STATE OF MICHIGAN

COURT OF APPEALS

ROCHEL COHEN, a/k/a RACHEL COHEN, and DANIEL COHEN, Plaintiffs-Appellees, v GREAT LAKES LIVE STEAMERS, INC., Defendant-Appellant.	UNPUBLISHED March 6, 2008 No. 275190 Oakland Circuit Court LC No. 2006-072161-NO

ROCHEL COHEN, a/k/a/ RACHEL COHEN, and DANIEL COHEN, Plaintiffs-Appellees, v GREAT LAKES LIVE STEAMERS, INC., Defendant-Appellant.	 No. 275801 Oakland Circuit Court LC No. 2006-072161-NO

Before: Gleicher, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

In these consolidated appeals, defendant appeals by leave granted two circuit court orders, the first denying its motion for summary disposition pursuant to MCR 2.116(C)(10), and the second striking its expert witness, Bradley Cook. We affirm the circuit court's denial of summary disposition, but reverse and remand with regard to the order striking Cook.

I. Facts and Proceedings

Defendant owns and operates a miniature ($1/8^{th}$-scale) railroad located at Starr Jaycee Park in Royal Oak. Park visitors are permitted free rides on the trains, which travel around the park at speeds of five- or six-miles per hour. Defendant's representatives control passenger seating on the train cars, drive the locomotives, and serve as the train conductors.

Plaintiff Rochel Cohen and her family visited the Starr Jaycee Park on August 7, 2005, and decided to take a ride on defendant's railroad.[1] Defendant's representative directed plaintiff, who weighed 230 pounds, to sit on the rear seat of a gondola-style railroad car. Plaintiff's daughter, who weighed 140 pounds, sat on the forward seat, and her 30-pound son sat on the floor of the gondola car, in front of both women.

Plaintiff recounted at her deposition that about halfway through the short train ride, she felt the railroad car "just flipping," and it then "disconnected" from the rest of the train. She and her children tumbled out of the car, landing on the grass. Plaintiff alleged that she sustained a serious neck injury during this accident.

Robert Winkel, the train conductor that day, occupied the car directly behind plaintiff and her children. Winkel saw plaintiff's gondola car "vibrating," which he attributed to its front wheels being off the track ("derailed"). According to Winkel, plaintiff's car was "[r]iding on the ties."[2] Winkel yelled at the engineer to stop the train. Before the train came to a complete halt, however, the derailed car began to tip. Within moments, Winkel recalled, "our passengers were on the ground."

Leonard Barry, the train's engineer, could not specifically remember plaintiff's accident, but suggested in his deposition that improper weight distribution could have caused the train derailment. Barry testified that defendant's representatives have the responsibility to assure "that people load in the cars properly," and must avoid "put[ting] the heavy person in the back and a little, tiny kid up in front." According to Barry, "[i]f there's too much weight on the rear" of a gondola car, the front of the car may "pick up," leading to a front wheel derailment. In answer to a question posed by defense counsel, Barry opined that proper weight distribution of passengers weighing 200, 130 and 30 pounds, would necessitate seating the heaviest passenger in the middle of the gondola car, and not in the back.

After the close of discovery, defendant moved for summary disposition pursuant to MCR 2.116(C)(10), on multiple grounds. Defendant first argued that plaintiffs' cause of action sounded in premises liability. According to defendant, any dangers posed by the park railroad qualified as open and obvious, and thus it owed no duty to protect plaintiff from injury. Defendant alternatively alleged that plaintiffs failed to present facts establishing defendant's negligence, and that they could not prove either cause in fact or proximate causation. Defendant further contended that the recreational land use act[3] barred plaintiffs' claims, or that a recklessness standard of care applied.[4]

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[1] Plaintiff Daniel Cohen's claims are derivative of the claims made by Rochel Cohen. The singular term "plaintiff" thus refers to Rochel only.

[2] The railroad ties are the beams that lay across a railroad bed to secure the rails.

[3] MCL 324.73301.

[4] Defendant has abandoned the last two claims on appeal.

Plaintiffs disputed that this case involved premises liability, and argued that Barry's testimony concerning proper weight distribution procedures during the train's loading process created a question of fact regarding defendant's negligence, cause in fact, and proximate causation of the accident. In support of their argument, plaintiffs emphasized Barry's deposition declaration that seating the heaviest passenger in the rear of the gondola car could cause a derailment. Defendant replied by producing an affidavit signed by Cook, a licensed professional engineer. In his affidavit, Cook opined that the weight distribution within plaintiff's railroad car did not cause the car to derail or to tip, and that "some movement Mrs. Cohen made was the likely reason the car tipped over." Plaintiffs responded by urging the circuit court to disregard Cook's opinions because defendant failed to timely identify Cook as an expert witness, and Cook had not been deposed. The circuit court denied summary disposition, finding that Barry's testimony created a question of fact regarding whether "[d]efendant was negligent in the seating arrangement."

