STATE OF MICHIGAN

COURT OF APPEALS

BETTY ANN KLEES,

Plaintiff,

v

MARY HELEN PELTON,

Defendant,

and

MARY HELEN PELTON,

Defendant/Third-Party Plaintiff-Appellant,

v

THE BRAKE SHOP,

Third-Party Defendant-Appellee.

UNPUBLISHED
August 11, 2000

No. 213106
Wayne Circuit Court
LC No. 96-632054-NI

Before: Bandstra, C.J., and Holbrook, Jr., and Fitzgerald, JJ.

PER CURIAM.

This action arises from an automobile accident that occurred on March 5, 1996. Plaintiff, Betty Ann Klees, was injured when her vehicle was struck from behind by a vehicle driven by defendant/third-party plaintiff-appellant Mary Helen Pelton. Klees brought suit against Pelton, and subsequently Pelton filed a third-party claim against third-party defendant-appellee, The Brake Shop. On March 20, 1998, the trial court granted The Brake Shop's motion for summary disposition under MCR 2.116(C)(10). In a subsequent order, the trial court awarded The Brake Shop $8,447.50 in mediation sanctions. After the third-party matter was disposed of, the underlying lawsuit between Klees

and Pelton proceeded to trial. During that trial, the lawsuit was settled, and on July 2, 1998, a stipulation and order was entered dismissing with prejudice Klees' cause of action against Pelton. While Pelton appeals as of right from the July 2, 1998 stipulation and order, the issues on appeal relate to the March 20, 1998 order granting third-party defendant's motion for summary disposition pursuant to MCR 2.116(C)(10), and the order awarding The Brake Shop mediation sanctions. We reverse and remand.

On the day of the accident, plaintiff was traveling southbound on Interstate 75. As Klees entered the Interstate 94 interchange, she had to bring her car to a complete stop due to traffic congestion. Pelton, who was traveling the same route as Klees, was unable to come to a complete stop and collided with the back of Klees' vehicle, forcing it to collide with a semi-truck. In her complaint, Klees alleged that she sustained severe injuries due to Pelton's negligence. Pelton's third-party complaint against The Brake Shop alleged that the accident was caused by The Brake Shop's negligence in performing brake repairs on Pelton's vehicle earlier that day.

In granting The Brake Shop's motion for summary disposition, the trial court concluded that Pelton had failed to establish that The Brake Shop's alleged negligence was the cause in fact of the accident. The court stated:

> In this case I think it's clear. I'm relying on [*Jordan v Whiting Corp*, 396 Mich 145, 151; 240 NW2d 468 (1976),] . . . which states, "The mere possibility that a defendant's negligence may have been the cause[,] either theoretically or conjectural[,] of an accident is not sufficient to establish a causal link between the two."
>
> Mrs. Pelton's expert was unable to say that The Brake Shop was the cause of this accident. The Brake Shop employees agree that as long as there was fluid in the brake line even if there is a little or no fluid in the reservoir, a person would still have brakes.
>
> I don't believe [Pelton] . . . can provide any substantial evidence that would allow the formulation of the reasonable inference of negligence. And therefore, the motion is granted.

Pelton argues that the trial court erred in granting summary disposition because she demonstrated a genuine issue of material fact with respect to the issue of causation. We agree. This Court reviews decisions on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

> A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to damages as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the

opposing party. [*Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).]

Initially, we want to make it clear that the type of causation at issue in the case before us is cause in fact, not proximate or "legal" cause. Further, Pelton's theory of causation is grounded in circumstantial evidence and the inferences that arise therefrom. Our analysis of the issue will be accordingly focused.

The trial court's ruling is predicated on the longstanding rule that a plaintiff's theory of causation must not be based on mere conjecture or speculation. *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994); *Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956). By itself, mere speculation that an injury might have occurred in the way alleged by a plaintiff does not offer adequate proof that it did occur in that manner. Rather, a plaintiff must come forth with proof from which the trier of fact may reasonably conclude that it was the defendant's conduct that was the cause in fact of the injury sustained. *Skinner, supra* at 164-165.

