus, the party opposing summary judgment must produce some competent, admissible evidence which, if proved, would warrant entry of judgment in her favor. *Brown, Udell & Pomerantz,* 369 Ill.App.3d at 824. Summary judgment is appropriate if the nonmoving party cannot establish an element of her claim. *Willett v. Cessna Aircraft Co.*, 366 Ill. App. 3d 360, 368 (2006).

¶ 57 We may affirm on any basis appearing in the record, whether or not the trial court relied on that basis, and even if the trial court's reasoning was incorrect. *Ray Dancer, Inc. v. DMC Corp.*, 230 Ill. App. 3d 40, 50 (1992).

¶ 58 II. Plaintiff's Claim Against Defendant

¶ 59 Plaintiff sued defendant under a products liability claim based on a theory of negligence. *Blue v. Environmental Engineering, Inc.*, 215 Ill. 2d 78, 89 (2005) (discussing the differences between a products liability case based on a negligence theory and a strict products liability case). Plaintiff alleged that defendant committed one or more of the following careless and negligent acts or omissions: (1) designed, manufactured, distributed and sold the snow tube equipment without appropriate safeguarding and an adequate warning label; (2) failed to adequately warn users of the dangers of the snow tube; (3) failed to design and manufacture the snow tube safely; (4) failed to properly inform or instruct the purchaser of the snow tube's use; and (5) negligently designed, manufactured, tested, inspected (or failed to test and inspect), and heeded the test results of the subject snow tube involved in her accident.

¶ 60 "A product liability claim [based] in negligence is concerned with both defendant's fault and the condition of the product." *Sobczak v. General Motors Corp.*, 373 Ill. App. 3d 910, 923 (2007) (citing *Coney v. J.L.G. Industries, Inc.*, 97 Ill. 2d 104, 117 (1983)). To succeed in a products liability claim based on

negligence, a plaintiff must prove: (1) the existence of a duty; (2) a breach of that duty; (3), an injury that was proximately caused by that breach, and (4) damages. *Jablonski v. Ford Motor Co.*, 2011 IL 110096, ¶ 82 (citing *Heastie v. Roberts*, 226 Ill. 2d 515, 556 (2007)). " 'A manufacturer has a nondelegable duty to produce a product that is reasonably safe for all intended uses.' " *Sobczak* , 373 Ill. App. 3d at 923 (quoting *Hansen v. Baxter Healthcare Corp.*, 198 Ill. 2d 420, 433 (2002)). "A plaintiff must show that the manufacturer knew or should have known of the risk posed by the design at the time of the manufacture to establish that the manufacturer acted unreasonably based on the foreseeability of harm." *Sobczak v. General Motors Corp.*, 373 Ill. App. 3d at 923 (citing *Calles v. Scripto-Tokai Corp.*, 224 Ill. 2d 247, 255 (2007)). Moreover, in a products liability action asserting a claim based in negligence, "[t]he plaintiff must show that the manufacturer breached his duty to design something safer for the user because the quality of the product in question was insufficient." *Blue*, 345 Ill. App. 3d at 463 (citing *Rotzoll v. Overhead Door Corp.*, 289 Ill. App. 3d 410, 419 (1997)).

¶ 61 Most importantly, "the plaintiff must identify the manufacturer of the product and establish a causal relationship between the injury and the product." *Zimmer v. Celotex Corp.*, 192 Ill. App. 3d 1088, 1091 (1989) (citing *Schmidt v. Archer Iron Works, Inc.*, 44 Ill. 2d 401, 405-06 (1970), *cert. denied* 398 U.S.

959). While the plaintiff may prove these elements by direct or circumstantial evidence, "liability cannot be based on mere speculation, guess, or conjecture." *Zimmer*, 192 Ill. App. 3d at 1091. Therefore, when circumstantial evidence is relied on, the circumstances must justify an inference of *probability* as distinguished from mere *possibility*." (Emphasis added.) *Naden v. Celotex Corp.*, 190 Ill. App. 3d 410, 415 (1989); *Mateika v. LaSalle Thermogas Co.*, 94 Ill. App. 3d 506, 508 (1981); *Zimmer*, 192 Ill. App. 3d at 1091.

¶ 62 III. Parties' Arguments

¶ 63 A. Plaintiff's Arguments

¶ 64 On appeal, plaintiff claims that the trial court erred in granting defendant's motion for summary judgment because she raised a genuine issue of material fact about whether defendant was the manufacturer of the snow tube. Plaintiff argues that, since the court is to consider the evidence strictly against defendant and liberally in favor of her, summary judgment was not a proper disposition here. Plaintiff argues that the record, including invoices and witness testimony, shows that fair minded persons could draw different conclusions about whether defendant was the manufacturer.

