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UNPUBLISHED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.

BANDSTRA, C.J. (*dissenting*).

Reviewing a motion for summary disposition granted under MCR 2.116(C)(10), we grant the benefit of any reasonable doubts to the party opposing the motion. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994). Thus, I conclude that, following the accident, the reservoir cover of the master brake cylinder was found to be loose and brake fluid had been expelled from that cylinder. Assuming also that The Brake Shop ("defendant") failed to secure the reservoir cover when doing warranty repair work on the brake system prior to the accident, I nonetheless conclude that Pelton has failed to come forward with sufficient evidence to create a genuine issue of material fact as to whether defendant's action was a legal cause of her accident.

Although the majority relies on precedents from long ago and far away to conclude otherwise, I think that the relatively recent Supreme Court decision in *Skinner v Square D Co*, 445 Mich 153; 516 NW2d 475 (1994), provides the best summary of current law here in Michigan on this issue. *Skinner* reasoned that, in cases where there are competing theories of causation arising out of the available evidence, liability cannot be imposed if the theory which implicates the defendant is merely "just as possible as another theory." *Skinner, supra* at 164. If "the probabilities [as to which theory is true] are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." *Id.* at 165, quoting *Mulholland v DEC Int'l Corp*, 432 Mich 395, 416, n 18; 443 NW2d 340 (1989), quoting Prosser & Keeton, Torts, (5th Ed), § 41, p 269.

Applying that analysis to this case, Pelton failed to come forward with sufficient evidence and summary disposition was properly granted. Pelton's expert identified two possible reasons that the brakes might have malfunctioned. The first was a brake seal he found to be defective upon his examination of the vehicle. At his deposition, the expert explained his opinion that the seal in the master cylinder had been "abraded to allow the leak to take place." When directly asked his opinion as to what caused Pelton's inability to bring her car to a stop, the expert opined that the defective master cylinder seal was the cause. Pelton does not argue and there is no evidence to suggest that defendant had anything to do with the defective seal.

The expert went on to suggest "a further possibility," the insecure master cylinder cap. However, the expert concurred with the deposition testimony of defendant's employees that the insecure cap could have caused the accident only if the reservoir was empty and he testified that braking power would be maintained if even "a half a teaspoon full, a very small amount" of brake fluid was left in the master cylinder. However, the expert had no direct factual basis to conclude that an insufficient amount of brake fluid was in the reservoir at the time of the accident. The only person to examine the reservoir after the accident, plaintiff's son, equivocally testified that there was "maybe a little bit left in there."

I conclude that the evidence presented by plaintiff would support a conclusion that, if the brake failure caused the accident,[1] that failure was more probably than not the result of the defective seal rather than the loose reservoir cap. At best, the evidence, viewed in a light favorable to Pelton, might suggest that the probabilities as to which of the competing theories is true are evenly balanced, or that each is just as possible as the other. The evidence produced clearly does not support the conclusion that the loose reservoir cap was more probably than not the cause of the brake failure, in comparison to the defective seal. Accordingly, under *Skinner*,

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[1] I note the record evidence suggesting that the accident at issue here was not the result of brake failure. Pelton's son, who was in the car with her when the accident occurred, testified that conditions were "wet" and "slippery," that the car slowed down "severely" when his mother applied the brakes and that he "felt the car slide" and "could sense the tires locking up" before the collision.

the trial court properly granted summary disposition to defendant.

I would affirm.

/s/ Richard A. Bandstra