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2 **UNITED STATES COURT OF APPEALS**
3 **FOR THE SECOND CIRCUIT**
4

5 August Term, 2015

6
7 (Argued: August 19, 2015 Decided: November 30, 2015)
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9 Docket No. 14-2725-cv
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12 PAUL A. GEMMINK,
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14 *Plaintiff-Appellant,*
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16 – v. –
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18 JAY PEAK INC.,
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20 *Defendant-Appellee.*
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24 Before: CALABRESI, STRAUB, POOLER, *Circuit Judges.*
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26 *Pro se* plaintiff Paul Gemminck was injured while skiing at defendant Jay Peak's ski
27 resort. Although Gemminck could not recall the circumstances of his injury, he came to
28 believe that he had been injured in a collision with another skier as a result of Jay Peak's
29 negligent maintenance of ski jumps on its property. As a result, Gemminck brought an
30 action to recover against Jay Peak for his injuries. The District Court granted summary
31 judgment to Jay Peak, finding that Gemminck had failed to establish that any negligence on
32 the part of Jay Peak was the cause of Gemminck's injuries. We affirm the judgment of the
33 District Court.

34 Judge POOLER joins only Parts I and II(B) of the opinion.

35 PAUL A. GEMMINK, *pro se*
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37 THOMAS P. AICHER, Cleary Shahi & Aicher, P.C.,
38 Rutland, VT, *for Defendant-Appellee*
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1 CALABRESI, *Circuit Judge*:

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3 **I. BACKGROUND**

4 On February 21, 2011, Paul Gemmink and his daughter, Christine, visited the Jay
5 Peak ski resort in Jay, Vermont. The two skied down the Northwest Passage trail, with
6 Christine preceding her father as she turned onto the Kokomo trail, which intersected the
7 Northwest Passage trail. When Christine reached the base of the ski lift at the end of the
8 trail, she noticed that her father had failed to follow her descent. Instead, a Jay Peak ski
9 patroller would find Gemmink “combative and in obvious pain,” lying on his back by a tree
10 on the left side of the Kokomo trail, near the Kokomo-Northwest Passage intersection.
11 App’x at 31. Gemmink had been rendered unconscious and, though argumentative, could
12 not recall or provide an account of the incident. Christine, however, had observed a ski
13 jump situated near the trees on the right side of the intersection, leading her and her father
14 to surmise that another patron “fl[ew] of[f] the jump” and collided with Gemmink. *Id.* at
15 30, 32. Gemmink suffered fractures to his left ribs and left transverse processes in the
16 incident, injuries that, according to Gemmink, are usually attributable to a significant
17 impact coming from right to left, and are therefore at least consistent with the theory that a
18 skier jumped from the right of the intersection into Gemmink.

19 Proceeding *pro se*, Gemmink brought this action against Jay Peak to recover for
20 injuries that he claims were sustained as a result of Jay Peak’s negligence. Specifically,
21 Gemmink asserts that Jay Peak negligently permitted dangerous jumps on its ski trails and
22 that, in consequence of such a constructed jump at the Kokomo-Northwest Passage
23 intersection, Gemmink suffered a collision with another skier resulting in harm to his left

1 side. The District Court (Murtha, *J.*) granted Jay Peak’s motion for summary judgment,
2 finding that Gemmink had failed to establish that Jay Peak’s alleged negligence was the
3 cause of his injuries. Gemmink now appeals.

4 II. DISCUSSION

5 A.

6 This Court reviews a grant of summary judgment *de novo*. *Amerex Group, Inc. v.*
7 *Lexington Ins. Co.*, 678 F.3d 193, 199 (2d Cir. 2012). Where, as here, the party opposing
8 summary judgment bears the burden of proof at trial, summary judgment should be granted
9 if the moving party can “point to an absence of evidence to support an essential element of
10 the nonmoving party’s claim.” *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18
11 (2d Cir. 1995). The court draws all inferences in favor of the nonmoving party, but the
12 opposing party “must come forward with specific evidence demonstrating the existence of a
13 genuine dispute of material fact.” *Robinson v. Concentra Health Servs., Inc.*, 781 F.3d 42, 44
14 (2d Cir. 2015).