This does not mean, however, that to survive a (C)(10) motion the plaintiff need negate all alternative theories of causation. As our appellate courts have often observed, a distinction exists between a causal theory that shows that an injury could have, hypothetically, occurred in a given way, and a causal theory that is reasonably inferred from the circumstantial evidence:

> "'As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any one of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.'" [*Kaminski, supra* at 422, quoting *City of Bessemer v Clowdus*, 261 Ala 388, 394; 74 So2d 294 (1954), quoting *Southern Ry Co v Dickson*, 211 Ala 481, 486; 100 So 665 (1924).]

Given a fixed set of circumstances surrounding an injury, numerous plausible hypotheses could be constructed which both account for the circumstances and explain the occurrence of the injury. In the abstract, each of these hypotheses is said to be "consistent with known facts or conditions." However, if there is no evidence from which a given hypothesis could be inferred, then that explanation remains pure conjecture. Indeed, the evidence may effectively rule out the hypothesis as a reasonable explanation of the injury by discrediting one of the premises underlying the explanation.

If, however, the plaintiff provides substantial evidence that "points to" any one hypothesis, then that theory of causation is removed from the realm of the purely speculative. This evidence need not establish with mathematical precision the causal chain, i.e., the "logical sequence." See *Skinner, supra* at 166. Such exactitude is not only antithetical to the nature of circumstantial evidence, see Prosser & Keeton, Torts (5th ed), § 41, pp 269-270, but is also not in keeping with the burden of proof in cases

like the one before us. That such evidence might also have some application to an alternative theory of causation is also not fatal to maintaining the lawsuit. *Dickson, supra* at 669 (observing that alternative theories of causation can find "support in the evidence").[1] Nevertheless, the evidence must provide a reasonable basis "from which a jury may conclude that more likely that not," the defendant's actions were the cause in fact of the injury sustained. *Skinner, supra* at 165.

Pelton's theory of the case is that she was unable to stop her car because the brakes failed. She attributes that brake failure to a loss of pressure caused by a leak in the closed braking system, and in turn, identifies three theories linking actions of The Brake Shop to the brake failure.[2] First, Pelton asserts that the brakes failed due to the failure of The Brake Shop to secure the reservoir cover to the master brake cylinder, thereby causing the brake fluid to be expelled from the system.

Our review of the record leads us to conclude that a genuine issue of material fact exists regarding the above causal theory. Pelton testified that when she was about eight car lengths behind and to the left of Klees, she began to apply the brakes as she merged into Klees' traffic lane. When she was about five car lengths directly behind Klees, she stated that the brake pedal dropped to the floor. Unable to stop, she crashed into the back of the stationary Klees vehicle. Pelton's son confirmed that his mother had applied the brakes, but that they did not stop the car. After the accident, Pelton's son drove the car about four or five miles to his father's house. He indicated that while he was able to stop the car when he arrived at his father's house, the brake pressure was not normal. According to Pelton's son, the brake pedal dropped to the floor each time he applied the brakes during that four or five mile trip. When Pelton's son and his father propped open the engine hood, they discovered that the master brake cylinder's reservoir cover was not secured. The two men also observed that brake fluid had

---

[1] While the *Dickson* Court spoke of "deducible" inferences, this should not be taken to imply that a plaintiff is required to set forth a causal theory that is necessarily true if the factual premises are established. The *Dickson* Court's use of the term "deducible" is more in keeping with the common understanding of the term than it is with the technical meaning attached to the term by logicians. In common parlance, to speak of something being "deducible" from the evidence refers to any kind of inference drawn, be it deductive, inductive, or a mixture of the two.

