STATE OF MICHIGAN

COURT OF APPEALS

BEVERLY HEIKKILA, as Personal Representative of the ESTATE OF SHERI L. WILLIAMS,

Plaintiff-Appellant,

v

NORTH STAR TRUCKING, INC.,

Defendant,

and

MARC ROLLAND SEVIGNY and J. R. PHILLIPS TRUCKING, LTD.,

Defendants-Appellees,

and

NORTH STAR STEEL CO.,

Defendant/Cross-Plaintiff-Appellee,

v

INTERNATIONAL MILL SERVICE, INC.,

Defendant/Cross-Defendant-Appellee.

UNPUBLISHED
December 7, 2004

No. 246761
Monroe Circuit Court
LC No. 00-011135-NI

Before: Smolenski, P.J., and White and Kelly, JJ.

PER CURIAM.

In this negligence action, plaintiff appeals as of right from the trial court's grant of summary disposition in favor of defendants. Plaintiff also appeals from the trial court's ruling excluding the testimony of three expert witnesses. We reverse the trial court's ruling with respect to the grant of summary disposition, but affirm the trial court's evidentiary ruling.

This case involved a fatal accident in which plaintiff's decedent, Sheri Williams, was struck in the head by an object as she drove her car. Plaintiff's theory is that a piece of slag[1] had been lodged in the tires of a truck driven by defendant Marc Rolland Sevingy ("Sevigny"), and owned by defendant J. R. Phillips Trucking Ltd. ("Phillips"). This truck was hauling slag from a steel mill owned by defendant North Star Steel Company ("North Star"). Although the facility was owned by North Star, defendant International Mill Service, Inc., ("IMS"), contracted with North Star to handle the slag-hauling portion of the job. Plaintiff claimed negligence against all defendants.[2]

In granting summary disposition, the trial court ruled that plaintiff could not establish that defendants' actions served as the proximate cause of the decedent's injuries. In *Lysogorski v Charter Twp of Bridgeport*, 256 Mich App 297, 298-299; 662 NW2d 108 (2003), this Court restated the standard of review applicable to a trial court's ruling on a motion for summary disposition pursuant to MCR 2.116(C)(10):

> We review the grant or denial of a motion for summary disposition de novo. A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint, and the court considers the affidavits, pleadings, depositions, admissions, and other evidence in a light most favorable to the non-moving party. The entire lower-court record must be reviewed, and if the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [Citations omitted.]

"To establish a prima facie case of negligence, a plaintiff must be able to prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Haliw v City of Sterling Hts*, 464 Mich 297, 309-310; 627 NW2d 581 (2001). "Proof of causation requires both cause in fact and legal, or proximate, cause." *Id.* at 310, citing *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994).

In *Skinner, supra* at 164-165, our Supreme Court addressed the requisite degree of proof a plaintiff must satisfy to survive summary disposition on the issue of proximate cause:

> To be adequate, a plaintiff's circumstantial proof 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:
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> > "As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not

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[1] "Slag" is defined as "the more or less completely fused and vitrified matter separated during the reduction of a metal from its ore." *Random House Webster's College Dictionary* (1997), p 1212.

[2] North Star's indemnity claim against IMS is not at issue here.

> deducible 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."
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> 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.

Here, there is no question that Williams' injuries were caused when something struck her windshield, dash board and steering wheel, and then her head, continuing through the car until it exited through the rear window. Spencer Maniaci, who was driving behind Williams, witnessed this, and indicated that the object was less than a foot in size, and irregularly shaped. Maniaci believed the object that struck Williams bounced off her trunk and came to a stop near the curb.

R. Matthew Brach, one of defendants' experts, explained that, based on the force and trajectory of the object which struck Williams, it was doubtful that the object merely fell off a truck. Responding to plaintiff's counsel's rhetorical question as to whether the object "fell from the sky," Brach also explained that such a conclusion was also not possible. In fact, Brach stated that the only possibility he was aware of was that the object was thrown from the tires of Sevigny's truck.

