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IN THE
COURT OF APPEALS OF INDIANA

MICHELLE HAGER, Individually, and as Personal Representative of the Estate of NORMAN JAMES HAGER, JR., Deceased,	)	
Appellant-Plaintiff,	)	
vs.	)	No. 32A01-1103-CT-89
ROBERT and SUE FARIS,	)	
Appellees-Defendants.	)	

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable Stephenie LeMay-Luken, Judge
Cause No. 32D05-0906-CT-17

August 9, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Plaintiff Michelle Hager, individually and in her position as personal representative of the Estate of Norman James Hager, Jr. (hereinafter "the Estate"), appeals the trial court's order granting summary judgment in favor of Appellees-Defendants Robert and Sue Faris (collectively, "the Farises"). We affirm.

FACTS AND PROCEDURAL HISTORY

At all times relevant to the instant appeal, Sue Faris was the owner of a three-level home in Pittsboro, Indiana. A residential elevator system was installed in the home in May of 1997. Norman Hager was "in charge of installing the elevator system." Appellant's App. pp. 178, 181. Hager continued to perform routine maintenance and service on the elevator system for the next decade.

On November 12, 2007, Sue "became stuck in the elevator between the basement and the first floor of the house." Appellant's App. p. 179. In examining the elevator, the Farises "determine[d] that the gate was not closed properly inside the elevator" and that "a metal strip where the gate closed was loose." Appellant's App. p. 179. The "loose metal strip" fell into the elevator shaft after Sue touched it. Appellant's App. p. 179. The next morning, Sue spoke to Hager, and he came to the Farises' home to service the elevator. While servicing the elevator, Hager became trapped underneath the elevator. As a result of being trapped underneath the elevator, Hager sustained injuries that resulted in his death.

On June 15, 2009, the Estate initiated the instant matter, alleging that the Farises owed Hager a duty to "properly keep and maintain the residence, including the elevator system, and to refrain from causing injury," and that the Farises' "negligent acts and omissions were the

direct and proximate cause of [Hager's] fatal injuries." Appellant's App. p. 177. The Farises filed a Motion for Summary Judgment on June 10, 2010. On August 5, 2010, the Estate sought and was granted permission to amend its complaint against the Farises to allege that Robert pressed the call button in the basement, activating the power to the elevator and causing it to descend from the first floor to the basement. In response to the additional allegation, the Farises filed a supplemental brief in support of their motion for summary judgment on January 17, 2011, in which they denied the additional allegation. On February 16, 2011, the Estate filed its response in opposition to the Farises' motion for summary judgment. The trial court issued an order granting summary judgment in favor of the Farises on February 24, 2011. This appeal follows.

DISCUSSION AND DECISION

I. Standard of Review

The purpose of summary judgment is to end litigation about which there can be no factual dispute and which may be determined as a matter of law. *Shelter Ins. Co. v. Woolems*, 759 N.E.2d 1151, 1153 (Ind. Ct. App. 2001), *trans. denied.* Summary judgment is appropriate where the evidence shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Colonial Penn Ins. Co. v. Guzorek*, 690 N.E.2d 664, 667 (Ind. 1997). All designated evidence must be construed liberally and any doubt resolved in favor of the non-moving party. *Woolems*, 759 N.E.2d at 1153. Summary judgment is inappropriate where material facts conflict or undisputed facts lead to conflicting material inferences. *Guzorek*, 690 N.E.2d at 667. Summary judgment

may not be used as a procedural device to avoid a trial on claims that are perceived to be weak. *Id*.

On appeal, we review a summary judgment order de novo and must determine whether the designated evidence before the trial court presents a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Bules v. Marshall Cnty.*, 920 N.E.2d 247, 250 (Ind. 2010). Although the nonmoving party has the burden of demonstrating that the grant of summary judgment was erroneous, we carefully assess the trial court's decision to ensure that the nonmovant was not improperly denied its day in court. *McSwane v. Bloomington Hosp. and Healthcare Sys.*, 916 N.E.2d 906, 909-10 (Ind. 2009) (quotation omitted); *Guzorek*, 690 N.E.2d at 667. We may not reverse the entry of summary judgment on the ground that a genuine issue of material fact exists unless the material fact and the evidence relevant thereto were designated specifically to the trial court. *Woolems*, 759 N.E.2d at 1154. Furthermore, we will sustain the trial court's decision to grant a motion for summary judgment if it is sustainable by any theory or basis found in the record. *Id*.