Plaintiffs then moved to strike Cook as a trial witness. Plaintiffs asserted that although defendant named Cook as a "potential" expert witness in its original witness list, it neglected to timely supplement its discovery responses to reveal Cook's anticipated trial testimony. Defendant countered that it did not "retain" Cook until after plaintiffs offered the improper weight distribution theory in opposition to summary disposition. The circuit court granted plaintiffs' motion to strike Cook "[f]or the reasons stated by plaintiff[s]," and also emphasized the "imminent" trial date.

II. Summary Disposition Standard of Review

This Court reviews de novo a circuit court's summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, *supra* at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, *supra* at 183.

III. Summary Disposition Analysis

A. Premises Liability

Defendant contends that premises liability law applies to this case because "[p]laintiff's claim arises out of a dangerous condition on the land," and defendant both occupied the land and owned the instrumentality that allegedly caused plaintiff's injury. As an occupier of the land, defendant asserts, it had no duty to eliminate the open and obvious dangers posed by its trains.

"Premises liability is conditioned upon the presence of both possession and control over the land." *Merritt v Nickelson*, 407 Mich 544, 552; 287 NW2d 178 (1980). A "possessor" of land is

(a) a person who is in occupation of the land with intent to control it or

(b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or

(c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

[*Orel v Uni-Rak Sales Co, Inc*, 454 Mich 564, 568; 563 NW2d 241 (1997), quoting *Merritt, supra* at 552, quoting 2 Restatement Torts, 2d, § 328 E, p 170.]

"[P]ossession for purposes of premises liability does not turn on a theoretical or impending right of possession, but instead depends on the actual exercise of dominion and control over the property." *Kubczak v Chem Bank & Trust Co*, 456 Mich 653, 661; 575 NW2d 745 (1998). In *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 703; 644 NW2d 779 (2002), this Court applied the Black's Law Dictionary (7th ed) definitions of "possession" and "control." "Possession" means "[t]he right under which one may exercise control over something to the *exclusion of all others*," while "control" refers to "the power to . . . manage, direct, or oversee." *Id*. at 703-704 (emphasis in original). Pursuant to these definitions of possession and control, to qualify for the shelter of the open and obvious danger doctrine, defendant had to exercise exclusive "dominion and control" over the property.

Defendant admitted that it does not own the land, but uses it pursuant to a written contract with the City of Royal Oak. The record contains no evidence that defendant enjoys *exclusive* possession or control of the land on which it operates its trains. Although defendant avers that it had "control" of this land, it failed to produce a copy of its contract with Royal Oak, an affidavit, deposition testimony, or any other evidence proving its "dominion and control" over the property. Defendant therefore failed to carry its burden under MCR 2.116(G)(3)(b), and the circuit court properly denied summary disposition based on a premises liability theory.

Even assuming that defendant established its exclusive control of the land, plaintiffs could nevertheless assert a claim for negligence arising from defendant's operation of the train. In *Laier v Kitchen*, 266 Mich App 482, 493 (opinion by Neff, J.), 502 (opinion by Hoekstra, P.J., concurring in part and dissenting in part); 702 NW2d 199 (2005), this Court recognized that the open and obvious danger doctrine does not "preclude a separate claim grounded on an independent theory of liability based on the defendant's conduct." Furthermore, the open and obvious defense does not apply to an ordinary negligence claim. *Hiner v Mojica*, 271 Mich App 604, 615; 722 NW2d 914 (2006).

In this case, plaintiffs have presented an ordinary negligence action. Plaintiffs allege that defendant failed to safely operate the train ride by negligently distributing weight within plaintiff's gondola car. Because plaintiffs have put forward an independent theory of liability premised on defendant's conduct, rather than on its status as occupier of the land, the open and obvious danger doctrine has no application here.

We additionally observe that even if the open and obvious danger doctrine applied, a question of fact exists as to whether any dangers associated with the train ride were open and obvious. This Court has explained that when determining whether a danger is open and obvious,

the proper inquiry is "[w]ould an average user with ordinary intelligence have been able to discover the danger and the risk presented upon casual inspection?" *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). The record evidence reflects that an ordinary rider of defendant's railroad would not necessarily anticipate that merely sitting on the seat of a slow moving train car could result in injury. Barry and Winkel could not recall the occurrence of a similar accident. Cook noted in his affidavit that the railroad cars "are stable and will not tip" absent a passenger making a "sudden or unexpected movement." The record contains no indication that plaintiff engaged in any sudden or unexpected movements.[5] Plaintiff and her daughter denied doing anything other than sitting in the train car. Given this record, we cannot conclude as a matter of law that the train ride posed an open and obvious danger.

