

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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KENNETH DOBRIK,

Plaintiff-Appellant,

v

BOMBARDIER, INC.,

Defendant-Appellee,

and

ANDERSON SALES & SERVICE,

Defendant.

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UNPUBLISHED

December 26, 2000

No. 216197

Oakland Circuit Court

LC No. 97-536890-CZ

Before: Gribbs, P.J., and Kelly and Sawyer, JJ.

PER CURIAM.

Plaintiff Kenneth Dobrik appeals by right from the circuit court order granting summary disposition of his product liability claim against defendant Bombardier, Inc. We affirm.

Plaintiff was injured while riding a 1995 Sea-Doo model XP personal watercraft manufactured by defendant Bombardier, and purchased by plaintiff as new from defendant Anderson Sales and Service in April 1995.<sup>1</sup> According to plaintiff, the cause of his injury was the failure of the craft's steering system which resulted in his inability to turn the craft and avoid striking a dock.

Following this accident, plaintiff filed suit against both Bombardier and Anderson Sales, alleging that his injuries were the result of negligent design, manufacture, and marketing of the 1995 Sea-Doo XP's steering system. As part of discovery in this matter, expert representatives from each party performed a post-accident inspection of plaintiff's 1995 XP. During this inspection, gouges in the internal surface area of the steering stem arm, as well as the steering stem itself, were found. Both parties' experts indicated that although no screws were found at

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<sup>1</sup> Defendant Anderson Sales and Service is not a party to this appeal.

the time of the inspection, these gouges were consistent with marks which would have been created by driving drywall screws in between the craft's steering stem and steering stem arm. Bombardier's expert also noted that these gouges had cut into the key of the steering stem arm, causing substantial damage to the steering system's components and resulting in "the inability of the steering mechanism to fully function." During his deposition in this matter, plaintiff acknowledged that he drove two drywall screws into the steering stem the summer before his accident, but asserted that he had the steering system replaced by Anderson Sales later that same year. He had not asked Anderson Sales which parts of the system were replaced.

Following inspection of the Sea-Doo, Bombardier filed a motion for summary disposition, MCR 2.116(C)(8) and MCR 2.116(C)(10). Bombardier argued that because the evidence showed that plaintiff's injuries were caused by damage caused by plaintiff's alteration of the XP's steering system, it was not liable to plaintiff because the alteration was not reasonably foreseeable. The trial court agreed that the alteration by plaintiff was not foreseeable and granted summary disposition on that ground.

A motion for summary disposition under MCR 2.116(C)(10)<sup>2</sup> is subject to de novo review. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In order to defeat a motion for summary disposition under MCR 2.116(C)(10), a plaintiff must bring forth some evidence to establish a genuine issue of material fact. With respect to a suit for product liability, this entails production of admissible evidence showing that the defendant supplied a product that was defective and that the defect caused the injury. *Auto Club Ins Ass'n v General Motors Corp*, 217 Mich App 594, 604; 552 NW2d 523 (1996). A plaintiff may establish its case by circumstantial and direct evidence, but mere speculation and conjecture are insufficient to meet the burden imposed. *Skinner v Square D Co*, 445 Mich 153, 165; 516 NW2d 475 (1994). There must be more than a mere possibility that defendant's unreasonable conduct caused the injury. *Id.* We agree with the trial court that the evidence proffered by plaintiff here did not establish a genuine issue of material fact with respect to the existence of a design or manufacturing defect which caused his injuries.

Plaintiff presented evidence of a warranty bulletin involving a different watercraft, the 1995 HX model. Even accepting arguendo as true plaintiff's claim that Bombardier redesigned the upper support of the steering housing on the 1995 HX model, plaintiff's rationale for the reasons underlying that fact are no more than conjecture and are therefore insufficient to meet his burden establishing an issue of fact with respect to a defect in the system. See *Skinner, supra*, at 165. The warranty bulletin, which indicates that the steering arm on the HX Model may have been "improperly assembled" does not establish that the HX steering system was defectively designed, nor does plaintiff offer expert opinion that the single-key system initially used in the HX model was inadequate to withstand its intended use.

<sup>2</sup> Although Bombardier's motion for summary disposition was premised on both MCR 2.116(C)(8) and (10), the trial court did not specify which subsection of MCR 2.116(C) it was relying on when it granted the motion. Nonetheless, because both parties and the trial court relied on matters outside the pleadings, this Court will construe the motion as having been granted under MCR 2.116(C)(10). *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997).

Further, even if a single-key system was inadequate for the HX model, there is nothing in the record to establish that the same was true with respect to the XP. There may or may not be significant differences in these models. Plaintiff was required to develop this information in order to avoid summary disposition of his claim. This is not apparent from the record. MCR 2.116(G)(4). Plaintiff's supposition that the 1995 XP at issue here was defective because it used the same single-key system as the HX, is simply too speculative to create a factual dispute.

Nor did plaintiff create a factual dispute as to causation. Under Michigan products liability law, proving causation entails proof of two separate elements: (1) cause in fact, and (2) legal causation, also known as proximate cause. *Id.* at 162-163. The first of these elements, cause in fact, generally requires a showing that but for the defendant's negligence, the plaintiff would not have been injured. *Id.* at 163. On the other hand, legal or proximate cause involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences. *Id.* While proximate cause is a legal question reserved for the court, the question of cause in fact is an issue of fact to be decided by a jury. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 626; 513 NW2d 773 (1994).

Here, in finding that plaintiff's alteration of the steering system was not reasonably foreseeable, the trial court was addressing the issue of legal causation. However, in order for legal causation to even become a relevant consideration, a plaintiff must first adequately establish cause in fact. *Skinner, supra* at 163. In this case, plaintiff failed to create a factual dispute regarding whether, but for Bombardier's failure to place a key in the upper support, his accident would not have occurred, and thus any error in the trial court's decision as to legal causation was irrelevant. *Id.*

In challenging the trial court's decision as to legal causation, plaintiff argues that summary disposition on this ground was not proper because there remained a question of fact as to whether the "alterations" found by the parties' experts during the post-accident inspection of the craft were made before or after plaintiff's accident, and thus whether these alterations could have been the cause of his accident. In support of this argument, plaintiff asserts that as Anderson Sales assured him that it had "replaced the steering system" after plaintiff's initial alterations during the summer of 1995. Plaintiff also argues that we must consider the possibility that it may have been necessary for the person who towed his XP from the lake after the accident to have made modifications to the steering system in order to get the craft ashore, creating a material question of fact as to the existence of the alterations at the time of the accident. Plaintiff argues that the issue whether it was an alteration to the craft's steering system which caused his injuries, or whether those injuries were caused by a defect in the steering system as designed and manufactured by Bombardier, remains, precluding summary disposition. We do not agree.

Contrary to plaintiff's assertion that the "steering system" was completely replaced before his accident, the invoice issued by Anderson Sales indicates only that the "steering stem arm" had been replaced. Plaintiff acknowledge in this deposition that he did not ask Anderson Sales what specific parts were replaced. As previously noted, during the post-accident inspection of the vehicle, both parties' experts discovered screw marks consistent with plaintiff's initial alterations within the steering stem as well as the steering arm. Moreover, in light of plaintiff's testimony during his deposition that no modifications or alterations were done to the craft since

the accident, he is precluded from attempting to create a triable issue of fact by now contradictorily asserting the possibility of a subsequent modification. See, e.g., *Atkinson v Detroit*, 222 Mich App 7, 11; 564 NW2d 473 (1997). Plaintiff offered no evidence, save his own lay opinion that the single-key system was inadequate and therefore failed, which would contradict the opinion of Bombardier's expert that an alteration to the steering system caused a malfunction. As noted by the Court in *Skinner, supra* at 166, "[s]omething more should be offered the jury than a situation which, by ingenious interpretation, suggests the mere possibility of defendant's negligence being the cause of his injury."

Plaintiff also argues that even if this Court finds no error in the trial court's grant of summary disposition with respect to his product liability claim, the trial court still erred in dismissing the entire complaint against Bombardier because plaintiff also alleged that Bombardier was negligent in authorizing Anderson Sales as a certified Bombardier service center. Review of the complaint filed by plaintiff reveals no such allegation and we therefore find this argument to be factually without merit.

We also reject plaintiff's claim that despite the trial court's grant of summary disposition with respect to Bombardier, the trial court erred in granting summary disposition with respect to Anderson Sales. Contrary to plaintiff's implication, Anderson Sales was not dismissed from the suit in conjunction with Bombardier's motion for summary disposition. Rather, plaintiff's claims against Anderson Sales were dismissed without prejudice by stipulation of the parties some nine months later. In light of this fact, as well as the fact that plaintiff failed to raise this issue in his statement of questions presented, we reject plaintiff's claim of trial court error in the dismissal of Anderson from this suit. MCR 7.212(C)(5); *Marx v Dep't of Commerce*, 220 Mich App 66, 81; 558 NW2d 460 (1996).

Affirmed.

/s/ Roman S. Gribbs  
/s/ Michael J. Kelly  
/s/ David H. Sawyer