The Estate's action is one for negligence. In order to prevail in a negligence action, the Estate had to establish the three elements for actionable negligence: (1) a duty flowing from the Farises to Hager; (2) a breach of that duty; and (3) injury to Hager resulting from that breach. *Briggs v. Finley*, 631 N.E.2d 959, 963 (Ind. Ct. App. 1994), *trans. denied*.

> Negligence will not be inferred; rather, all of the elements of a negligence action must be supported by specific facts designated to the trial court or reasonable inferences that might be drawn from those facts. *Id*. (citing *Miller v. Monsanto Co.*, 626 N.E.2d 538, 541 (Ind. Ct. App. 1993)). An inference is

> not reasonable when it rests on no more than speculation or conjecture. *Id*.
>
> A negligence action is generally not appropriate for disposal by summary judgment. *Miller*, 626 N.E.2d at 541. However, a defendant may obtain summary judgment in a negligence action when the undisputed facts negate at least one element of the plaintiff's claim. *U-Haul Int'l, Inc. v. The Mike Madrid Co.*, 734 N.E.2d 1048, 1052 (Ind. Ct. App. 2000), *trans. denied* (2001). While proximate cause is generally a question of fact, it becomes a question of law where only a single conclusion can be drawn from the facts. *City of Indianapolis Housing Auth. v. Pippin*, 726 N.E.2d 341, 347 (Ind. Ct. App. 2000); *Basicker ex rel. Johnson v. Denny's, Inc.*, 704 N.E.2d 1077, 1080 (Ind. Ct. App. 1999), *trans. denied*.

Kincade v. MAC Corp., 773 N.E.2d 909, 911 (Ind. Ct. App. 2002).

II. Whether the Trial Court Erred in Granting Summary Judgment in Favor of the Farises

A. Whether the Designated Evidence Establishes a Genuine Issue of Material Fact

The Estate contends that the designated evidence creates a genuine issue of material fact as to whether Robert's actions caused the elevator to descend on Hager. Specifically, the Estate claims that Robert acted negligently by either pressing the call button in the basement or activating power to the elevator causing the elevator to descend from the first floor to the basement. In making this claim, the Estate relies on a report by Dr. Stephen S. Radentz in which he opines that he believed that Robert may have "inadvertently or purposely pushed the elevator call button" in the basement causing the elevator to descend on Hager. Appellant's App. p. 163. However, Dr. Radentz's opinion did not create a genuine issue of material fact, as it is not supported by any evidence but is merely conjecture. *See Briggs*, 631 N.E.2d at 964 (citing *C & C Oil Co. v. Ind. Dept. of Revenue*, 570 N.E.2d 1376, 1378-79 (Ind. Tax 1991) (providing that plaintiff's hypothesis that it was possible that the cashier did

not see the customers dispensing special fuel into vehicles rather than into cans was merely conjecture and did not create a genuine issue of fact)). Thus, absent a showing that some action by Robert caused the elevator to descend upon Hager, no dispute of material fact exists. *See id*. No such showing was made here.

The designated evidence establishes that Robert did not push the elevator call button in the basement but that the call button was already lit and engaged when he first arrived in the basement. The designated evidence also establishes that no other actions by Robert caused the elevator to descend upon Hager. When Hager arrived, Robert let Hager into the house through the garage. Robert told Hager that he would stay in the kitchen "while [Hager] worked on the elevator so that [he] would not be in [Hager's] way." Appellant's App. p. 40. A few minutes after Hager went to the basement to begin working on the elevator, Robert heard Hager yelling. Robert "ran downstairs and found the door to the elevator was closed." Appellant's App. p. 182. Robert heard Hager yelling "Get it off me." Appellant's App. p. 182. Robert asked Hager "what to do to get the elevator car to go up." Appellant's App. p. 182. Hager instructed Robert to go to the elevator power supply in the garage and "hit contact 2 to 3." Appellant's App. p. 182. Robert did as instructed, but nothing happened. Robert then called 911.

