STATE OF MICHIGAN

COURT OF APPEALS

ROGER EKSTROM and DEBRA EKSTROM,

Plaintiffs-Appellants,

v

TROY HONDA, OXFORD OVERHEAD DOOR COMPANY, OVERHEAD DOOR CORPORATION, OVERHEAD DOOR COMPANY WEST/COMMERCIAL, INC. and THE T.M. SNYDER CO., INC. d/b/a OVERHEAD DOOR COMPANY OF GREATER DETROIT,

Defendants-Appellees.

UNPUBLISHED
December 19, 1997

No. 196434
Oakland Circuit Court
LC No. 94-480362-NP

Before: Bandstra, P.J., and Murphy and Young, JJ.

PER CURIAM.

In this negligence action, plaintiffs appeal as of right the trial court's order granting summary disposition to defendants pursuant to MCR 2.116(C)(10). We affirm in part, reverse in part and remand for further proceedings.

I

Plaintiff Roger Ekstrom was employed by defendant Troy Honda as a janitor on an independent contractor basis.[1] In order to clean the premises on the day of his injury, plaintiff had to move one of the vehicles out of the service area. In order to move the vehicle, plaintiff electronically operated the rear service bay garage door. When the door was almost fully opened, it fell out of its track and landed on plaintiff's head. As a result of the accident, plaintiff suffered serious injuries and remains disabled.

The garage door was manufactured by defendant Overhead Door Corporation. It was installed in 1986 by defendant Overhead Door Company of Greater Detroit, which plaintiff alleged was succeeded by Overhead Door Company West/Commercial, Inc., and T.M. Snyder Co., Inc.[2] The door was serviced by defendant Oxford Overhead Door Company (Oxford). Troy Honda did not have a regular service contract with Oxford; rather, they were apparently hired on an "as needed" basis

for specific maintenance and repairs of the door. The day after the accident, Troy Honda hired Oxford to repair the broken garage door. After repairing the door, Oxford apparently disposed of the broken garage door parts.

On July 20, 1994, plaintiff filed the present complaint alleging negligence, premises liability, nuisance, and products liability. The complaint also alleged a claim of loss of consortium on behalf of plaintiff's wife, Debra Ekstrom. In support of his claims, plaintiff employed Russell Carniak as an expert witness who inspected the by-then-repaired garage door in May 1994. Carniak testified at his deposition that, because of the disposal of the broken garage door parts, he was unable to determine, with "reasonable engineering certainty," what caused the accident.[3]

Defendants then filed motions for summary disposition, arguing inter alia that plaintiffs' claims were speculative and had no basis in fact. Plaintiff responded by submitting an affidavit by Carniak which expressed his opinion that there were defects in the installation of the door and that the defects caused or contributed to plaintiff's injuries.

The trial court ruled that plaintiff's claims were based upon speculation as opposed to fact and granted summary disposition in favor of all defendants. The trial court concluded that plaintiff failed to establish causation. The trial court later denied plaintiff's motion for reconsideration. On appeal, plaintiff argues that the trial court erred in dismissing his negligence, premises liability and products liability claims on the ground that he failed to provide sufficient evidence of causation to survive summary disposition.[4]

II

A trial court's determination concerning a motion for summary disposition is reviewed de novo. *Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 524; 542 NW2d 912 (1995). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Id*. This Court must review the record evidence and all reasonable inferences from that evidence, and, giving the nonmoving party the benefit of reasonable doubt, determine whether a genuine issue of material fact exists to warrant a trial. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995).

In *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994), our Supreme Court explained that proof of proximate cause "actually entails proof of two separate elements: (1) cause in fact, and (2) legal cause, also known as 'proximate cause.'" The only issue in this case is whether plaintiff adequately established cause in fact. In order to establish the cause in fact element, the plaintiff must show that "but for" the defendant's actions, the plaintiff's injury would not have occurred. *Id*. at 163. "To be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." *Id.* at 164. A plaintiff must present evidence from which a jury may conclude that, more likely than not, the plaintiff's injuries would not have occurred but for the defendant's conduct. *Id*. at 164-165.

