STATE OF MICHIGAN

COURT OF APPEALS

JACK HARRIS and MARY HARRIS,

Plaintiffs-Appellants,

v

CARS AND CONCEPTS, INC., a Michigan corporation,

Defendant-Appellee.

UNPUBLISHED
December 17, 1996

No. 188911
LC No. 94-13655-NO

Before: Doctoroff, C.J., and Corrigan and R.J. Danhof,* JJ.

PER CURIAM.

In this premises liability action, plaintiffs appeal by right the grant of summary disposition to defendant under MCR 2.116(C)(10). We affirm.

Plaintiff Jack Harris,[1] a driver who regularly transported cars to and from defendant's plant, slipped and fell while getting out of a car on a carrier parked at defendant's yard. To haul the cars, plaintiff drove a car carrier with a double-decker trailer. On June 17, 1992, plaintiff loaded ten Mustangs onto his tractor-trailer at a Ford plant and drove to defendant's plant. Plaintiff noticed a three-foot-square spill of oil on the yard of defendant's unloading area. A substance used to dry spills had been placed over the oil. Plaintiff stepped in the spill, but wiped off his feet. Plaintiff unloaded the cars from his carrier truck, loaded ten more onto his truck and returned to Ford. Plaintiff testified in his deposition that he had wiped his feet frequently, so the oil on his shoes was gone at that point. After unloading and loading again, he went back to defendant's plant for the second time that morning. Plaintiff looked for the oil spill, but noticed that other trucks had driven through it, spreading the substance in spots over the yard. Plaintiff stepped over the oil spots while unloading and loading his truck. Plaintiff said he "could have" stepped in an oil spot at that time, but he could not say definitely that he did so.

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Plaintiff then loaded a Mustang onto the top of another driver's trailer. Plaintiff got out of the car and closed the door. His feet slipped and went from underneath him on the truck's narrow walkway. Plaintiff then fell between the "skids" (the rails of the trailer) onto the blacktop yard below. Immediately after he fell, plaintiff noticed that his shoes were oily.

The trial court granted defendant's motion for summary disposition because the oil and fluids on defendant's premises comprised an open and obvious danger. The court concluded that a reasonable defendant would not foresee that plaintiff would proceed despite this known danger. We review de novo a trial court's grant of summary disposition. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995).

Plaintiff argues that the slippery fluids on defendant's yard posed an unreasonable risk of harm and that he had no choice but to proceed in the face of this danger to do his job. Further, plaintiff contends that the obvious nature of the danger did not excuse defendant's duty of care because defendant should have foreseen that plaintiff would proceed in the face of the danger. According to plaintiff, the open and obvious defense shields a premises owner or occupier only from his duty to warn, but his overriding duty to protect remains unaltered. We agree.

The lower court erroneously concluded that defendant should not have anticipated the harm based solely on its finding that the danger was open and obvious. Our Supreme Court has recently clarified that the question of duty involves more than the obviousness of the danger. *Bertrand v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1995) and *Riddle v McLouth Steel*, 440 Mich 85; 485 NW2d 676 (1992) hold that a defendant can be liable even for an open and obvious danger where "the possessor ha[d] reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk." *Bertrand*, *supra* at 612 (citation omitted). The trial court did not undertake this type of cost-benefit analysis, but instead relied on only the obviousness of the danger. Under *Bertrand* and *Riddle*, the trial court erred in its duty analysis.

Nevertheless, the court reached the correct result. We will not reverse where a trial court reaches a correct result for the wrong reason. *In re Powers*, 208 Mich App 582, 591; 528 NW2d 799 (1995). We instead affirm because of the absence of a genuine issue of material fact on the question of causation.

Plaintiff argues that a review of the record in a light most favorable to him reflects substantial evidence demonstrating a causal link between the dangerous fluid on defendant's premises and his fall. Plaintiff's argument fails because the proofs show no reasonable likelihood of probability that a slippery condition on defendant's premises caused plaintiff's accident.

In *Skinner v Square D Co*, 445 Mich 153, 161-162; 516 NW2d 475 (1994), our Supreme Court discussed the degree of proof necessary to establish a genuine issue of causation. The Court confirmed that, while the mere occurrence of an accident does not aid in establishing causation,

circumstantial evidence may be considered. *Id.* at 163. The Court explained the distinction between causal proof and insufficient speculation or conjecture:

> 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. [*Id.* at 164, quoting *Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956) (emphasis added).]