Considering evidence that the object that struck Williams did so as her car passed Sevigny's truck, Maniaci's testimony that he saw the object fly by Williams' car, and Brach's interpretation of the trajectory that an object went through Williams' car, from the windshield through the rear window, we find that plaintiff has set forth sufficient evidence to suggest that, more likely than not, the object probably was thrown from the truck, as opposed to falling off the truck, or falling from the sky, or coming from anywhere else. *Skinner, supra,* cautions against allowing a jury to base its decision on conjecture, which is merely guessing between two plausible explanations where there is nothing to suggest that either explanation has more force. In this case, based on this evidence, the only legitimate explanation appears to be that the object was hurled by Sevigny's tires towards Williams' car. Even if there were other explanations, the trajectory and velocity of the object, as well as the timing of the accident, make it more probable than not that the object was thrown from Sevigny's tires.

Moreover, we find that plaintiff has satisfied her burden of showing that the object was more likely than not a piece of slag from North Star's facility. Corporal Brett C. Ansel, of the Michigan State Police, investigated the accident scene. Ansel identified what he believed was

the object that struck Williams; the object was large and it was in the roadway. However, it was later determined that the object was composed of concrete, and not slag. Despite this, Ansel continued to believe that Williams was struck by slag. Ansel testified that he felt Williams' steering wheel, and felt a gritty substance that was similar in feel to the grit he felt when he handled a piece of slag.

Plaintiff's expert, Scott Stoeffler, provided an affidavit in which he explained that he inspected Williams' car and took samples for analysis. Based on his inspection of the material he took from Williams' car, Stoeffler opined "that more likely than not, the object that went through Ms. Williams' vehicle was composed primarily of carbon or alloy steel and was not a rock, stone or piece of concrete." This opinion bolsters plaintiff's theory that the object was slag, and not the concrete found at the scene.

Moreover, gouge marks found on the pavement suggest that the object was lodged in the truck's tires at the time the truck left North Star's facility. Lieutenant Danny Richards of the Michigan State Police was deposed about the gouge marks he found at the crash scene. Richards and Ansel found gouge marks that were "about ten feet, eight inches apart." These gouge marks ran parallel to the centerline of the roadway, in the inside lane, and followed the path of Sevigny's truck. Richards testified that the gouge marks were traceable back to North Star's facility. Ansel also observed that the marks entered North Star's facility. The gouges ended where the broken glass was found in the roadway at the accident scene. The gouges also "appeared . . . that they were very fresh." Sevigny's co-worker Dean Rioux saw the grooves in the westbound travel lane of the road. According to Rioux, the marks "almost looked like they started almost immediately as he left the North Star Gate." And the marks did not continue beyond where Williams' car had gone off the road.

Thus, plaintiff has provided evidence from which a jury could conclude that an object was wedged between Sevigny's trailer tires. The gouge marks were made on the path Sevigny traveled, from North Star's facility to the location of the accident. The gouge marks were "fresh," and evenly spaced a distance roughly equal to the circumference of a trailer tire. Moreover, despite the fact that no slag was found, and that the object initially believed to be the object that struck Williams turned out to be concrete, there is evidence that suggests the object that struck Williams was, in fact, slag.

Viewing this evidence in a light most favorable to plaintiff, we conclude that plaintiff has presented sufficient evidence to indicate a "reasonable likelihood of probability" that defendants' actions served as the proximate cause of Williams' death. *Skinner, supra* at 166. Plaintiff's theory of the case is more than mere conjecture or speculation as those terms are used in *Skinner* as there is evidence to support this theory. Moreover, plaintiff's theory does not appear to be "just as possible as another theory" because there is no other theory which accounts for an object of metal composition to be thrown with the velocity necessary to travel through Williams' car as it did. We note that *Skinner* also cautions against requiring "absolute certainty," *id.*, and conclude that plaintiff has satisfied the evidentiary threshold.

Plaintiff next argues that the trial court erred in concluding that Sevigny and Phillips owed no duty to Williams, as the harm allegedly suffered was not foreseeable. Questions regarding duty are for the court to decide as a matter of law, *Harts v Farmers Ins Exchange,* 461 Mich 1, 6; 597 NW2d 47 (1999), and are subject to de novo review, *Benejam v Detroit Tigers,*

Inc, 246 Mich App 645, 648; 635 NW2d 219 (2001). If there is no duty, summary disposition is proper. *Howe v Detroit Free Press, Inc*, 219 Mich App 150, 156; 555 NW2d 738 (1996). However, if factual questions exist regarding what characteristics giving rise to a duty are present, the issue must be submitted to the factfinder. *Id*.