[2] It is not necessary that a plaintiff identify a single causal mechanism underlying the expert's causal theory. For example, a defendant may have taken several actions which combined to produce a plaintiff's injuries. A defendant cannot be absolved of liability simply because the defendant has taken several actions which caused the injuries sustained. In the case at hand, plaintiff's expert has identified three specific negligent acts on the part of The Brake Shop that combined to cause the brake failure. Further, a defendant's actions might combine with that of another "to produce an injury, and where any one of them, operating alone, would have been sufficient to cause the harm, a plaintiff may establish factual causation by showing that the defendant's actions . . . were a 'substantial factor' in producing a plaintiff's injuries." *Skinner, supra* at 165 n 8. Finally, we note that while several causal mechanisms might be reasonably inferred from the evidence available to the expert, the total evidence in the record might point to one of the mechanisms as being, more likely than not, the cause of the plaintiff's injuries.

been sprayed throughout the engine compartment. Pelton's son testified that the reservoir was "[e]mpty, that I could see, maybe a little bit left in there."

Robert Jarred, who worked as a mechanic at The Brake Shop at the time of the accident,[3] stated in his deposition that a car whose brake pedal goes to the floor is unsafe to drive. Jarred also testified that if the reservoir cap is not secured, the brakes would eventually fail. "You would get about 10 stops," he opined, then "[t]he master cylinder would be bone dry and you wouldn't have any brakes." Robert Wood, another mechanic working at The Brake Shop,[4] testified in his deposition that if air is in the brake line, the brake pedal would sit low. According to Wood, without a solid column of brake fluid, the brakes would not respond normally if the car had to be stopped in an emergency situation. Sal Tacco, another mechanic working for The Brake Shop, similarly testified in his deposition that "if there's air in the system the brake pedal would go to the floor." Tacco opined that air could be sucked back into the brake system like that in Pelton's car, eventually reaching the brake line, if the system were not closed and the reservoir were emptied of fluid.

As for Pelton's expert, while it is true that he theorized that the failure of the brakes could be attributed to a defective seal, he also stated that the failure could be attributed to leaving the reservoir cover off. Specifically, the expert testified, "And, a further possibility is that if the cap had been left off of the master cylinder, that the reservoir, if empty, wouldn't support proper brake operation." In other words, Pelton's expert testified that the fluid level in the system had been compromised, and he identified two possible sources of this problem (the defective seal and the missing cover). The equivocal "ifs" that punctuate his opinion regarding the cover merely highlight the expert's lack of first-hand knowledge of the premises, i.e., unlike the defective seal, he did not see first-hand the uncovered reservoir or the fluid level on March 5, 1996. However, this lack of knowledge on the part of the expert is not fatal to Pelton's lawsuit. Pelton's son clearly testified that the cap was off when he opened the hood at his father's house, and there is a picture in the record to support this assertion.

Pelton's lawsuit is also not undercut by the fact that her expert labeled the "cover off" theory as a "possibility." As our appellate courts have often observed, conclusions about the cause in fact of a given injury must be based on reasonable probabilities, not mere possibilities. See, e.g., *Skinner, supra* at 165. This is simply another way of saying that such a conclusion must be based on reasonable inferences drawn from the evidence, not mere conjectures. See *Jordan, supra* at 151.[5] Both conjectures and possibilities are just explanations that are consistent with the known facts, but not

---

[3] Although he could not be certain, Jarred believed he had been working on March 5, 1996.

[4] Wood's signature appears on the repair invoice, signifying that the repairs "were performed properly."

[5] The *Jordan* Court observed that "[t]he 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." *Jordan, supra* at 151. For the purposes of this opinion it is not necessary for us to examine whether there is any significance to the distinction, apparently being drawn by the *Jordan* Court, between the concepts theory, possibility, and conjecture. It is enough just to note that the *Jordan* Court acknowledged that a conjecture is a completely encompassed subset of the category "possibility."

deducible from them as reasonable inferences. For a theory to be raised from the realm of the possible to the probable, there must be evidence in the record which provides a basis for the trier of fact to reasonably infer that such a theory is not only possible, but probable. *Skinner, supra* at 164-165.