In negligence cases involving multiple defendants, a plaintiff may establish factual causation by showing that the defendant's actions were a "substantial factor" in producing the plaintiff's injuries. *Id.* at 165, n 8. The *Skinner* Court approved of the following observation made in 57A Am Jur 2d, Negligence, § 461, p 442:

> "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.]

Contrary to defendants' uniform assertion, plaintiff was not required to prove with "reasonable engineering certainty" what caused the garage door to fall. Rather, plaintiff was required to present sufficient circumstantial evidence to create a reasonable inference that his injury was more probably caused in a particular way. *Mull v Equitable Life Assurance Society of the United States*, 196 Mich App 411, 421; 493 NW2d 447 (1992).

A. Troy Honda

Plaintiff argues that the trial court erred in granting summary disposition to Troy Honda. We agree.

In order to withstand summary disposition of his premises liability claim, plaintiff, as an invitee, was required to present evidence that Troy Honda failed to exercise reasonable care to protect him from dangerous conditions that might result in injury. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 90; 485 NW2d 676 (1992). A premises owner may be held liable for an invitee's injuries that result from (1) a failure to warn of a dangerous condition, (2) negligent maintenance of the premises, or (3) defects in the physical structure of the building. *Bertrand, supra* at 610.

Here, plaintiff's expert, Russell Carniak, stated in an affidavit that, although he could not state with certainty the exact cause of the accident due to the disposal of the old parts, the existing evidence suggested that the door was installed incorrectly, and that the door was not properly maintained.[5] Additionally, Carniak opined that one or more of the above defects more probably than not caused plaintiff injuries. In addition to this expert testimony, plaintiff presented evidence that Troy Honda did not perform regular maintenance on the garage door that fell and injured plaintiff.

Plaintiff also presented evidence that Troy Honda was aware of earlier problems with the door. Troy Honda's service manager, Don Hazelton, testified in his deposition that some of the door's rollers occasionally came out of their tracks, and that the problem was "fixed" by hammering the rollers back in. Hazelton also acknowledged that the horizontal rails on which the door was suspended vibrated as

the door went up. Drawing all reasonable inferences in favor of plaintiff, we conclude that there was a question of fact concerning whether Troy Honda should have known of the existence of a risk of harm to plaintiff and also whether Troy Honda negligently maintained its garage door. In the face of this circumstantial evidence, summary disposition was inappropriate as to Troy Honda.

B. West Commercial

We further conclude that summary disposition as to West Commercial was inappropriate. Plaintiff's expert averred that it was more probable than not that installation defects caused or contributed to plaintiff's injury. Specifically, Carniak indicated that the original vertical door tracks had been misaligned, that two bolts were missing from the bracket connecting the vertical track with the curved portion of the track, and that the horizontal tracks were improperly installed. Leroy Krupke, the vice-president of Overhead Door Corporation, apparently referring to a photograph of the door assembly as it existed prior to the accident, testified that the door was not installed according to manufacturer specifications. Krupke testified that the lack of a rear horizontal bracket could have caused the door to slip out of the track, and plaintiff's son testified that part of the track was bent after the accident.

Finally, plaintiff's evidence indicated that several labels provided by the manufacturer, which warned against standing under the door while it was being operated, were never affixed to the door. Because there is a genuine issue of material fact concerning whether faulty installation contributed to the cause of the accident and plaintiff's resulting injuries, the trial court's grant of summary disposition to West Commercial was premature.

C. Oxford

We next conclude that the trial court erred in granting summary disposition to Oxford. Oxford does not dispute that it performed periodic maintenance and repairs on the garage door. Moreover, as stated above, plaintiff's expert averred that a lack of necessary preventive maintenance more probably than not contributed to the accident. Drawing all reasonable inferences in favor of plaintiff, we conclude that there was a material issue of fact regarding whether faulty maintenance or repair was a substantial factor in causing plaintiff's injury and that Oxford was therefore not entitled to summary disposition.

