

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD A. BOUMA,

Plaintiff-Appellant,

v

BRAVOGRAND, INC. and BISON REALTY,
LLC,

Defendants-Appellees,

and

QUALITY DINING, INC.,

Defendant.

UNPUBLISHED

July 28, 2011

No. 297044

Kent Circuit Court

LC No. 08-002750-NO

Before: SHAPIRO, P.J., and O'CONNELL and OWENS, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for directed verdict. We affirm.

This case arises from an accident on November 20, 2006, in which plaintiff was injured when he fell while preparing to clean a roof on defendants' property. Plaintiff had climbed a ladder that consisted of two pieces: one stationary piece attached to the roof of the property, and the other a detachable extension reaching to the ground. Plaintiff testified that before he used the ladder, he put some weight on it to make sure it was safe. He did not notice anything wrong with the ladder and would not have used it if he thought something was wrong. Plaintiff climbed the ladder, carrying cleaning supplies in one hand and holding onto the ladder with the other. As he reached the top of the ladder, he fell with the ladder still in his hand. He did not see, hear, or feel anything to indicate that the ladder was going to detach from the roof. Plaintiff fractured his elbow as a result of the fall.

Defendants investigated the accident and prepared a report; however, the report itself was apparently missing and was not admitted at trial. Plaintiff did not call as a witness the creator of the report. At the close of plaintiff's proofs, defendants moved for a directed verdict. The court took the motion under advisement, and defendants presented their case, followed by plaintiff's

rebuttal. On the fourth day of trial, the court again heard arguments on defendants' motion. After hearing the parties' arguments, the court granted defendants' motion for directed verdict.

We review de novo a trial court's decision regarding a motion for directed verdict. *Taylor v Kent Radiology, PC*, 286 Mich App 490, 499; 780 NW2d 900 (2009). A motion for directed verdict is essentially a challenge to the sufficiency of the evidence in support of a jury verdict. *Id.* This Court views the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Id.* A directed verdict is inappropriate if reasonable people could honestly reach different conclusions about whether the nonmoving party established the claim. *Id.* at 500.

We conclude that the directed verdict in this case was proper. To establish a prima facie case of negligence, a plaintiff must prove four elements: (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). Breach of the duty requires determination of a general standard of care and a specific standard of care; causation requires both cause in fact and proximate cause. *Case v Consumers Power Co*, 463 Mich 1, 6 n 6; 615 NW2d 17 (2000). Cause in fact may be established by circumstantial evidence, but such proof must be subject to reasonable inferences and not mere speculation. *Skinner v Square D Co*, 445 Mich 153, 163-164; 516 NW2d 475 (1994). An explanation that is consistent with known facts but not deducible from them is impermissible conjecture. *Id.* at 164. It is not sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. *Id.* 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 164-165.

In the present case, plaintiff failed to show that defendants breached their duty or that defendants acted in any way to cause plaintiff's injury. The record contains nothing to establish the nature of the allegedly defective condition. The ladder apparently detached from the roof, but conjecture would be required to determine whether the detachment resulted from a problem with the ladder, the means of attachment, the material into which it was attached, a movement made by plaintiff, or some other cause. Plaintiff correctly asserts that there was circumstantial evidence that defendants' negligence was a possible cause of plaintiff's injury. The same evidence, however, equally supports causes unrelated to any negligence by defendants.

Moreover, the doctrine of *res ipsa loquitur* does not save plaintiff's case. To invoke the doctrine of *res ipsa loquitur*, a plaintiff must show: (1) that the event was of a kind that ordinarily does not occur in the absence of negligence; (2) that it was caused by an agency or instrumentality within the exclusive control of the defendant; (3) that it was not due to any voluntary action of the plaintiff; and (4) that evidence of the true explanation of the event was more readily accessible to the defendant than to the plaintiff. *Woodard v Custer*, 473 Mich 1, 6-7; 702 NW2d 522 (2005).

Here, the record lacks sufficient evidence on the third element of the doctrine. The evidence did not establish whether the ladder itself was defective, or whether there was a defect in the roof, or the attachment, or some other aspect of the equipment. In addition, the evidence indicated that plaintiff's own actions could have caused the ladder to detach.

Lastly, to the extent that plaintiff argues the missing investigation report or the missing ladder creates an inference of negligence, the argument is unfounded. The rule is “the intentional spoliation or destruction of evidence raises the presumption against the spoliator where the evidence was relevant to the case or where it was his duty to preserve it, since his conduct may properly be attributed to his supposed knowledge that the truth would operate against him.” *Trupiano v Cully*, 349 Mich 568, 570; 84 NW2d 747 (1957) (quoting 20 Am Jur, Evidence, § 185, p 191). However, the *Trupiano* Court noted that there was more to the rule than this:

“Such a presumption can be applied only where there was intentional conduct indicating fraud and a desire to destroy and thereby suppress the truth. Moreover, while the spoliation of evidence raises a presumption against the person guilty of such act, yet such presumption does not relieve the other party from introducing evidence tending affirmatively to prove his case, insofar as he has the burden of proof. The spoliation or suppression of evidence is a circumstance open to explanation.” [*Id.*, continuing to quote 20 Am Jur, Evidence]

There is no evidence in this case that defendants acted with intent to destroy the report or the evidence. Defendants asserted that they did not know the location of the ladder or of the report. However, plaintiff made no further effort to obtain either item or to compel defendants to produce them. In fact, although the ladder and report were unavailable, plaintiff could have called the report’s creator to testify as to its contents. Thus, plaintiff has not shown the information was unavailable and has not shown intentional conduct by defendants regarding the alleged spoliation.

Affirmed.

/s/ Peter D. O’Connell
/s/ Donald S. Owens