"Duty" is a legally recognized obligation to conform to a particular standard of conduct toward another. *Id*. at 155. A duty of care may be specific, owing to the plaintiff by the defendant, or general, owing by the defendant to the public. *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 15; 596 NW2d 620 (1999). The analysis to determine whether a duty exists as a matter of law requires

> a determination whether the relationship of the parties is the sort that a legal obligation should be imposed on one for the benefit of another. In determining whether a duty exists, courts examine different variables, including
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> > "foreseeability of the harm, existence of a relationship between the parties involved, degree of certainty of injury, closeness of connection between the conduct and the injury, moral blame attached to the conduct, policy of preventing future harm, and the burdens and consequences of imposing a duty and the resulting liability for breach." [*Graves v Warner Bros*, 253 Mich App 486, 492-493; 656 NW2d 195 (2002) (internal citations omitted), citing *Krass v Tri-County Security Inc*, 233 Mich App 661, 668-669; 593 NW2d 578 (1999).]

Here, the facts developed during discovery were directed primarily at the issue of foreseeability.

In discussing the hazards associated with the roadways at North Star, plaintiff relies on the testimony of several people who were familiar with them. Sevigny found that the roadways there were "not good" as "there's a lot of [slag] laying all over the place." Sevigny agreed with plaintiff's counsel that if he picked up a piece of slag between his tires, it would cause a hazardous condition. Sevigny visually inspected the tires before he left; he looked at them from behind, and he checked to make sure there was nothing between them. Sevigny also kicked the tires to see if they were flat. Sevigny knew that other drivers use a rod to check if their tires were flat; however, Sevigny knew of no other way, other than a visual inspection, to insure that there was no object between his tires. After Sevigny initially loaded the truck, he noticed a piece of slag between the wheels of his fourth axle, which he removed. Sevigny rechecked his tires after he offloaded some slag. However, he did not check his tires after he reweighed his rig. Therefore, Sevigny drove his truck through the facility from the slag pile to the weigh station, and onto Front Street without checking his tires for any slag that might have been picked up between these two points.

Other witnesses offered different opinions. Dave Sterns, a crane operator with IMS, observed Sevigny pull a piece of slag from the truck tires while at North Star before the accident. Sterns told the police that it was common for drivers to pick up pieces of slag while driving on the facility grounds. But this observation was contradicted by Richard Hahey, a superintendent at IMS, who stated it was uncommon. Sterns added that most drivers were conscientious about checking their axles before leaving.

James Jonasen testified that he never saw pieces of debris on the roadways at North Star. However, Jonasen acknowledged that a large piece of slag on the roadway could be dangerous. He stated that "a piece of material the right size could be lodged in-between tires anywhere, yes, at any time and come out at any time." On the other hand, Rioux testified that "there's lots of debris" at the facility. Ronald Cutter testified that he was aware that removal of slag was an issue. Cutter acknowledged that the facility's roads were typical of a foundry's roads, in that there was "scrap laying alongside the track and stone on the road and things." Although Cutter never damaged his vehicle there, he noted that IMS "always had a sweeper running through there." However, Cutter also admitted that "for the most part it was fairly clean." David Suttles corroborated Cutter's testimony that the roads were clean. Suttles testified that the roads were in "fairly good shape" when he drove them. During his deposition, Suttles agreed with plaintiff's counsel that a piece of slag six inches in diameter would pose a safety concern. However, Suttles was unaware that anyone ever found such a piece of slag lying on the roadway.

Moreover, there was testimony about how a driver should guard against the possibility of picking up an object between his or her tires. Rioux stated that he checks his tires every time he loads or unloads the vehicle because the debris could cause a flat tire or a hazardous condition if caught between the tires; Rioux believed that checking tires is "common sense." Hahey also indicated that the drivers in the facility check their tires. Hahey noted that a "good operator" checks his vehicle every time he stops, to guard against "failures, oil leaks, stuff like that." Such a search also includes looking at tires, and checking between dual tires.

