NO. 5-09-0121

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WILLIAM L. KLUMP,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Jackson County.
	)	
v.	)	No. 08-L-49
	)	
	)	
LLOYD R. KLUMP,	)	Honorable E. Daniel Kimmel and
	)	Honorable William G. Schwartz,
Defendant-Appellee.	)	Judges, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Welch and Spomer concurred in the judgment.

RULE 23 ORDER

Held: A summary judgment was appropriate when the record demonstrated no genuine issue of material fact supporting a viable theory whereby defendant owed a duty to plaintiff.

Plaintiff, William Klump, filed suit for negligence against defendant, Lloyd Klump, in the circuit court of Jackson County. On the motion of defendant, the court granted a summary judgment. On appeal, plaintiff raises issues regarding whether the grant of a summary judgment was proper. We affirm.

FACTS

On April 1, 2008, plaintiff filed a one-count complaint against defendant in the circuit court of Jackson County. Plaintiff alleged that on May 1, 2007, defendant asked him to come to his farm to repair a John Deere tractor that was locked in gear. Plaintiff arrived at the residence and attempted to perform the requested repair.

Plaintiff alleged that defendant "had a duty to the general public, including [plaintiff],

to exercise reasonable care for the safety of [plaintiff]." Plaintiff alleged a breach of the duty by defendant in that he (1) failed to occupy the operator's seat while the repairs were made, (2) failed to secure the tractor in the event that the hand clutch became disengaged, (3) failed to secure the hand clutch to prevent it from becoming disengaged, and (4) failed to turn the tractor motor off during the repair process. The plaintiff alleged that as a proximate result, the hand clutch became disengaged and the tractor moved forward, striking plaintiff.

Defendant filed an affirmative defense alleging contributory negligence and filed a motion for a summary judgment (735 ILCS 5/2-1005 (West 2008)). Defendant argued as follows: "There is no legal basis for imposing a duty upon the defendant where (1) the plaintiff has the greater expertise in the repair of the product in question; (2) where [*sic*] the plaintiff is the individual physically manipulating and operating the controls at the time of the occurrence; (3) where [*sic*] the defendant is neither giving instructions nor advice [*sic*] regarding said repairs; [and] (4) where [*sic*] the defendant is simply an observer standing approximately ten feet away."

Defendant attached an affidavit. Defendant attested that the tractor is gasoline-powered with a standard configuration, with the gearshift lever located in the front of the driver on the transmission tunnel and the hand-operated clutch lever located on the right side of the transmission tunnel. The tractor has six forward gears and one reverse gear and became stuck in the second and/or fourth position. Defendant attested to the following sequence of events:

> "6. [Plaintiff] and I hooked the back of his pickup truck to the back of the tractor in order to pull it out from under the carport where it had been parked. With the clutch lever in the disengaged position, the engine was started. After starting the engine, [plaintiff] adjusted the carburetor so it would idle properly.
>
> 7. [Plaintiff] was standing on the right side of the tractor in front of the right

rear tire. The clutch was in the disengaged position. With the tractor idling, [plaintiff] attempted to move the gearshift lever. The clutch engaged unexpectedly causing the tractor to move forward.

8. The tractor moved forward, rolling over [plaintiff]. It stopped when the engine bogged down in soft gravel. It had moved forward a few feet. [Plaintiff] was on the ground between the tractor and his pickup truck when the tractor came to a stop.

9. At the time the tractor unexpectedly moved forward while [plaintiff] was manipulating the gearshift lever I was standing on the left or opposite side of the tractor about ten feet away.

10. At the time the tractor unexpectedly moved forward I was not operating the tractor[;] I was not giving instructions to [plaintiff]. I was observing [plaintiff] attempting to disengage the gearshift lever."

On September 22, 2008, the court entered an order granting a summary judgment. The court pointed out that plaintiff had not responded to the motion for a summary judgment and that the facts set forth in the motion were undisputed. The court found that, based on these facts, defendant owed no duty to plaintiff and that, even if there was a duty, defendant did nothing to cause the injuries.

On September 25, 2008, plaintiff filed a motion to vacate the summary judgment, asserting that plaintiff's counsel missed the hearing due to a scheduling error. Plaintiff asserted that a reasonable jury could conclude that defendant failed to exercise reasonable care for the safety of plaintiff by acts and or omissions including, but not limited to, (a) failing to turn the tractor motor off, (b) failing to occupy the driver's seat, and (c) failing to take steps to secure the clutch to prevent its disengagement, such as holding the clutch lever while occupying the driver's seat on the tractor.

