STATE OF MICHIGAN

COURT OF APPEALS

JAMES NURSE and SHARON NURSE,

Plaintiffs-Appellants,

v

TOWNSHIP OF WATERFORD,

Defendant-Appellee.

UNPUBLISHED
September 21, 1999

No. 208956
Oakland Circuit Court
LC No. 96-517579 NO

Before: Collins, P.J., and Jansen and White, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition in favor of defendant under MCR 2.116(C)(10). We affirm.

This negligence action arises out of an incident which occurred on May 28, 1995, at approximately 5:50 p.m. It was sunny and warm out and the pavements were not wet. Plaintiff James Nurse[1] was riding his bicycle on a sidewalk with his dog running along side on a twelve- to fifteen-foot leash attached to (wrapped around) the left handle bar. As he was riding his bicycle, the dog began to run ahead of plaintiff and toward a bush on the front lawn of a private residence. The dog was on plaintiff's left side. As the dog approached the bush, the dog slowed down and plaintiff likewise applied his hand brakes so that his bicycle slowed down as well. Plaintiff testified that the action of both the dog and him slowing down created a loop in the leash; however, plaintiff admitted that he did not "know what was going on behind me" and that he did not see where the leash was located either before or after the fall. Plaintiff stated that the bicycle suddenly "jerked out" from under him, "displaced to the left," and that plaintiff fell to his right. He stuck out his right leg to brace the fall and suffered a serious fracture to his right leg as well as ligament damage to his right knee.

The witnesses to the accident testified in their depositions that, although they saw plaintiff fall off his bicycle, they did not see the leash become entangled on anything, and plaintiff testified that he did not see the leash behind him. Plaintiff testified in his deposition that he "surmised" and "assumed" that the dog's leash had become entangled on a water pipe cap that extended approximately one inch above the sidewalk causing the bicycle to suddenly stop, thus causing him to fall. Plaintiff admitted that he had not seen the water pipe cap before the fall from the bicycle. Further, plaintiff testified that although he

concluded that the leash had become caught around the water pipe cap, he admitted that he had not searched the grassy area next to the sidewalk for rocks or wires because "none were readily apparent."[2] Plaintiff's expert inspected the scene sometime after the accident and, because no object other the water pipe cap was in the area at the time, he concluded in an affidavit that the water pipe cap caused plaintiff's fall.

Defendant moved for summary disposition on the ground that plaintiff's theory of causation was based on speculation, conjecture, and mere possibility, which is insufficient to establish the element of causation. In response, plaintiff argued that circumstantial evidence supported his theory of causation and that circumstantial evidence was sufficient to create a question for the jury. Defendant argued that plaintiff failed to present sufficient evidence to remove the question of causation from surmise, conjecture, or speculation, and that summary disposition was appropriate. The trial court agreed with defendant that plaintiff had failed to meet his burden of establishing cause in fact, and granted summary disposition in favor of defendant on this basis only.[3]

We review de novo a trial court's ruling on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. The court considers the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted to it to determine whether a genuine issue of any material fact exists to warrant a trial. *Spiek, supra,* p 337. A motion for summary disposition may be granted pursuant to MCR 2.116(C)(10) when, except with regard to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

This appeal concerns only whether plaintiff has submitted sufficient evidentiary proof of cause in fact. The witnesses saw only plaintiff fall to the ground and did not see the leash become ensnared in any object. Plaintiff did not actually see what caused the dog's leash to jerk and did not see the leash wrapped around the pipe cap after his fall. Plaintiff had to rely on circumstantial evidence to establish that the leash became ensnared around the water pipe cap, which plaintiff contends was the cause in fact of his fall. While plaintiff may show causation circumstantially, the mere happening of an unwitnessed mishap neither eliminates nor reduces a plaintiff's duty to effectively demonstrate causation:

> That there was no eyewitness to the accident does not always prevent the making of a possible issue of fact for the jury. But the burden of establishing proximate cause . . . always rests with the complaining party, and no presumption of it is created by the mere fact of an accident. [*Howe v Michigan Central RR Co*, 236 Mich 577, 583-584; 211 NW 111 (1926).]