Looking at these facts, the issue of the foreseeability depends on the conditions of the road. We find that plaintiff has created a genuine issue of fact as to the condition of the roadway. Some of the witnesses testified that the conditions at the plant were dangerous, as slag and debris were frequently on the roadway, creating a factual dispute as to whether it was foreseeable that slag or other debris could become wedged between the truck drivers' tires. Moreover, the fact that IMS was concerned enough to sweep the premises for such slag suggests that errant pieces of slag posed a safety hazard. In addition, the fact that Sevigny removed a piece of slag from his tires shortly before the accident suggests that it was foreseeable that another piece of slag could become lodged in the tires.

We decline to determine the parameters of Sevigny's duty as a matter of law because factual questions exist regarding what characteristics giving rise to a duty are present. We point out that several witnesses testified that the North Star facility was kept in a clean manner, and that Sevigny inspected his tires before he initially weighed the truck. However, there is also no dispute that Sevigny did not check his tires after he drove through North Star's facility before he left. Because there is a question as to the conditions of the road, and whether Sevigny satisfied any duty by inspecting his tires, we conclude that the issue of Sevigny's duty, and therefore Phillips' duty, is properly an issue for the jury to resolve. *Howe, supra* at 156.

Finally, defendant agues that the trial court erred in excluding the testimony of three of plaintiff's expert witnesses: Thomas Bereza, Howard J. Bosscher and Jonathan Crane. The trial court ruled that these witnesses' testimony "lack[ed] the requisite evidentiary basis for want of specialization, scientific knowledge removing the testimony from the ambit of speculation." Testimony is admissible under MRE 702 if (1) the witness is qualified as an expert in a pertinent field; (2) the witness' testimony is relevant, or "will assist the trier of fact to understand the evidence or to determine a fact in issue"; and (3) the testimony is derived from "recognized

scientific, technical, or other specialized knowledge." *People v Beckley*, 434 Mich 691, 711; 456 NW2d 391 (1990).

We review for an abuse of discretion a trial court decision as to whether a particular witness qualifies as an expert. *In re Wentworth*, 251 Mich App 560, 562-563; 651 NW2d 773 (2002). Here, plaintiff fails to offer evidence establishing that these witnesses are qualified to offer expert opinions. The portion of the deposition transcripts submitted by plaintiff fail to set out these witnesses' qualifications. Although Bosscher was a former director of safety at a trucking company, there was nothing else to suggest what his educational or experiential background involved. Moreover, there was nothing to suggest what Bereza's and Crane's qualifications were. Plaintiff's brief merely includes a conclusory statement that "plaintiff's experts were clearly qualified to testify and were versed in a recognized discipline."

As to the second requirement, that these witnesses' testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue," plaintiff similarly fails to show how that is the case. No evidence was presented to establish that this testimony would provide "recognized scientific, technical or other specialized knowledge," as is required under MRE 702. Rather, plaintiff's response is that these witnesses based their proffered testimony on common sense. For this reason alone, these witnesses should not be allowed to testify as experts.

> [A]s a prerequisite to the admission of expert testimony, "there must be knowledge [by the expert] in a particular area that "belongs more to an expert than to the common man," i.e., if the jury is in as good a position as the expert to determine intelligibly the issue involved without enlightenment from those with a specialized understanding of the subject, then the expert should not be permitted to express his opinion. [*Franzel v Kerr Mfg Co*, 234 Mich App 600, 621; 600 NW2d 66 (1999), quoting *Cirner v Tru-Valu Credit Union*, 171 Mich App 163, 168-169; 429 NW2d 820 (1988).]

In this case, the "common sense" testimony offered by these witnesses is just as much in the purview of the jurors as with these experts. Therefore, we conclude that the trial court did not abuse its discretion in excluding these expert witnesses' testimony.

Accordingly, we reverse the trial court's grant of summary disposition in favor of defendants, and affirm the trial court's evidentiary ruling regarding the challenged expert witness testimony.

/s/ Michael R. Smolenski