In his response to the summary judgment, plaintiff attached an affidavit. Plaintiff attested as follows:

> "3. On or about May 01, 2007, at the request of [defendant], I went to the residence of [defendant], in Elkville Illinois, to attempt repairs on a John Deere tractor which belongs to [defendant]. The tractor in question needed an adjustment to the carburetor; additionally the gears on the tractor were jammed or stuck such that the gear shift could not be placed in the neutral position. The tractor has a hand clutch which was engaged during the attempted repair. It was necessary to have the tractor engine running in order to adjust the carburetor. After making adjustments to the carburetor I turned to approach the rear of the tractor to attempt to diagnose and repair the gear problem. Somehow the hand clutch became disengaged and the tractor, which was still running, moved forward and struck me causing serious injuries. I do not know exactly how the hand clutch became disengaged. It is possible that I bumped the hand clutch or fell against it. I do know that I did not intentionally disengage the hand clutch while the tractor was running."

On February 23, 2009, the circuit court entered an order denying the motion to vacate the summary judgment. The court noted that plaintiff had failed to appear for the hearing on the motion for a summary judgment. The court stated that it would reconsider the ruling, but it concluded that the plaintiff had failed to present a viable theory for the existence of a duty. Plaintiff appeals.

ANALYSIS

A summary judgment is a drastic measure and should only be granted where it is clear and free from doubt. *Graham v. Bostrom Seating, Inc.*, 398 Ill. App. 3d 302, 305, 921 N.E.2d 1222, 1226 (2010). The purpose of a summary judgment is not to try questions of fact, but to determine whether there is any genuine issue of material fact. *Bagent v. Blessing*

Care Corp., 224 Ill. 2d 154, 162, 862 N.E.2d 985, 991 (2007). The movant must demonstrate that no genuine issue of material fact exists, and the evidence must be construed strictly against the movant and liberally in favor of the opposing party. *Williams v. Manchester*, 228 Ill. 2d 404, 417, 888 N.E.2d 1, 9 (2008). If the material facts are disputed or reasonable persons might draw different inferences from the undisputed facts, then a summary judgment is inappropriate. *Williams*, 228 Ill. 2d at 417, 888 N.E.2d at 9. In the case at hand, there is no genuine issue of material fact precluding a summary judgment.

In entering the summary judgment, the trial court found no material issue on the questions of duty or causation. Aside from the issue of causation, the record leaves no issue regarding the existence of a duty. Every person has a duty to use ordinary care to prevent injury that naturally occurs as the reasonably foreseeable consequence of his or her own action. *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 291, 864 N.E.2d 227, 238 (2007). In Illinois, the existence of a duty derives from the relationship of the parties to each other. *Simpkins v. CSX Corp.*, 401 Ill. App. 3d 1109, 1113, 929 N.E.2d 1257, 1261 (2010), *appeal allowed*, 238 Ill. 2d 675, ___ N.E. 2d ___, (2010). For example, a landowner may be liable if he should expect that an invitee will not realize that a dangerous condition exists or will fail to protect himself from it. *Genaust v. Illinois Power Co.*, 62 Ill. 2d 456, 468, 343 N.E.2d 465, 472 (1976) (adopting Restatement (Second) of Torts §343 (1965)). Whether a relationship between the parties will justify the imposition of a duty depends upon the following factors: (1) the foreseeability of the injury, (2) the reasonable likelihood of the injury, (3) the magnitude of the defendant's burden in guarding against injury, and (4) the consequences of placing the burden on the defendant. *Simpkins*, 401 Ill. App. 3d at 1113, 929 N.E.2d at 1262.

On appeal, plaintiff generically declares that the issue is whether the court erred by finding that defendant had no duty to exercise ordinary care for the safety of plaintiff under

the circumstances. Plaintiff asserts that his statement that he might have fallen on the clutch is mere speculation and not a judicial admission. Plaintiff further contends that whether the hand clutch became disengaged due to some action of defendant is a moot point. Nonetheless, plaintiff fails to explain how the relationship of the parties created a duty under the circumstances, nor does plaintiff point to any genuine issue of material fact relating to the subject.

