

STATE OF MICHIGAN
COURT OF APPEALS

CARMELLO DONALD MALTESE and JUDY
MALTESE,

UNPUBLISHED
April 10, 2001

Plaintiffs-Appellants,

v

No. 214292
Macomb Circuit Court
LC No. 97-000897-NI

CHERYL LYNN AMARIDO and CAMBRIDGE
TOP SOIL, INC.,

Defendants,

and

DAN'S EXCAVATING, INC., and LOWE
CONSTRUCTION CO., INC.,

Defendants-Appellees.

Before: Markey, P.J., and Murphy and Collins, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting summary disposition in favor of defendants-appellees, Dan's Excavating, Inc., and Lowe Construction Co., Inc. (defendants). We reverse and remand for further proceedings.

Plaintiffs first argue that the circuit court improperly granted summary disposition under MCR 2.116(C)(10) because a genuine issue of material fact existed regarding whether a dirt mound allegedly created by defendants obstructed the view of defendant Cheryl Lynn Amarido and plaintiff Carmello Maltese as they approached an intersection and was a proximate cause of the accident that occurred at the intersection. We agree. This Court reviews a trial court's grant or denial of a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual basis underlying the plaintiff's claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). We review the pleadings, affidavits, depositions, and any other documentary evidence in a light most favorable to the nonmoving party. *Id.* The motion may be granted when, except with regard to the amount of damages, no genuine issue of material fact exists and

the moving party is entitled to judgment as a matter of law. *Morris v Allstate Ins Co*, 230 Mich App 361, 364; 584 NW2d 340 (1998). A court may not make factual findings or weigh witness credibility in deciding a motion for summary disposition. *Id.*

In order to prove negligence, a plaintiff must show that the defendant owed a legal duty to the plaintiff, that the defendant breached or violated that duty, that the plaintiff suffered damages, and that the breach was a proximate cause of the damages suffered. *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). Here, the circuit court granted defendants' motion for summary disposition on the basis that plaintiffs failed to present sufficient evidence to establish that defendants' actions were a proximate cause of plaintiffs' damages.

"[P]roving proximate cause actually 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).

The cause in fact element generally requires showing that "but for" the defendant's actions, the plaintiff's injury would not have occurred. On the other hand, legal cause or "proximate cause" normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences. A plaintiff must adequately establish cause in fact in order for legal cause or "proximate cause" to become a relevant issue. [*Id.* at 163. (citations omitted).]

Cause in fact may be established by circumstantial evidence that permits "reasonable inferences of causation, not mere speculation." *Id.* at 163-164. It is not sufficient to present a causation theory, even if supported by evidence, that is just as possible as another theory. *Id.* at 164. However, "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." *Id.*, quoting *Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956). "All that is necessary is that the proof amount to a reasonable likelihood of probability rather than a possibility." *Skinner, supra* at 166, quoting 57A Am Jur 2d, Negligence, § 461, p 442.

The circuit court determined that plaintiffs could not establish that defendants' actions were a proximate cause of the accident because Amarido testified at her deposition that the mound of dirt did not obstruct her view of the intersection. However, the record shows that Amarido's deposition testimony was contradictory on the issue whether the mound of dirt obstructed her view of the intersection. Generally, deposition testimony that is clear, intelligent, and unequivocal should be considered binding against the deponent in the absence of any explanation, modification, or showing of mistake. *Gamet v Jenks*, 38 Mich App 719, 726; 197 NW2d 160 (1972). However, where the deponent testifies in a conflicting manner, summary disposition may not be appropriate. *Miller v Foster*, 122 Mich App 244, 249; 332 NW2d 454 (1982). Further, "where a factual issue is raised by evidence outside the party's own conflicting statements, summary judgment does not necessarily follow." *Braman v Bosworth*, 112 Mich App 518, 520; 316 NW2d 255 (1982).

In this case, not only was Amarido's testimony conflicting, but other witnesses to the accident, including the two passengers in Amarido's vehicle and the driver of the vehicle behind Carmello Maltese's vehicle, testified that the view of the intersection was obstructed by the mound of dirt, and that they believed the obstruction caused the accident. The circuit court apparently disregarded this testimony as irrelevant. However, testimony is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401 (emphasis added).