15 Before the district court, it was assumed that the negligence of Jay Peak in the
16 structure and maintenance of the jumps was sufficiently made out to survive summary
17 judgment. Accordingly, for purposes of this opinion, we will assume *arguendo* that
18 Gemmink has established such a potential basis for liability on the part of Jay Peak. The
19 issue before us, then, is a not-infrequent one in torts cases: whether the plaintiff proffered
20 sufficient evidence for a jury to find, more probably than not, that the ground for liability
21 (here, the assumed negligence) was the cause of the plaintiff’s injury.

22 As Professor Abraham has demonstrated in his recent article, a showing of cause-in-
23 fact almost always involves circumstantial evidence. See Kenneth S. Abraham, *Self-Proving*

1 *Causation*, 99 Va. L. Rev. 1811, 1815-16 (2013). Thus, in considering whether a plaintiff has
2 proven causation, a trier of fact asks whether it is likely that the harm that occurred resulted
3 from the negligence (or from another basis of liability) attributed to the defendant. In other
4 words, is the reason that the defendant's behavior is deemed risky, and the defendant
5 deemed potentially liable, the harm that in fact occurred?

6 In such circumstances, as then-Chief Judge Cardozo set out in *Martin v. Herzog*, 126
7 N.E. 814 (N.Y. 1920), a jury can assume that the injury occurred as the expected or
8 ordinary result of the defendant's conduct. *Id.* at 816. If for some reason it was not the
9 ordinary result of the defendant's conduct, that the "extraordinary" had occurred must be
10 shown by the party wishing to counter causation. For example, if a defendant proprietor
11 has failed to install lights on its stairways after dark, and a person coming down the stairs in
12 the dark of night falls and injures himself, one can fairly assume that the failure to illuminate
13 the stairs caused the injury. And it will be up to the defendant to show that something
14 extraordinary happened, say, that an animal scampered up the stairs and tripped the injured
15 person instead. In essence, the greater the risk that the defendant's conduct will result in the
16 harm the plaintiff suffered, the more likely that a jury will be allowed to find that such
17 conduct was the cause of that harm.

18 In addition to considering the strength of the circumstantial evidence linking injury
19 and harm, however, the cases dealing with questions of causation take into account two
20 other factors. First, where one party has knowledge or access to information that renders
21 that party better able than his adversary to explain what actually transpired, courts have
22 tended to put the onus on that party to do so. This principle—that the party with superior
23 knowledge bears the burden of coming forward with evidence—has always served as a basis

1 of finding negligence under the doctrine of *res ipsa loquitur*. See, e.g., *Griffen v. Manice*, 166
2 N.Y. 188, 194-96 (1901). But it also serves as a basis for finding causation. See *Williams v.*
3 *Utica Coll. Of Syracuse Univ.*, 453 F.3d 112, 120-21 (2d Cir. 2006); *Williams v. KFC Nat. Mgmt.*
4 *Co.*, 391 F.3d 411, 431-32 (2d Cir. 2004) (Calabresi, J., concurring). Thus, the requirement
5 that the plaintiff be able circumstantially to show a link between the expected risk of
6 defendant's conduct and what actually occurred tends to be greater when the plaintiff is
7 better able to explain what happened, and is considerably less when, instead, it is the
8 defendant who can better or more easily proffer evidence of what, in fact, occurred.

9 But cases of this sort also involve a third factor. Thus, in deciding whether sufficient
10 proof of causation has been proffered to get to a jury, courts consider whether the law of the
11 jurisdiction is indifferent as to error in one direction or the other. If an erroneous finding of
12 causation is, in the law of the jurisdiction, more harmful than an erroneous finding of no
13 causation, the requirements of circumstantial evidence and knowledge grow stronger.
14 Conversely, where the law of the jurisdiction makes clear that an erroneous finding of no
15 causation is more harmful, the requirements are diminished. Compare *Williams v. Utica Coll.*
16 *Of Syracuse Univ.*, 453 F.3d at 121 (finding summary judgment against plaintiff appropriate
17 because, *inter alia*, New York courts placed only a minimal duty on the defendant to avert
18 the type of harm incurred, which is “close to saying that if an error is to be made in this context, it
19 is better made in favor of the defendant”) (emphasis added), with *Williams v. KFC Nat. Mgmt. Co.*,
20 391 F.3d at 432 (finding summary judgment against plaintiff inappropriate because, *inter*
21 *alia*, of “the absence of any reason to prefer erring in favor of [the defendant] rather than the
22 plaintiff”).

