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UNPUBLISHED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.

KELLY, J. *(Concurring in part and dissenting in part.)*

I respectfully dissent from the majority's conclusion that the trial erred in granting summary disposition in favor of defendants. I concur in all other respects.

I. Generally Applicable Law

We review de novo a trial court's decision to grant summary disposition pursuant to MCR 2.116(C)(10) to determine whether, when the evidence is considered in the light most favorable to the nonmoving party, there is a genuine issue of material fact. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the breach of duty proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Haliw v City of Sterling Heights*, 464 Mich 297, 309-310; 627 NW2d 581 (2001).

II. Causation

"[P]roving proximate cause . . . entails proof of two separate elements: (1) cause in fact, and (2) legal cause, also known as proximate cause." *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). Cause in fact requires a showing that "but for" the defendant's actions, the alleged injury would not have occurred. *Id.* at 163. Proximate cause involves the foreseeability of consequences, and whether a defendant should be held legally responsible for them. *Id.* Cause in fact must be established before proximate cause is an issue. *Id.* In granting summary disposition in defendants' favor, the trial court ruled that plaintiff could not establish that defendants' actions were the "proximate cause" of decedent's injuries:

> In the case at bar, there lacks adequate evidence for a reasonable trier of fact to conclude Defendants proximately caused Plaintiff's injury. The object has never been discovered. Test results report the object was comprised of ubiquitous materials: iron and paint. Plaintiffs' [sic] expert witnesses' testimony conclude and speculate with regard to their theories that proffer no basis in fact for the source of the object linked to Defendants' premises or actions. Plaintiffs' [sic] allegations lack the requisite linkage. While Plaintiffs' [sic] theory may be conceivably true, Michigan law does not permit a jury to speculate between a couple or more coequally supposable causes of injury.

The trial court correctly determined that plaintiff failed to establish a link between the decedent's death and any action on the part of North Star Co. (North Star) or International Mill Service, Inc. (IMS). Because plaintiff failed to establish that either of these defendants' actions caused plaintiff's death, the trial court properly granted summary disposition to defendants.

Plaintiff offers only circumstantial evidence of causation. While a plaintiff may prove causation with circumstantial evidence, she must effectively demonstrate causation:

> 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 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." [*Skinner, supra* at 163-164.]

Applying these principles to this case, plaintiff did not satisfy her burden of presenting "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 164-165. Plaintiff argues that the link between defendants and the decedent's injury is the slag that was picked up by Sevigny's truck. But plaintiff has failed to create a genuine issue of fact as to whether the object that caused the decedent's death was slag. The object that caused the injury has not been recovered. Plaintiff's expert, Scott Stoeffler, merely opined "that more likely than not, the object that went through [the decedent's] vehicle was composed primarily of carbon or alloy steel and was not a rock, stone or piece of concrete." While this opinion may bolster plaintiff's assertion that the object was not the concrete found at the scene, it does not demonstrate that the object was slag. Stoeffler did not, and could not, opine that the material was slag; rather, his opinion merely established that the object was something of a metallic nature. Even if the evidence demonstrates that the object *may* have been slag, the evidence, to an equal or greater extent, establishes that the object may have been any number of other things such as corroded steel, a scrap steel of unknown origin, or any broken part of a truck or car.

In granting summary disposition, the trial court relied on *Moody v Chevron Chemical Co*, 201 Mich App 232; 505 NW2d 900 (1993), in which the decedent died of allergic reaction after sustaining a bee sting. The plaintiff alleged that the bee that stung the decedent came from a hive that had been sprayed with the defendant's pesticide. In affirming the trial court's grant of summary disposition, this Court held:

> [O]ur review of the record discloses that the trial court found that, as a matter of law, plaintiff could not prove proximate causation. That is, because the stinging bee was not recovered, plaintiff could not prove that the bee that stung his son came from the nest that was sprayed, that it came in contact with the pesticide, or that its behavior was caused by exposure to the pesticide. Therefore, the causal sequence of events posited by plaintiff, although conceivably true, was not based on any evidence and was instead wholly speculative. Summary disposition was proper under MCR. 2.116(C)(10) because plaintiff failed to create an issue of material fact regarding causation. [*Id.* at 238.]

Here, just as in *Moody*, plaintiff can only speculate that the object causing the decedent's injury came from North Star and IMS's operations. At most, the evidence establishes that an object of unknown origin was picked up on the apron of the driveway leading to Front Street where the fresh gouge marks started. There is no evidence demonstrating where, when, or how the unidentified object came to be there. It could have been dropped by Sevigny's co-worker Dean Rioux's truck which, also carrying a truckload of slag, immediately preceded Sevigny onto Front Street. It could also have come from myriad other sources. The evidence demonstrates

that Front Street is located in an industrial area heavily traveled by trucks and other industrial traffic.