We conclude that the testimony of those in the car with Amarido, who observed the intersection and Amarido's behavior as she entered that intersection, was relevant to the issue whether the dirt mound obstructed her view and caused the accident. Further, the driver of the vehicle following Carmello Maltese's vehicle at the time of the accident, Paul Lakawskas, testified that he lived in the area where the accident occurred, that he was very familiar with the intersection where the accident occurred, that he had approached the intersection from the same direction as Amarido was approaching just prior to the accident, and that his vision of the intersection was obstructed by the mound of dirt and machinery at defendants' work site. He further testified that he believed the mound of dirt caused the accident. Defendants contend that this testimony is not relevant because Lakawskas is not an expert. However, Lakawskas' lay opinion testimony was based on his perceptions and would assist a trier of fact in understanding the circumstances at the intersection where the accident took place. MRE 701; *McPeak v McPeak*, 233 Mich App 483, 493; 593 NW2d 180 (1999). Thus, any challenge to his testimony would be to its weight, not its admissibility.

Although the officer at the scene did not report any obstruction and testified that none of the witnesses or drivers mentioned any obstructions at the time of the accident, and plaintiff Carmello Maltese testified at his deposition that he did not see any obstruction, we conclude that the evidence presented by plaintiff was sufficient to create a question for the jury with regard to causation. As noted above, a court may not make factual findings or weigh witness credibility in deciding a motion for summary disposition. *Morris, supra*. It is for the trier of fact to weigh disputed testimony. *Forton v Laszar*, 239 Mich App 711, 717; 609 NW2d 850 (2000).

Contrary to defendant's assertions, evidence that plaintiff was driving in excess of the speed limit and that there may have been obstructions other than the mound of dirt that affected Amarido's view of the intersection does not preclude a finding that the mound of dirt was a proximate cause of the accident. The testimony of the witnesses to the accident, if accepted by a trier of fact, would be sufficient to support plaintiff's theory that, more likely than not, the mound of dirt was a proximate cause of the accident. While plaintiff's speed may have been a contributing factor to the accident, if a trier of fact accepted the testimony that Amarido's view of the intersection was obstructed, that trier of fact could also find that, but for obstructions at the intersection, Amarido could have avoided the accident by not venturing into the intersection until Carmello Maltese passed. We note that, unlike the accident in *Skinner, supra*, there were witnesses to the accident in this case. Here, plaintiff's theory is not one of mere speculation, but is one that has a basis in the evidence and presents a logical sequence of cause and effect that "amount[s] to a reasonable likelihood of probability rather than a possibility." *Skinner, supra* at 164, 166, quoting 57A Am Jur 2d, Negligence, § 461, p 442.

Plaintiffs argue next that the trial court abused its discretion in failing to grant their request to amend their complaint to include allegations that construction equipment under defendants' control was the cause of the accident. This Court reviews a trial court's decision to grant or deny a motion to amend pleadings for an abuse of discretion. *Doyle v Hutzell Hospital*, 241 Mich App 206, 211-212; 615 NW2d 759 (2000). Leave to amend a pleading "shall be freely given when justice so requires." MCR 2.118(A)(2); *Doyle, supra*.

A trial court may allow amendment of the complaint after summary disposition has been granted to the opposing party, unless amendment would not be justified. MCR 2.116(I)(5); *Doyle, supra*. Here, the circuit court ruled that amendment of plaintiffs' complaint to include an allegation that construction equipment under defendants' control also obstructed Amarido's view of the intersection would not be justified because "the deposition testimony of Amarido and plaintiff Carmello Maltese[] precludes any factual dispute on this issue." In light of our conclusion that the evidence presented by plaintiff was sufficient to establish a material factual issue, we find that the trial court abused its discretion in denying plaintiffs' request to amend their complaint.

In light of our resolution of the preceding issues, we need not address plaintiffs' remaining issue on appeal.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Jeffrey G. Collins