At a minimum, a causation theory must have some basis in established fact and a basis in only slight evidence is not enough. *Skinner v Square D Co,* 445 Mich 153, 164; 516 NW2d 475 (1994). It is insufficient to submit a causation theory that, while factually supported is, at best, just as possible as another theory. *Id.* The plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred. *Id.*, pp 164-165. "The mere possibility that a defendant's negligence may have been the cause, either theoretical or conjectural, of an accident is not sufficient to establish a causal link between the two." *Id.*

at 165-166, citing *Jordan v Whitting Corp*, 396 Mich 145, 151; 240 NW2d 468 (1976). Rather, there must be a reasonable likelihood of probability other than a mere possibility that the defendant's negligence caused the plaintiff's injury. *Skinner, supra,* p 166, citing 57A Am Jur 2d, Negligence, § 461, p 442.

Plaintiff testified at his deposition that he could not see the leash dragging behind him and that he did not know what was going on behind him. The dog had been trotting in front of plaintiff, thus, plaintiff was speculating that a loop was even formed in the leash. Plaintiff admitted that he never actually saw the leash or whether a loop actually formed, therefore, it is initially speculation as to whether a loop actually formed to become snagged on any object. Additionally, no one testified that they saw the leash snagged around the water pipe cap; it was again speculation as to whether the leash became caught on the water pipe cap. Defendant offered other theories of causation. The trial court deemed defendant's theories of causation to be equally plausible. Thus, the trial court concluded that plaintiff's causation theory remained in the realm of speculation and conjecture.

Although we agree that the issue of causation is normally for the jury, if there is no issue of material fact, the trial court may decide the issue itself. *Reeves v Kmart Corp*, 229 Mich App 466, 480; 582 NW2d 841 (1998); *Halbrook v Honda Motor Co, Ltd*, 224 Mich App 437, 446; 569 NW2d 836 (1997). Here, the trial court correctly determined that plaintiff's theory of causation was based on speculation and conjecture. The evidence only established that an accident took place. Plaintiff assumed both that a loop formed in the leash and that the leash became snared on the water pipe cap. There was no physical evidence that either of these two events occurred. Although plaintiff's assumptions are certainly possibilities, there was no evidence presented to support a reasonable inference of causation. Michigan law does not allow this Court to infer causation simply because an accident occurred in the vicinity of a defective condition. *Skinner*, *supra,* p 174.

Accordingly, the trial court did not err in granting summary disposition in favor of defendant on the basis that plaintiffs failed to set forth sufficient evidence to establish cause in fact of the injury.

Affirmed.

/s/ Jeffrey G. Collins
/s/ Kathleen Jansen

[1] In this opinion, "plaintiff" will refer solely to James Nurse because he was the injured party and his wife's claim is purely derivative.

[2] To the extent that plaintiff attempted to create sufficient evidence of causation in his affidavit, we again find it to be insufficient. In his affidavit, plaintiff averred that as he began to slow down on the bicycle, the action "had to cause a portion of the leash to curl" behind him and drag on the sidewalk. This statement is again nothing more than speculation. Plaintiff never saw or submitted any evidence that the leash actually formed a loop behind him. Moreover, plaintiff's assertions in his affidavit that the dog did not pull him, that the leash did not become entangled around the back tire, and that the leash did not

become entangled in the bush are not sufficient to create a set of evidentiary facts establishing his own theory of causation. See *Skinner v Square D Co*, 445 Mich 153, 174, n 19; 516 NW2d 475 (1994).

[3] Defendant also argued in its motion for summary disposition that its statutory duty to maintain sidewalks did not extend to fixtures attached to a sidewalk, such as the water pipe, and that plaintiffs' claims were barred by the open and obvious defense.