¶ 65 Specifically, plaintiff argues that according to the testimony of Jorens, Villa Olivia's superintendent of golf and skiing, four to five snow tubes were stolen each year between 2000 to 2011 and that the majority of defendant snow

tubes purchased by Villa Olivia occurred in 2008 and 2009. According to plaintiff, this figure equates to potentially 44 to 55 Tough Tubes being stolen prior to plaintiff's injury. Plaintiff also relies on invoices that show Villa Olivia purchased 60 refurbished snow tube covers from defendant. Plaintiff argues that, given the refurbishment of these 60 snow tubes and the approximately 44 to 55 Tough Tubes stolen each year between 2000 to 2011, it was highly unlikely that Tough Tubes were still being used at Villa Olivia at the time of plaintiff's accident. Plaintiff also relies on the testimony of Jorens to show that more defendant snow tubes than Tough Tube snow tubes were being used at Villa Olivia in January 2011.

¶ 66 Plaintiff also claims that witness testimony raises questions of material fact as to whether the defect identifies defendant as the subject manufacturer. Plaintiff claims that defendant was aware of alleged defects in its snow tubes at Villa Olivia prior to her accident. Annie Pawson testified that she had observed defective defendant snow tubes before and that Villa Olivia employee Conrardy described the defective snow tube he observed as having a protruding crack. Additionally, plaintiff relies on her own testimony when she described the alleged defect "like a knife had gone through the ice, sharp object had gone through the ice." Jorens testified that he discussed the cracking plastic defect with defendant, and that the plastic cracking would decrease speed on a hill.

Plaintiff also observes that, prior to January 2011, defendant had received yearly complaints regarding the cracking of the plastic bottoms.[8] Based on this evidence, plaintiff argues that she can prove a *prima facie* case without the snow tube because the defect at issue was known to defendant.

¶ 67 B. Defendant's Arguments

¶ 68 Defendant, on the other hand, argues that the evidence presented to the trial court shows that plaintiff could not identify anything about the subject snow tube which distinguished it from other tubes such that a reasonable inference could be drawn that defendant manufactured the allegedly defective snow tube. Defendant claims that, without the snow tube, plaintiff has failed to present evidence on a critical element in her product liability claim based on negligence. Since plaintiff did not and could not produce the snow tube, she could not introduce the alleged defect into evidence. Consequently, defendant argues that plaintiff has failed to show and cannot show that any defect existed at the time the snow tube left defendant's control. Hence, without the tube itself or photos of it, defendant asserts that a jury could only speculate about whether plaintiff's injuries were caused by a defect in the tube, and whether the defect was present when the snow tube allegedly left defendant's control, and whether

[8] In her brief, plaintiff claims that, prior to January 2011, defendant received yearly complaints regarding the plastic bottoms cracking, without citing to the record.

defendant even manufactured the snow tube. Under such circumstances, defendant argues that the trial court properly entered summary judgment in its favor.

¶ 69 IV. Failure to Cite Authority

¶ 70 First, we observe that plaintiff's appellate brief fails to comply with Illinois Supreme Court Rule 341(h)(7), which requires a proponent to cite supporting authority; and the failure to do so results in waiver. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Illinois Supreme Court Rule 341(h)(7) provides that an appellant's brief must "contain the contentions of the appellant and the reasons therefor, with *citation of the authorities* and the pages of the record relied on." (Emphasis added.) Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). The purpose of this rule is to provide "[a] court of review" with "clearly defined" issues and cites to "pertinent authority." *People v. Trimble*, 181 Ill. App. 3d 355, 356 (1989) (discussing the provisions of former Illinois Supreme Court Rule 341(e)(7), which is now numbered as Illinois Supreme Court Rule 341(h)(7), and its importance to the appellate court). A reviewing court "is not a depository in which the appellant may dump the burden of argument and research." *Trimble*, 181 Ill. App. 3d at 356. The appellate court stated in *Trimble:*

> "To ignore such a rule by addressing the case on the merits would require this court to be an advocate for, as well as the judge of the correctness of, defendant's position on the issues he raises. On the other hand, strict compliance with the rules permits a reviewing court to ascertain the integrity of the parties' assertions which is essential to an accurate determination of the issues raised on appeal." *Trimble*, 181 Ill. App. 3d at 356-57.