B.

With these three factors in mind, we turn to the case before us. The first factor favors the defendant. The causal link between Jay Peak’s assumed negligence in its maintenance of ski jumps and the injury incurred by the plaintiff is far too attenuated to sustain Gemmink’s claim. Our common experience does not tell us that this kind of lack of maintenance results in accidents of this sort with any frequency. And plaintiff has failed to proffer expert testimony suggesting a stronger link. *See Human Rights Comm’n v. LaBrie, Inc.*, 668 A.2d 659, 667 (Vt. 1995) (“Generally, expert . . . testimony is required to support a finding of causation where the link is obscure and abstruse such that a layperson can have no well founded knowledge and can do no more than indulge in mere speculation.”) (internal quotation marks omitted).

The second is, at most, neutral. Neither Gemmink nor Jay Peak has greater knowledge or access to information concerning what actually happened on the Kokomo trail.

We turn, then, to the third factor: Is this an area where, in Vermont, liability of ski operators to skiers is close to strict, so that whether negligence was the cause of the alleged injury is a matter that, in uncertainty, should be decided in favor of the skier? Or is this an area where the risk of injury, even in the presence of negligence on the part of the ski operator, is assumed primarily by the skier, so that the requirement of causation is fairly placed on the skier (unless either (a) the evidentiary link between the evidence of negligence and causation of the kind of harm that occurred is particularly strong, or (b) the defendant is in a distinctly better position to tell us what happened)? Or, finally, is Vermont relatively

1 indifferent to error in one direction or the other, offering no reason to favor either the
2 plaintiff or defendant?

3 A review of Vermont law suggests that it follows the approach of symmetrical
4 indifference. By statute, although assumption of risk has generally been subsumed in
5 comparative negligence, 12 V.S.A. § 1036, it has been expressly retained as to sporting
6 events, 12 V.S.A. § 1037. This would suggest that Vermont prefers to err on the side of
7 finding no causation with respect to sport injuries like the one that here occurred. At the
8 same time, however, the decision of whether the risk borne by the plaintiff in the sporting
9 event was sufficiently “obvious and necessary” as to be assumed generally forms a jury
10 question under Vermont law. *See Estate of Frant v. Haystack Grp., Inc.*, 641 A.2d 765, 770-71
11 (Vt. 1994) (rejecting the conclusion that “by enacting § 1037, the legislature intended to
12 provide *more* protection from liability for ski areas” and stating that “§ 1037 is broad enough
13 . . . [that s]kiers should be deemed to assume only those skiing risks that the skiing industry
14 is not reasonably required to prevent,” as determined by “a jury [applying] a contemporary
15 sense of what constitutes an obvious or necessary risk”). Vermont’s approach stands in
16 notable contrast both to Connecticut, where participants in sporting events rarely assume
17 the risk of that participation, *see, e.g., Jagger v. Mohawk Mtn. Ski Area, Inc.*, 849 A.2d 813, 827
18 (Conn. 2004), and to New York, where assumption of risk is powerfully applied by courts to
19 bar recovery by participants in sporting events, *see, e.g., Martin v. New York*, 878 N.Y.S.2d
20 823, 825-26 (App. Div. 3rd Dept. 2009); N.Y. Gen. Obl. Law § 18-106. This contrast
21 reinforces our conclusion that Vermont wants us to treat errors in this area pretty much
22 symmetrically.

Consequently, we are left to infer causation, then, from only the placement of the ski jumps and the nature of Gemmink's injuries. We cannot infer a causal link between Jay Peak's assumed negligence in its maintenance of ski jumps and the injury incurred on the facts presented, and the plaintiff does not provide sufficient evidence to support a link between his injuries and alleged theory of causation. Under these circumstances, the district court was clearly correct in its holding that the evidence adduced by Gemmink was not sufficient to raise a question for the jury.

III. CONCLUSION

The judgment of the District Court is, therefore, **AFFIRMED**.