Further, an expert witness need not necessarily draw the same inferences, or employ the magic word "probability" in his testimony. In *Jordan*, the deceased was electrocuted "while he was repairing an overhead crane . . . ." *Jordan, supra* at 147. The plaintiff, administratix of the decedent's estate, alleged that the crane assembler's failure to properly ground the electrified crane was the cause of the decedent's death. *Id.* at 149-150. The *Jordan* Court based its conclusion that the plaintiff's causal theory remained pure conjecture on the lack of any evidence in the record identifying the decedent's location on the crane at the time of the accident. *Id.* Without such evidence, the logical sequence of cause and effect could not be drawn. In the case before us, however, the factual holes in the testimony of Pelton's expert are filled by the testimony of the other witnesses. Unlike *Jordan*, Pelton's evidence does not consist solely of the testimony of her expert witness.

The trial court also focused on testimony concerning how much brake fluid need be in the brake line for the brakes to function. "The Brake Shop employees agree," the trial court reasoned, "that as long as there was fluid in the brake line even if there is little or no fluid in the reservoir, a person would still have brakes." However, Pelton testified in her deposition that she did not have brakes at the time of the accident. Her son, who was a passenger in Pelton's car, confirmed her account. Further, Woods testified that the ability to stop a car in a emergency situation would be negatively impacted by a low brake pedal. The fact that Pelton's son was able to drive the car back to his father's house after the accident does not necessarily contradict the assertion that the brakes failed before Klees was struck. As Pelton's expert noted, there is a difference between using the brakes to stop a car when faced with a sudden emergency as opposed to stopping or slowing a car when the use of the brakes is anticipated. There is also a difference between applying the brakes before they have failed, and applying them after you have reason to believe they are not functioning properly.

Having reviewed the record before us, we conclude that Pelton did present evidence from which a trier of fact "may conclude that more likely than not, but for" the failure to replace the reservoir cover, the accident would not have occurred. Therefore, we reverse the trial court's grant of summary disposition to The Brake Shop. We also reverse the award of mediation sanction, given that the award was based on the grant of summary disposition.

The dissent states that that the evidence supports the conclusion that "if the brake failure caused the accident, that failure was more probably than not the result of the defective seal rather than the loose reservoir cap." *Infra*, p ___. The explanation of a defective seal was the premise underlying Pelton's "failure to properly inspect" and "failure to properly test drive" theories of the case. The expert testified that the car would not have been able to pass proper inspection and

road tests[6] while it was still at the repair shop, because the leak caused by the defective seal would have resulted in a loose brake pedal, and that a car with such a low pedal would not pass either test. However, Pelton herself testified that the brake pedal was functioning normally until the time of the accident when it suddenly dropped to the floor. Accordingly, we disagree that the defective seal explanation is more likely than not the cause in fact of Pelton's injuries. In fact, we believe the evidence effectively rules out these theories by discrediting one of the premises that underlie both theories.[7]

Reversed and remanded. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ E. Thomas Fitzgerald

---

[6] Pelton's expert identified the following inspection procedure that he believed should have been performed: "apply a force of 125 pounds to the brake pedal and hold for 10 seconds." 49 CFR § 570.5(b)(1). He also turned to the CFR for the following test drive procedure: "The service brake system shall stop the vehicle in a distance of 25 feet or less from a speed of 20 miles per hour without leaving a 12-foot wide lane."

[7] We are somewhat puzzled by the dissent's disapproving characterization of the authority underlying the majority opinion as being "precedents from long ago and far away." *Infra* at ___. Like the dissent, the majority opinion is based on a longstanding, and thus firmly rooted, rule of law, i.e., that a plaintiff's theory of causation must not be based on mere conjecture or speculation. The *Skinner* Court's articulation and explanation of this principle relies heavily on *Kaminski*, which in turn was predicated upon a legal distinction drawn by the Alabama Supreme Court "between reasonable inference and impermissible conjecture with regard to causal proof." *Skinner, supra* at 164. We believe, as did the *Skinner* Court, that an informed understanding of the principle that causation must not be based on speculation or conjecture is only enlightened by a considerate examination of the meaning behind the legal axiom. As Oliver Wendell Holmes observed a long time ago, "[i]n order to know what [the law] is, we must know what it has been . . . ." Holmes, The Common Law (1881), p 1.