

STATE OF MICHIGAN
COURT OF APPEALS

JAMIE HARRISON,

Plaintiff-Appellant,

v

CARL HARRISON,

Defendant-Appellee.

UNPUBLISHED

August 23, 2012

No. 304864

Macomb Circuit Court

LC No. 10-001760-NO

Before: SAAD, P.J., and SAWYER and CAVANAGH, JJ.

PER CURIAM.

In this negligence action, plaintiff alleged that her finger caught on a metal protrusion on defendant's chain-link fence. Her finger was severed from her hand and could not be reattached. Plaintiff appeals the trial court's order that granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). For the reasons set forth below, we affirm.

This Court reviews de novo a trial court's decision to grant summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). A trial court has properly granted a motion such a motion, "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

To establish a prima facie case of negligence, a plaintiff must establish: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Henry v Dow Chem Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). As a social guest at defendant's home at the time of her injury, plaintiff was a licensee on the premises. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000); *Petraszewsky v Keeth (On Remand)*, 201 Mich App 535, 540; 506 NW2d 890 (1993). Thus, defendant owed plaintiff "a duty only to warn [her] of any hidden dangers [defendant] knows or has reason to know of, if [plaintiff] does not know or have reason to know of the dangers involved." *Stitt*, 462 Mich at 596. Further, to trigger defendant's duty to warn plaintiff of a hidden danger, the hidden danger must involve an unreasonable risk of harm. *Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 64-65; 680 NW2d 50 (2004).

We agree with the trial court that plaintiff presented insufficient evidence to create a genuine issue of material fact about causation. Proof of causation requires both cause in fact and proximate cause. *Haliw v Sterling Hts*, 464 Mich 297, 310; 627 NW2d 581 (2001). At issue here is whether plaintiff presented sufficient evidence of cause in fact. Cause in fact may be established by circumstantial evidence, but such proof must give rise to reasonable inferences of causation and not mere speculation as to a possible cause. *Skinner v Square D Co*, 445 Mich 153, 163-164; 516 NW2d 475 (1994). As our Supreme Court explained in *Skinner*, the burden of establishing causation “always rests with the complaining party, and no presumption of it is created by the mere fact of an accident.” *Id.* at 163, quoting *Howe v Michigan C R Co*, 236 Mich 577, 583-584; 211 NW 111 (1926). Further,

[t]o be adequate, a plaintiff’s circumstantial proof [of causation] must facilitate reasonable inferences of causation, not mere speculation. In *Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956), this Court highlighted the basic legal distinction between a reasonable inference and impermissible conjecture with regard to causal proof:

“As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deductible 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 1 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.”

We want to make clear what it means to provide circumstantial evidence that permits a reasonable inference of causation. As *Kaminski* explains, at 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. [*Id.* at 163-165.]

Here, plaintiff admittedly had “no idea” what caused her injury; she could not say how it happened or on what her finger became caught. The only evidence offered to suggest that a bolt on top of a gate rail caused plaintiff’s injury was her statement that defendant told her that he thought that her finger *may* have become caught on the bolt. However, plaintiff testified that she did not remember where on the gate she placed her hands; she could not even state with certainty that she placed her hands in the area where the bolt was located. Further, defendant testified that the bolt was not protruding from the gate, but was tightened down so that it was just a “bolt head.” He also testified that he did not see what caught plaintiff’s finger and that, after plaintiff was injured, he found her ring dangling from the top of a bent portion of the chain link,

suggesting that perhaps she caught her hand on the chain link itself. As the trial court aptly noted, there were “all kinds of things sticking out of the gate just by way of its construction,” and no one, including plaintiff knew “what part of the gate her finger hooked on.”

We hold that there was insufficient evidence to permit a finder of fact to deduce that it was more probable than not that plaintiff caught her finger on the bolt rather than in the chain link, in the metal ring affixing the chain link to the fence rails, or in any other portion of the fence. That plaintiff was injured is not an indication that defendant was negligent; rather, plaintiff bears the burden of establishing that the bolt was the cause. *Skinner*, 445 Mich at 164, quoting *Howe*, 236 Mich at 583-584. Plaintiff failed to present any evidence to establish a reasonable likelihood that her finger caught on the bolt rather than any other part of the fencing. Therefore, the trial court correctly ruled that plaintiff failed to establish a genuine issue of material fact on the element of causation. *Id.*

Because plaintiff failed to establish that the bolt caused her injury, we need not consider her argument that the bolt constituted a hidden danger that posed an unreasonable risk of harm. *Henry*, 473 Mich at 71-72. Nonetheless, plaintiff failed to show that the bolt was not readily observable by anyone using the gate, that the bolt was hidden or obscured in any way, or that plaintiff was prevented from seeing it. Thus, it cannot be said that the bolt was a “hidden” danger. Further, testimony established that the bolts were on the fence in the same position and condition for 27 years without prior incident. Therefore, nothing suggests that defendant knew, or should have known, that the bolts presented an unreasonable risk of danger to persons on his premises.

We also reject plaintiff’s claim that defendant’s decision to remove bolts and re-crimp the chain link after her injury created an inference that there was a latent defect in the fence. “When, after an event, measures are taken which, if taken previously would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event.” MRE 407. Further, while intentional spoliation of evidence may raise a presumption against a defendant, it would only apply if evidence shows “intentional conduct indicating fraud and a desire to destroy and thereby suppress the truth.” *Trupiano v Cully*, 349 Mich 568, 570; 84 NW2d 747 (1957), quoting 20 Am Jur Evidence, § 185, p 191. Plaintiff offers no evidence to suggest that defendant took any action with such intent. And, most importantly, plaintiff nonetheless failed to prove her negligence claim and cannot prevail. *Id.*; *Henry*, 473 Mich at 71-72.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Mark J. Cavanagh