The evidence is without selective application to plaintiff's theory or any one of North Star's alternative theories. It is insufficient to submit a causation theory that, "while factually supported, is, at best, just as possible as another theory." Plaintiff has not presented substantial evidence from which a jury could conclude more likely than not that but for defendants' conduct, the decedent's injuries would not have occurred. *Skinner, supra* at 164-165.

Therefore, I agree with the trial court that plaintiff failed to create a genuine issue of factual causation. Instead, plaintiff "posited a causation theory premised on mere conjecture and possibilities." *Id.* at 174.

III. Duty

Although I agree with the majority that plaintiff produced sufficient evidence to create a genuine issue of fact as to whether the object that caused decedent's death was propelled by the truck driven by defendant Marc Sevigny and owned by defendant J. R. Phillips Trucking Ltd. (Phillips), I believe that the trial court correctly determined as a matter of law Sevigny and Phillips owed no duty to the decedent to detect and remove that object.[1]

Generally, there is no duty obligating one person to aid or protect another unless there is a special relationship between them or some special circumstance, *Beaudrie v Henderson,* 465 Mich 124, 141; 631 NW2d 308 (2001) *and* the protected party is readily identifiable as foreseeably endangered. *Murdock v Higgins,* 208 Mich App 210, 214-215; 527 NW2d 1 (1994). In determining whether a duty exists, a court must consider the foreseeability of the harm, the relationship between the parties, the degree of certainty of injury, the closeness of the connection between the conduct and the injury, any moral blame attached to the conduct, any policy of preventing future harm, and the consequences of imposing a duty and the resulting liability for breach. *Krass v Tri-County Security, Inc*, 233 Mich App 661, 667-669; 593 NW2d 578 (1999). Whether a duty exists is a question of law for the court. But if the determination of duty depends on factual findings, the jury must make those findings. *Holland v Liedel*, 197 Mich App 60, 65;

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[1] Plaintiff additionally alleged that IMS had a contractual duty to keep its premises "clean and free" from debris, i.e. slag. But our Supreme Court recently held in *Fultz v Union-Commerce Associates,* 470 Mich 460, 460; 683 NW2d 587 (2004):

> [L]ower courts should analyze tort actions based on a contract and brought by a plaintiff who is not a party to that counteract by using a "separate and distinct" mode of analysis. Specifically, the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based upon that contract will lie.

Plaintiff failed to show any such independent duty on the part of IMS.

494 NW2d 772 (1992). If there is no duty, summary disposition is proper. *Howe v Detroit Free Press, Inc*, 219 Mich App 150, 156; 555 NW2d 738 (1996).

As recognized by the majority, the "facts developed during discovery were directed primarily at the issue of foreseeability." Yet, the legal determination of duty does not rely on foreseeability alone, but implicates several other factors. Plaintiffs have not produced any evidence that would support the finding of a relationship between the decedent and defendants, special circumstances, the degree of certainty of injury, any connection between defendant's conduct and the decedent's injury, moral blame attached to defendants' conduct, or the burdens and consequences of imposing a duty under these circumstances. *Beaudrie, supra* at 124; *Krass, supra* at 667-669. As a matter of law, plaintiff points to no case or statute establishing a special relationship or circumstance. Plaintiff also cites no regulation or industry standard imposing a duty of inspection before entering onto a public roadway. On this record, no genuine issues of fact exist regarding "what characteristics giving rise to a duty are present." *Howe, supra* at 156. The trial court did not err in concluding, as a matter of law, that Sevigny and Philips owed no duty to the decedent.

Yet I would point out that even assuming an on-going duty to inspect tires and further assuming Sevigny's tires picked up an object after his last inspection, the evidence does not establish that Sevigny breached the alleged duty to inspect tires before leaving North Star premises. There is no evidence that Sevigny's truck picked up any object *before* leaving the North Star, the point at which plaintiff alleges that Sevigny had a duty to inspect. The gouge marks relied on by plaintiff indicate that an object was picked up, at the earliest, as the truck drove over the apron abutting Front Street, which would have been *after* the point in time plaintiff alleges Sevigny should have inspected the tire. Thus, the fact that the object was picked up by the truck, does not create a genuine issue of fact as to whether Sevigny inspected the tires before he left North Star as plaintiff alleged he should have.

IV. Expert Witnesses

I do agree with the majority that the trial court did not abuse its discretion in excluding plaintiff's expert witnesses. After review of the record, there is a total absence of any evidence establishing that these witnesses are qualified to offer expert opinions. As the majority notes, "Plaintiff's brief merely includes a conclusory statement that "plaintiff's experts were clearly qualified to testify and were versed in a recognized discipline" and "No evidence was presented to establish that this testimony would provide "recognized scientific, technical or other specialized knowledge," as is required under MRE 702." Because plaintiff fails to articulate and identify any supportive evidence of the experts' qualifications and basis for the expert opinions, I agree that on this record, the trial court properly excluded the proffered experts.

/s/ Kirsten Frank Kelly