¶ 71 In the instant case, plaintiff failed to cite a single substantive case in support of her argument that the trial court improperly granted summary judgment in favor of defendant. The cases that plaintiff cites in the argument section of her brief merely establish general principles of law regarding summary judgment and a products liability action. In Part A of the argument section of her brief which discusses how the evidence justifies an inference of probability that defendant was the manufacturer of the subject snow tube, plaintiff cites only *Black's Law Dictionary* and fails to cite any precedent in furtherance of her argument. Furthermore, in Part B of the argument section of her brief, plaintiff fails to cite any legal authority supporting her argument that she can prove a *prima facie* case without the defective tube since the defect at

issue was known to defendant.[9] Accordingly, because plaintiff has failed to comply with Illinois Supreme Court Rule 341(h)(7), the plaintiff has waived consideration of her claim that the trial court improperly granted summary judgment in favor of defendant.

¶ 72 V. No *Prima Facie* Case

¶ 73 However, *even if* plaintiff did not waive her claims regarding summary judgment, plaintiff still could not prove a *prima facie* case without the allegedly defective snow tube. The facts in *Shramek v. General Motors Corp.*, 69 Ill. App. 2d 72 (1966), cited by defendant, are similar to the present case. In *Shramek*, the plaintiff was injured when the automobile in which he was riding

[9] Plaintiff mentions *Wiesner v. Fontaine Truck Equipment Co.*, No. 06-CV-6239, 2010 WL 3023398 (N.D. Ill. 2010), an unreported case discussed in defendant's motion for summary judgment. However, we will not cite an unreported case. *State Farm Mutual Automobile Insurance Co. v. Progressive Northern Insurance Co.*, 2015 IL App (1st) 140447, ¶ 101 ("We will not cite an unreported case."); *Skokie Castings, Inc. v. Illinois Insurance Guaranty Fund*, 2012 IL App (1st) 111533, ¶ 15 ("an unreported case" is "not binding on any court"); *People v. Moore*, 243 Ill. App. 3d 583, 584 (1993) ("the decision was unreported and of no precedential value"). "Unreported decisions have no precedential value, and this is even more true for decisions from foreign jurisdictions." *American Family Mutual Insurance Co. v. Plunkett*, 2014 IL App (1st) 131631 ¶ 38; *Burnette v. Stroger*, 389 Ill. App. 3d 321, 329 (2009); *West American Insurance Co. v. J.R. Construction Co.*, 334 Ill. App. 3d 75, 82 (2002) (a "foreign, unreported decision" is of no precedential value"). Specifically, with respect to unpublished federal cases, this court has held that they do not carry any authority before an Illinois court. *Lyons v. Ryan*, 324 Ill. App. 3d 1094, 1107 n.11 (2001) ("unreported federal court orders" are not "any kind of authority before an Illinois court"); *Sompolski v. Miller*, 239 Ill. App. 3d 1087, 1093 (1992) ("we decline" to follow "an unreported Federal district court decision").

crashed after one of the tires suffered a blowout. *Shramek*, 69 Ill. App. 2d at 74. He filed both a negligence claim and a breach of implied warranty claim against the tire and auto manufacturers claiming a defect was in the tire at the time it left the control of the manufacturer or seller. *Shramek*, 69 Ill. App. 2d at 75. The tire, however, was never examined for a defect and could not be located. *Shramek*, 69 Ill. App. 2d at 78. The trial court granted the automobile and tire manufacturers' motions for summary judgment, and this court affirmed. *Shramek*, 69 Ill. App. 2d at 77. The appellate court held that summary judgment was required because the record conclusively demonstrated that the plaintiff could not prove, either by direct or circumstantial evidence, that the accident was caused by a defective tire. *Shramek*, 69 Ill. App. 2d at 77. The court noted that the mere occurrence of a blowout does not establish a manufacturer's negligence or that the tire was defective, since blowouts can be attributed to a myriad of causes. *Shramek*, 69 Ill. App. 2d at 78. The court stated:

> "[A]side from a superficial inspection of the damaged car and tire after the accident by plaintiff and his cousin, the tire in question was never subjected to an examination which would reveal that the blowout was due to a pre-existing defect. Thus, without any examination of the tire designed to elicit the cause of the blowout and without the tire itself or any hope or expectation for its recovery,

> plaintiff could never prove, directly or inferentially, a case of negligence, breach of warranty or strict liability." *Shramek*, 69 Ill. App. 2d at 78.