Oxford argues in the alternative that summary disposition was proper because its contractual relationship with Troy Honda in performing repairs on an as-needed basis did not give rise to additional duties to perform preventive maintenance or ongoing inspections or to provide gratuitous advice to Troy Honda on these issues. Although we agree that there is no independent common law duty to provide such services, the question whether Oxford contractually undertook such obligations was not raised before or ruled upon by the trial court. Therefore, we decline to address this issue. *Allen v Keating*, 205 Mich App 560, 564-565; 517 NW2d 830 (1994). Oxford is, of course, free to contest the question of duty on remand.

D. Overhead Door Corporation

Lastly, we conclude that the trial correctly granted summary disposition to Overhead Door Corporation. We first reject plaintiff's argument that Overhead Door Corporation failed to ensure that West Commercial properly installed the garage door. This is essentially a claim of vicarious liability. See *Little v Howard Johnson Co*, 183 Mich App 675; 455 NW2d 390 (1990). However, plaintiff did not offer any evidence demonstrating an agency relationship between Overhead Door Corporation and West Commercial.

We likewise reject plaintiff's claim that Overhead Door Corporation was negligent in failing to provide appropriate warning labels. As stated above, the record indicates that Overhead Door Corporation did provide warning labels. However, according to plaintiff's expert, because overhead doors are made up of either five or six interchangeable panels, manufacturers do not affix the labels themselves because, depending on the manner of installation, the panel to which the label was affixed could end up "ten feet off the floor" rather than in a location where the warning would be readily visible.[6] We conclude that summary disposition in favor of Overhead Door Corporation was proper.

III

We affirm the trial court's decision granting summary disposition to Overhead Door Corporation. However, we reverse the trial court's decision granting summary disposition to Troy Honda, West Commercial, and Oxford. In light of our decision, we need not address at this time plaintiff's argument that he was entitled to an adverse inference that the missing evidence would have been unfavorable to defendants.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ William B. Murphy
/s/ Robert P. Young, Jr.

[1] Because plaintiff Debra Ekstrom's loss of consortium claim is merely derivative of Roger Ekstrom's primary claims, all references to "plaintiff" in this opinion will be to Roger Ekstrom only.

[2] We note that the issue of successor liability has not been raised by any of the parties to this appeal and is therefore not before this Court. For ease of reference, we will refer to defendants Overhead Door Company of Greater Detroit, Overhead Door Company West/Commercial, Inc., and T.M. Snyder Co., Inc., collectively as "West Commercial."

[3] Although Carniak's deposition was started, it was never completed.

[4] We note that plaintiff does not address the dismissal of his nuisance claim against Troy Honda. Therefore, to the extent that plaintiff asserted a claim of nuisance, that claim has been abandoned on appeal. *Froling v Carpenter*, 203 Mich App 368, 372; 512 NW2d 6 (1994).

[5] All four defendants maintain that Carniak's affidavit improperly contradicted his previous deposition testimony. We disagree. In his deposition, Carniak testified that he could not determine the specific cause of the accident with "reasonable engineering certainty." In his affidavit, Carniak stated that he believed that it was more probable than not that various installation, maintenance and warning defects caused plaintiff's injuries. Because certainty, including "reasonable engineering certainty," is not the legal test for determining causation in fact and because Carniak's affidavit incorporates the proper legal standard, we do not believe that the deposition and affidavit are contradictory.

[6] Plaintiff also briefly asserts that Overhead Door Corporation did not supply Troy Honda with an operation and maintenance manual, which would have presumably informed Troy Honda that the door was only designed to be cycled ten thousand times before preventive maintenance was necessary. However, plaintiff has not cited to any record evidence in support of this claim and we deem it abandoned. See *Holtzlander v Brownell*, 182 Mich App 716, 723; 453 NW2d 295 (1990).