The Court emphasized that a plaintiff must do more than "submit a causation theory that, while factually supported is, at best, just as possible as another theory." *Skinner, supra* at 164. Instead, the plaintiff must submit "substantial evidence" from which a jury could conclude that it is "more likely than not" the plaintiff's injuries would not have occurred absent the defendant's conduct. *Id.* at 164-165. The Court further expressed its agreement with 57A Am Jur 2d, Negligence, § 461, p 442, quoting as follows:

> *All that is necessary is that the proof amount to a reasonable likelihood of probability rather than a possibility.* The evidence need not negate all other possible causes, but such evidence must exclude other reasonable hypotheses with a fair amount of certainty. Absolute certainty cannot be achieved in proving negligence circumstantially; but such proof may satisfy where the chain of circumstances leads to a conclusion which is more probable than any other hypothesis reflected by the evidence. However, if such evidence lends equal support to inconsistent conclusions or is equally consistent with contradictory hypotheses, negligence is not established. [*Id.* at 166-167 (emphasis added).]

The instant record evidence does not establish a reasonable likelihood of probability that plaintiff's shoes picked up oil from defendant's premises, which caused his fall. Plaintiff has not submitted evidence from which a jury could conclude that it was more likely than not that he would not have fallen absent the oil on defendant's premises. Plaintiff testified that he could have stepped in oil. Plaintiff also stated, however, that he lost his balance due to a shift in his weight as he swung the car door shut while it was mounted on another driver's carrier. Although plaintiff's testimony provides more than one plausible explanation for plaintiff's fall, his theory of causation remains conjectural. This testimony does not establish a reasonable likelihood that plaintiff fell because of an oil spill on defendant's premises.

Upon plaintiff's second visit to defendant's premises that day, plaintiff observed the oil spill that had been spread over the yard. Plaintiff *could have* stepped in oil during his return visit to defendant's

premises. On the other hand, plaintiff could not say that he stepped into the oil spots. In fact, he tried to avoid stepping into any spills not only for his own safety, but also to avoid being penalized by his employer if he accidentally were to get oil inside the cars. Plaintiff's theory that the oil on his shoes was from defendant's premises and caused his fall is mere speculation.

While the record contains evidence that plaintiff discovered oil on his shoes "right after" he fell, no evidence demonstrates that plaintiff had oil on his shoes at the time he fell. Plaintiff testified that he had gotten oil on his shoes on his first visit to defendant's premises earlier that day. He also testified that the dust at the Ford plant absorbed this oil from his shoes before he returned to defendant's premises. Before the fall, plaintiff did not think that he had oil on his shoes. If he thought he had, he would not have gone up on the carrier. Though he observed oil on his shoes "right after" he fell, he could have picked up this oil on his shoes *after* he fell when he hit the oily blacktop. Moreover, when plaintiff's shoes became oily is not material. The pertinent inquiry is whether the oil came from the yard at defendant's plant and whether that oil caused plaintiff to fall.

Assuming that oil was on plaintiff's shoes before he fell, that does not mean that the oil was from defendant's premises. While the record contains evidence that the yard at defendant's premises was strewn with slippery substances such as oil, transmission fluid, and antifreeze, the risk of spills was not limited to defendant's premises. On the day preceding the accident, plaintiff reported in writing that his carrier was leaking hydraulic fluid. The truck carrier had not been repaired before plaintiff's accident. Plaintiff admitted that his truck and others "popped a [hydraulic] line" three or four times a week and as a result, oil would shoot several feet and would "get all over everything." Thus, the slippery oil could have come from plaintiff's truck or the truck carrier on which he was standing when he fell.

Because the evidence supporting plaintiff's theory is no stronger than the evidence against it, plaintiff has not met his burden. While *Skinner*, *supra*, provides that circumstantial evidence may suffice, such evidence is insufficient where the causation theory advanced, while factually supported is, at best, just as possible as another theory. *Id.* at 164. Where, as here, the evidence "lends equal support to inconsistent conclusions or is equally consistent with contradictory hypotheses, negligence is not established." *Id.* at 166-167.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Maura D. Corrigan
/s/ Robert J. Danhof

[1] "Plaintiff" refers to Jack Harris only because the claims of Mary Harris are derivative.