The Estate did not designate any evidence, nor is there any in the record, to contradict the designated evidence establishing that Robert's actions did not cause the elevator to descend on Hager, and Dr. Radentz's speculation about what caused the elevator to descend upon Hager cannot be construed as a fact which can shed doubt on the validity of the

designated evidence. *Briggs*, 631 N.E.2d at 964-65 (citing *C & C Oil*, 570 NE2d at 1379). The Estate's argument is based on speculation. Thus, we conclude that the trial court properly granted summary judgment to the Farises on this issue.

B. Whether the Designated Evidence establishes that the Farises Breached the Duty of Care Owed to Hager

The Estate also contends that trial court erred in granting summary judgment in favor of the Farises because the designated evidence creates a question of material fact regarding whether the Farises breached the duty of care owed to Hager. It is undisputed that Hager was considered a business invitee at the Farises' home on the day the incident leading to the instant litigation occurred. *See Parojcic v. Bethlehem Steel Corp.*, 128 F.3d 601, 603 (7th Cir. 1997) (providing that under Indiana law, employees of an independent contractor (or subcontractor) are considered business invitees, and thus are owed a certain duty of care by a landowner). Generally, a landowner owes an invitee a duty to exercise reasonable care for the invitee's protection while he is on the landowner's premises. *Watson v. Ziegert*, 616 N.E.2d 785, 787 (Ind. Ct. App. 1993). This duty is defined in Restatement (Second) of Torts § 343 (1965):

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
> (c) fails to exercise reasonable care to protect them against danger.

Id. Section 343A of the Restatement, which is to be read along with § 343, further provides

that:

> A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Id. Thus, under Indiana law, the Farises should be held liable for Hager's death "only if it was reasonably foreseeable that he would fail to protect himself against injury." *Davis v. Hoosier Energy Rural Elec. Co-op, Inc.*, 19 F.3d 365, 369 (7th Cir. 1994).

In the instant matter, the designated evidence demonstrates that Hager was invited onto the Farises' property for the purpose of repairing the elevator. Hager was an experienced elevator repairman. Importantly, the designated evidence also demonstrates that Hager was in charge of the installation of the Farises' elevator in the Farises' home when the home was built in 1997, had performed regular maintenance and service work on the Farises' elevator in the past, and knew that the Farises' elevator was not working properly upon arriving at the Farises' home on the date in question. Hager also knew about the multiple features installed to ensure the safety of individuals working in the elevator shaft. Hager entered the elevator shaft and began working without disconnecting the power to the elevator or engaging any of the multiple safety features.

The Estate has not designated any evidence suggesting that the Farises should have known or could have reasonably foreseen that Hager would disregard the risk posed by working in the elevator shaft without either turning off the power to the elevator or engaging the installed safety features. Accordingly, even viewing the designated evidence most favorable to the Estate, we conclude that it was not reasonably foreseeable that Hager would

fail to protect himself from injury or death. As such, we conclude that under Indiana law, the Farises are not liable for Hager's death. *See Davis*, 19 F.3d 365, 369 (7th Cir. 1994); see also *Carter v. American Oil Co.*, 139 F.3d 1158, 1164 (7th Cir. 1998) (providing that in Indiana, a landowner is not liable for injuries that are caused by conditions that are known or obvious unless the landowner can anticipate that injury despite the obviousness of the risk). Furthermore, to the extent that the Estate claims that summary judgment was improper because the Farises failed to warn Hager about the danger involved with working in the elevator shaft, we observe that the Farises did not need to warn Hager, who by his experience was already aware of the danger. "A duty to warn is predicated upon the understanding that individuals who have superior knowledge of the dangers posed by a hazard must warn those who lack similar knowledge. [Thus, w]hen an individual is already aware of the danger, a warning is not necessary." *Carter*, 139 F.3d at 1164. The trial court did not err in granting summary judgment in favor of the Farises.

The judgment of the trial court is affirmed.

ROBB, C.J., and BARNES, J., concur.