¶ 74 The reasoning in *Shramek* has been cited with approval and applied in other cases (*E.g.*, *Scott v. Fruehauf Corp.* 602 F. Supp. 207, 209 (S.D. Ill. 1985); *Sanchez v. Firestone Tire & Rubber Co.*, 237 Ill. App. 3d 872, 874 (1992); *Phillips v. U.S. Waco Corp.*, 163 Ill. App. 3d 410, 417 (1987) (discussing and applying *Shramek*)). In *Scott*, the plaintiff sued a tire rim manufacturer and distributor, alleging he was injured while working on a tire rim. *Scott*, 602 F. Supp. at 208. As in *Shramek*, the allegedly defective product was unavailable. *Scott*, 602 F. Supp. at 209. The court held that, because the plaintiff could not produce the rim, he "could never prove his case" and, therefore, summary judgment was proper. *Scott*, 602 F. Supp. at 209. The *Scott* case held this, even though there were photographs of the rim. *Scott*, 602 F. Supp. at 209. However, the court found that even photographs were insufficient because the rim had never been examined by a qualified expert and was never made available to the defendant. *Scott*, 602 F. Supp. at 209. In the case at bar, plaintiff does not even have photographs of the tube, and the tube was certainly never examined by an expert or made available to defendant. Thus, pursuant to the reasoning of both *Shramek* and *Scott*, summary judgment was warranted.

¶ 75 Similarly, in *Sanchez v. Firestone Tire & Rubber Co.*, 237 Ill. App. 3d 872, 872-73 (1992), the plaintiff brought a negligence and product liability action against defendant for improper installation of a tire and inner tube. The inner tube was unavailable and the plaintiff's expert never examined the inner tube or took photographs of it. *Sanchez*, 237 Ill. App. 3d at 873. In affirming summary judgment, the appellate court held that the cause of the incident could only be left to speculation because the expert's testimony indicated nothing more than a mere possibility that the inner tube was improperly installed. *Sanchez*, 237 Ill. App. 3d at 874; *see also Scott*, 602 F. Supp. at 209 ("the very fact that other factors could have caused the injury warranted granting of summary judgment motions since without the alleged[ly] defective product the plaintiff could never prove up his case"). Similarly, in the case at bar, without the tube, the cause of the incident could only be left to speculation.

¶ 76 Lastly, in *Phillips v. U.S. Waco Corp*. 163 Ill. App. 3d 412, 417 (1987), the plaintiff brought a negligence and strict products liability claim against defendant for personal injuries he sustained when he fell from a scaffold manufactured by the defendant. As in *Shramek*, the plaintiff failed to produce the allegedly defective product involved in the accident or any photographs of it. *Phillips*, 163 Ill.App.3d at 415. And as in *Scott*, the plaintiff failed to provide any expert testimony regarding the alleged defect in the product. *Phillips*, 163

Ill. App. 3d at 415. In affirming summary judgment, this court held that the plaintiff failed to present facts to support the elements of his products liability claims based in negligence and strict liability. *Phillips*, 163 Ill. App. 3d at 418. This court reasoned that, because the scaffold was never examined for the presence of preexisting defects, the plaintiff "could never prove, either by direct or circumstantial evidence, that the accident was caused by a defective scaffold, since he did not and could not produce the scaffold." *Phillips*, 163 Ill. App. 3d at 418.

¶ 77 Similar to the plaintiff in *Phillips*, plaintiff in this case did not and cannot produce the allegedly defective product involved in her accident. The subject snow tube was never retrieved or examined for defects. Plaintiff also has not produced any photographs of the snow tube itself or provided testimony by an eyewitness to the accident or its aftermath, other than plaintiff herself. Plaintiff testified that all of the photographs she took on the day of the accident were of *different* snow tubes in use at Villa Olivia and *not* of the tube involved in her accident. Plaintiff testified that the last time she saw the tube was when she left it with the Villa Olivia employees when she walked inside with the paramedic to report the accident. Plaintiff also testified that her basis for believing that defendant manufactured the tube in her accident was that she saw a *different tube* that had writing on it that said defendant's name. She testified that a

photograph of a snow tube used by her son showed a red colored tube, but did not indicate the manufacturer's name on it. Without the snow tube itself or any examination of it, plaintiff cannot establish or raise a genuine issue of material fact that defendant was the manufacturer. Without the snow tube itself or any photographs of it, or an examination of the snow tube to determine if the accident was a result of a preexisting defect, plaintiff cannot prove a *prima facie* products liability case against defendant.

¶ 78 Therefore, for the reasons stated above, we cannot find that the trial court erred in granting summary judgment in favor of defendant. *Outboard Marine Corp.*, 154 Ill. 2d at 102 (discussing when summary judgment should be granted).

¶ 79 CONCLUSION

¶ 80 On appeal, plaintiff argues that the trial erred in granting summary judgment because there is a genuine issue of material fact as to whether defendant was the manufacturer of the snow tube that injured her. For the foregoing reasons, we conclude that plaintiff failed to present sufficient evidence to raise a genuine issue of material fact as to the manufacturer of the snow tube and thus the trial court did not err in granting summary judgment in favor of defendant.

¶ 81 Affirmed.