STATE OF MICHIGAN

COURT OF APPEALS

JOHN SHIER and SANDY SHIER,

Plaintiffs-Appellants,

and

CITIZENS INSURANCE COMPANY,

Intervening Plaintiff,

v

PGP CORPORATION, d/b/a VOSS STEEL,

Defendant-Appellee.

UNPUBLISHED
August 25, 1998

No. 198463
Wayne Circuit Court
LC No. 95-531458 NP

JOHN SHIER and SANDY SHIER,

Plaintiffs,

and

CITIZENS INSURANCE COMPANY,

Intervening Plaintiff-Appellant,

v

PGP CORPORATION, d/b/a VOSS STEEL,

Defendant-Appellee.

No. 198808
Wayne Circuit Court
LC No. 95-531458 NP

Before: Hood, P.J., and MacKenzie and Doctoroff, JJ.

PER CURIAM.

In Docket No. 198463, plaintiffs appeal as of right from an order granting summary disposition for defendant under MCR 2.116(C)(10). In Docket No. 198808, intervening plaintiff Citizens Insurance Company appeals as of right from the same order. The arguments made on appeal by Citizens are identical to plaintiffs' arguments on appeal and thus will not be addressed separately. The two appeals have been consolidated. We affirm.

Plaintiffs filed a complaint alleging that defendant chemically treated a 42,500-pound coil of steel for plaintiff John Shier's employer, Ottawa River Steel Company. After treating the steel, defendant rolled and banded it and returned it to Ottawa River Steel. Shier was injured at work when the bands or securing devices around the coil of steel failed, causing it to uncoil and strike him. Plaintiffs alleged that defendant failed to band the coil properly. Citizens intervened because it has paid worker's compensation benefits to John. Defendant moved for summary disposition, arguing that plaintiffs had failed to establish a material factual dispute with regard to their claim that defendant improperly banded the coil of steel. The trial court agreed.

Plaintiffs argue on appeal that the trial court erred in determining that plaintiffs had not established a genuine issue of material fact. We review an order granting a motion under MCR 2.116(C)(10) de novo. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996). Such a motion tests the factual support of a claim. *SSC Associates Ltd Partnership v General Retirement System of City of Detroit*, 192 Mich App 360, 363; 480 NW2d 275 (1991). This Court must view the pleadings, affidavits, depositions, admissions, and any other documentary evidence in the light most favorable to the nonmoving party. *Baker*, *supra*, p 202. We must then decide "whether a genuine issue regarding any material fact exists to warrant a trial." *Id*. On this record, we find no error in the trial court's determination that plaintiffs failed to establish a genuine issue of fact.

Plaintiffs presented no direct evidence that defendant failed to properly band the coil of steel. Plaintiffs instead relied on circumstantial evidence, including an affidavit of a witness who stated that there were only two bands on the coil when Shier was injured, rather than four bands as required by defendant's safety manual.

In order for circumstantial evidence to permit a reasonable inference of causation, the plaintiff's causation theory must have some basis in established fact. *Hasselbach v T G Canton, Inc*, 209 Mich App 475, 483; 531 NW2d 715 (1994). The plaintiff must present sufficient evidence from which a jury could conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred. *Id*. Summary disposition should be granted when the plaintiff's causation theory is as probable as other theories. *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994).

Here, the circumstantial evidence is not sufficient to permit a reasonable inference that defendant caused Shier's injury. The fact that there were only two bands on the coil when Shier was injured does not establish that defendant only applied two bands when it shipped the coil back to Ottawa River

Steel. Shier's own testimony established that it was just as possible that other bands were broken or removed after the coil was returned to Ottawa River Steel. Since this alternative theory is just as possible as plaintiffs' causation theory, plaintiffs have failed to provide sufficient circumstantial evidence to permit a reasonable inference that defendant caused Shier's injuries by failing to properly band the coil. *Hasselbach*, *supra*, p 483.

Plaintiffs further argue that they have established a material factual dispute under a res ipsa loquitur theory. Again, we disagree. "The doctrine of res ipsa loquitur requires, inter alia, that the event must have been caused by an agency or instrumentality within the exclusive control of the defendant." *Hasselbach*, *supra*, p 480. Here, the coil of steel was not within defendant's exclusive control. The coil was shipped back to Ottawa River Steel before Shier's accident. The coil was thus in the control of both the shipping company and Ottawa River Steel for a period of time. The doctrine of res ipsa loquitur is thus inapplicable.

Plaintiffs next argue that summary disposition should not have been granted because defendant submitted affidavits of its employees which contradicted their prior deposition testimony. Reversal is not required on this basis. The trial court indicated that it was not relying upon the affidavits in granting summary disposition, and based on our review of the record, we are satisfied that defendant was entitled to summary disposition without consideration of the affidavits. Plaintiffs were required to provide evidence in support of their theory of improper banding; the burden was not on defendant to show that the coil was adequately banded. Because plaintiffs failed to establish that defendant improperly banded the coil, summary disposition was proper independent of the affidavits.

Plaintiffs next argue that the trial court failed to consider the evidence in the light most favorable to plaintiffs. A review of the record indicates the contrary. In any event, even if the court did fail to properly consider the evidence, the error would be harmless on this record because the trial court reached the right result in granting summary disposition for defendant. MCR 2.613(A).

Finally, plaintiffs' argument that the "sophisticated user" doctrine is not applicable to the facts of this case is not preserved for appellate review because that issue was not decided by the trial court. *Bowers v Bowers*, 216 Mich App 491, 495; 549 NW2d 592 (1996).

Affirmed.

/s/ Harold Hood
/s/ Barbara B. MacKenzie
/s/ Martin M. Doctoroff