STATE OF MICHIGAN

COURT OF APPEALS

DANIEL W. FISCHER,

Plaintiff-Appellant,

v

RIVERWOODS L.D.H.A., also known as AMURCON CORP, doing business as HICKORY WOODS APARTMENT COMPLEX,

Defendant-Appellee.

UNPUBLISHED

No. 190631
Ingham Circuit Court
LC No. 95-079557 NO

Before: Murhpy, P.J., and Gribbs and Gage, JJ.

GAGE, J. (dissenting).

I respectfully dissent. I would affirm the trial court's grant of summary disposition to defendant in light of plaintiff's failure to establish beyond mere conjecture that he was injured on defendant's property.

The trial court properly granted defendant summary disposition because plaintiff cannot prove that any action or failure to act by defendant caused his injury, and thus cannot establish a prima facie case of negligence *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). Even assuming that defendant owed plaintiff a duty of reasonable care and that the question whether defendant breached this duty should go to a jury, plaintiff must still establish proximate cause, which includes both cause in fact and legal or proximate cause, between the allegedly negligent act of defendant and his injury. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). Plaintiff has merely speculated regarding the cause in fact element.

While a plaintiff may establish causation circumstantially, the mere happening of an unwitnessed mishap neither eliminates nor reduces a plaintiff's duty to effectively demonstrate causation. *Id*. A plaintiff may prove cause in fact through the introduction of circumstantial evidence, but his circumstantial proof must facilitate reasonable inferences of causation, not mere speculation. *Id*. at 164. It is insufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. *Id*.

> The plaintiff must introduce evidence which affords 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. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant. [*Id*. at 165 (citations omitted).]

Plaintiff alleged several times in a deposition and in response to interrogatories that he fell on multiple occasions on a sidewalk within defendant's apartment complex. However, plaintiff also testified in his deposition that he had fallen even before he reached the apartment complex sidewalk. Furthermore, plaintiff testified more than once that he did not know during which of his falls he had injured his wrist. Plaintiff's statements illustrate that he does not know specifically either where or when he fell, or where or when he injured his wrist. According to plaintiff's own statements, it is just as probable that he slipped and injured his wrist before he reached the apartment complex sidewalk as it is that he fell and injured his wrist within the complex.

I conclude that plaintiff's testimony that he fell several times within the apartment complex does not exclude with a fair amount of certainty the reasonable hypothesis that plaintiff fell and injured his wrist outside the complex. *Id*. at 166. To permit plaintiff to proceed to the jury on his negligence claim would improperly invite the jury to guess regarding when and where plaintiff fell and when and where plaintiff injured his wrist. *Id*.

I would affirm.

/s/ Hilda R. Gage