Plaintiff presents no viable theory for the existence of a duty. Plaintiff cites to precedents that explain how the ownership of premises can create a relationship underlying a duty, but he fails to show how a triable issue regarding a duty exists in this case. *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 143, 554 N.E.2d 223, 228 (1990) (the store owner's duty included the risk that a customer would walk into a post); *Rexroad v. City of Springfield*, 207 Ill. 2d 33, 44, 796 N.E.2d 1040, 146 (2003) (a student fell in a hole in a parking lot); *Clifford v. Wharton Business Group, L.L.C*, 353 Ill. App. 3d 34, 46, 817 N.E.2d 1207, 1218 (2004) (a carpenter fell through a hole in floor while attempting to avoid a wall that fell during construction); *Sobczak v. Flaska*, 302 Ill. App. 3d 916, 923, 706 N.E.2d 990, 996 (1998) (a worker was injured by a bulldozer in a rollover accident).

Of the cases cited by plaintiff, the one that most resembles the case at hand is *Sobczak v. Flaska*, 302 Ill. App. 3d 916, 923, 706 N.E.2d 990, 996-97 (1998). In *Sobczak*, a construction worker was injured when a bulldozer rolled over while work was being performed on the defendant's property. The property owner was found to have a duty of care based on his degree of control over the renovation work. Although the nature of that accident appears to be similar to the nature of the accident here, the description of the relationship of the parties in *Sobczak* reveals it to be facially distinct. In *Sobczak*, the defendant directly supervised the work performed:

"Evidence at trial was that Flaska routinely used Harbor Properties' workers

at his home to do jobs unrelated to Harbor Properties' business. With regard to renovations that were occurring on the property at the time of Sobczak's injury, Flaska admitted that he personally took out a building permit from the local village for much of the work occurring on the property, including work done by Harbor Properties' employees. He listed himself, and not Harbor Properties, as the general contractor for the renovations. Although Flaska insisted that Sobczak's work was unrelated to the permit work, there was testimony indicating that the dirt generated by the permit work was comingled with the dirt delivered to the site by Harbor Properties. Moreover, Sobczak testified Flaska and other Harbor Properties' employees routinely worked at the Flaska residence under Flaska's personal supervision. On these occasions, Flaska either told Sobczak what to do and how to do it or passed such information through others.

Evidence at trial also showed that, unlike a typical homeowner, Flaska had extensive experience with heavy equipment like the bulldozer that injured Sobczak. On at least two prior occasions, Flaska observed earth movers roll from their upright positions, causing severe injury to their operators. Flaska had participated in the purchase of the bulldozer that injured Sobczak and, indeed, had directed Sobczak in its assembly. He was familiar with its proper operation. Flaska also testified that he was familiar with the roll-protection systems, consisting of a canopy and seat belt, which modern bulldozers have to protect the operator from roll-over injury. He admitted that he knew such systems were commercially available." *Sobczak*, 302 Ill. App. 3d at 923, 706 N.E.2d at 996-97.

The defendant in *Sobczak* also failed to warn the plaintiff of known dangers:

"In addition, we find the record sufficient to support a finding that Flaska knew that the vehicle at the time of the accident did not provide rollover protection to its

operator, knew that a rollover was possible during the times the vehicle was being loaded and unloaded from its trailer, knew that vehicles with rollover protection systems were commercially available, and knew that a rollover accident without a protection system had the potential to severely injure Sobczak. Despite this knowledge, Flaska directed Sobczak, through others, to use this vehicle to do work on his property. In doing so, Flaska failed to warn Sobczak of the dangers associated with unloading the bulldozer or provide Sobczak with appropriate equipment to do the job safely. Finally, we find the evidence sufficient to support the jury's finding that the lack of either a warning or a rollover protection system on the vehicle used by Sobczak was a proximate cause of Sobczak's injuries." *Sobczak*, 302 Ill. App. 3d at 924, 706 N.E.2d at 997.

In contrast, the case at hand bears no such indicia of control by defendant or any indication that the relationship between the parties created a duty sufficient to impose liability.

The circuit court aptly explained the appropriateness of a summary judgment in the case at hand:

"The Court FURTHER FINDS that there are no facts in dispute and the law supports the position of the defendant. The plaintiff took it upon himself to attempt repairs on the tractor apparently owned by the defendant. The defendant took no part in the repair process and stood some distance away. The plaintiff did not ask for assistance and none was given. All actions were solely taken by the plaintiff of his own accord and as a result of his own decisions and deductions. The plaintiff offers no viable theory of duty owed by the defendant to the plaintiff. Consequently, there is no breach of that non[]existent duty. Any fault that may exist belongs solely to the plaintiff for actions which he took or failed to take to protect himself."

Accordingly, the order of the circuit court entering a summary judgment is hereby

affirmed.

Affirmed.