B. Negligence, Causation and Proximate Cause

Defendant next contends that it is entitled to summary disposition because plaintiffs cannot establish negligence, causation in fact, or proximate cause. According to defendant, plaintiffs failed to present any evidence establishing how or why the accident occurred, and the "mere occurrence" of plaintiff's fall from the moving train does not suffice to raise a reasonable inference of negligence. Defendant further argues that the evidence supports only a mere "possibility" that improper weight distribution caused the derailment and plaintiff's injury.

A prima facie negligence claim may be established by the use of legitimate inferences, as long as sufficient evidence removes the inferences from the realm of mere conjecture. *Berryman v K Mart Corp*, 193 Mich App 88, 92; 483 NW2d 642 (1992). "Negligence may be established by circumstantial evidence as well as by direct proof and they are equally competent, their relative convincing powers being for the jury to determine." *Spiers v Martin*, 336 Mich 613, 616; 58 NW2d 821 (1953).

Causation requires proof of both cause in fact and proximate cause. *Reeves v Kmart Corp*, 229 Mich App 466, 479; 582 NW2d 841 (1998). Cause in fact "generally requires a showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred." *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). The plaintiff must introduce evidence affording "a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result." *Id*. at 165 (internal quotation omitted). Normally, the issue of causation is for the jury. *Reeves*, *supra* at 480. Although the plaintiff bears the burden of proof as to causation, the plaintiff is not required to produce evidence positively eliminating every other potential cause of an accident. *Skinner*, *supra* at 159.

When a motion for summary disposition challenges causation pursuant to MCR 2.116(C)(10), "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*, *supra* at 161. "[I]f there is evidence which points to any 1 theory of causation,

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[5] Winkel testified that he "did not see the women do any of the things that we at the station say not to do," such as turning around in or reaching outside of the car.

indicating a logical sequence of cause and effect, then there is juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence." *Kaminski v Grand Trunk Western R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956) (internal quotation omitted).

Viewed in the light most favorable to plaintiffs, sufficient evidence exists in this case to present a prima facie case of negligence to a jury. Barry admitted that defendant's representatives "watched . . . at the loading station to make sure the weight's distributed properly on the car." According to Barry, seating the heaviest passenger in the rear of a gondola car could cause the wheels to "pick up toward the front," leading to a derailment. In fact, Barry further testified that if a heavy passenger seated in the rear of the car leaned back, "she could almost lift the front end of the car and derail it." This testimony amply established the standard of care expected of defendant, and supported at least a reasonable inference regarding the proximate consequences of violating that standard.

Plaintiff testified that defendant's representatives directed her and her children to their seats in the gondola car. A direct and reasonable inference of defendant's negligence arises from the fact that defendant placed plaintiff's 230-pound weight at the rear of her car, despite an admitted awareness that seating the heaviest passenger at the back could cause a derailment. Barry's testimony established that improper weight distribution could explain the derailment witnessed by Winkel. This evidence establishes a "logical sequence of cause and effect," and affords a reasonable basis for concluding that improper weight distribution caused plaintiff's gondola car to derail and fall over. Because the testimony of Barry and Winkel creates questions of fact regarding defendant's negligence, causation and proximate cause, the circuit court properly denied summary disposition on these grounds.

IV. Striking of Bradley Cook

We review for an abuse of discretion the circuit court's decision to strike Cook as a discovery sanction. *Local Area Watch v Grand Rapids*, 262 Mich App 136, 147; 683 NW2d 745 (2004). An abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). A court may preclude a party from introducing expert testimony at trial as a sanction for disobeying a discovery order. MCR 2.302(E)(2), MCR 2.313(B)(2)(b); *LaCourse v Gupta*, 181 Mich App 293, 296; 448 NW2d 827 (1989). However, "the mere fact that a witness list was not timely filed does not, in and of itself, justify the imposition" of a drastic sanction. *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990).

Defendant timely filed its initial witness list identifying Cook as a potential expert. Our review of the record reveals that defendant subsequently committed no violation of the circuit court's discovery order or the Michigan Court Rules. Therefore, the circuit court abused its discretion by striking Cook as an expert witness. On remand, the circuit court shall afford plaintiffs a reasonable opportunity to obtain an expert witness, and shall allow the parties adequate time to depose the named expert witnesses.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly