STATE OF MICHIGAN

COURT OF APPEALS

JOHN W. GRANT,

Plaintiff-Appellant,

v

SEPTIC TANK SYSTEMS CO.,

Defendant-Appellee.

UNPUBLISHED
December 14, 2001

No. 226792
Allegan Circuit Court
LC No. 98-021855-NO

Before: Wilder, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(10). The trial court concluded that plaintiff had failed to show a causal connection between defendant's alleged acts or omissions and plaintiff's injury. We affirm.

Plaintiff obtained a number of metal storage tanks for use in his scrap metal business. Defendant initially provided the tanks to Lonnie Holtsclaw, who later delivered them to plaintiff.[1] After accepting delivery, plaintiff allowed the tanks to sit on his property for approximately eight or nine months. When plaintiff finally attempted to dismantle one of the tanks with a welding torch, the resultant explosion caused plaintiff severe injuries. Plaintiff sued defendant, arguing that defendant had failed to empty the tanks of combustible or flammable materials before giving them to Holtsclaw. Plaintiff also argued that defendant had made material misrepresentations about the prior use of the tanks and that plaintiff would never have accepted the tanks if he had known that they had previously contained hazardous materials. Defendant filed a motion for summary disposition under MCR 2.116(C)(10), arguing that plaintiff had failed to present sufficient facts to show that defendant's actions or inactions caused plaintiff's injuries. The trial court agreed and granted defendant's motion.

We review de novo a trial court's order granting a party's motion for summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under that rule tests the factual support for a plaintiff's claim. *Id*. "The court considers the affidavits, pleadings, depositions, admissions, and other

[1] Plaintiff does not argue that he entered into a direct business relationship with defendant.

documentary evidence submitted or filed in the action to determine whether a genuine issue of any material fact exists to warrant a trial." *Id*. Further, "[t]he court is not permitted to assess credibility, or to determine facts on a motion for summary judgment. Instead, the court's task is to review the record evidence, and all reasonable inferences therefrom, and decide whether a genuine issue of any material fact exists to warrant a trial." *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994) (citations omitted).

Plaintiff argues that the following evidence sufficiently proved the issue of causation: (1) defendant previously owned the tanks in question, (2) defendant took no efforts to purge, clean, or otherwise prepare the tanks for transport, (3) plaintiff observed flame erupt from the tank once he applied the welding torch, and (4) the Michigan State Police hazardous materials inspector concluded that the tank probably exploded because it contained combustible or flammable materials.

In *Skinner*, *supra* at 164-165, our Supreme Court explained the causation proofs necessary to defeat a defendant's motion for summary disposition:

> [A]t a minimum, a causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, 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. [Footnote omitted.]

We conclude that the evidence relied on by plaintiff does not constitute substantial evidence from which a reasonable jury could conclude that more likely than not, but for defendant's actions or inactions, plaintiff would not have been injured.

First, plaintiff failed to present evidence that the storage tanks contained flammable or combustible liquids or vapors, while the tanks were in defendant's possession. Holtsclaw testified that none of the tanks that he removed from defendant's premises contained any liquid, and that he failed to smell any type of fuel in those tanks. Further, Holtsclaw testified that he inquired about the tanks' prior use and defendant told him that the tanks had been used to hold grease.[2] Plaintiff did not present any evidence regarding how or when defendant obtained the tank that exploded, and did not present any evidence regarding the actual contents of that tank.

Second, plaintiff failed to present evidence that the storage tanks contained flammable or combustible liquids or vapors, when the explosion occurred. Plaintiff admitted that he failed to check whether the tank was empty when he started to apply the welding torch, and that he failed to check for the smell of flammable materials. After the accident, the investigating State Police officer determined that the tank in question was "completely dry inside with no evidence of any combustible or flammable material." Further, the officer's examination of the other tanks received from defendant failed to turn up any evidence of flammable liquids or vapors. The officer did opine that "some sort of a flammable or combustible material" caused the tank to

[2] Yet, according to plaintiff, Holtsclaw told him that the tanks had been used to hold water.

explode. Yet, the officer could not rule out the possibility that such a substance was added to the tank *after* it arrived at plaintiff's property:

> From a criminal standpoint, the problem I had is there's no chain of custody on the tanks, per se. I couldn't—for example, if an attorney should ask me the question: Could I say that the local kids didn't dump a flammable material inside of [the tanks] or something like that, from a criminal standpoint, I could not testify to that. They're in a more or less open area that was accessible by trespassers and I couldn't determine that.

The officer's testimony coincided with plaintiff's admissions that the tanks were not kept in a secure location and that the occupants of the twelve homes on his property would have been able to access the tanks.

Although it is possible that defendant left some combustible substance in the tank that ultimately exploded, it is equally possible that someone introduced flammable or combustible materials to the tank in question during the eight or nine months that plaintiff stored the tanks on his property. "[C]ausation theories that are mere possibilities or, at most, equally as probable as other theories do not justify denying defendant's motion for summary judgment." *Skinner*, *supra* at 172-173. Plaintiff's causation theory is based on mere speculation or conjecture, and not on evidence. "'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, quoting *Jordan v Whiting Corp*, 396 Mich 145, 151; 240 NW2d 468 (1976). We conclude that the trial court properly granted defendant's motion for summary disposition for failure to demonstrate causation.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Michael R. Smolenski