STATE OF MICHIGAN

COURT OF APPEALS

THOMAS A. SCHMIDT and LINDA R. SCHMIDT,

Plaintiffs-Appellants,

v

JEMES LINCOLN COLLINS,

Defendant,

and

RAYMOND MICHAEL BRESETT,

Defendant/Third-Party Plaintiff/Appellee,

v

RICHARD C. MONTZ,

Third-Party Defendant,

and

RICKI COLAROSSI,

Third-Party Defendant/Appellee.

UNPUBLISHED
May 5, 1998

No. 199694
Wayne Circuit Court
LC No. 94-434075-NI

Before: Young, Jr., P.J., and Kelly and Doctoroff, JJ.

PER CURIAM.

In this negligence case, plaintiffs appeal as of right from the order granting defendant Raymond Michael Bresett's motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand.

On the evening of September 2, 1992, Mr. and Mrs. Schmidt were driving on westbound I-96 near its intersection with Kent Lake Road in Oakland County. It was raining heavily at the time. Third-party defendant Ricki Colarossi was driving in front of Mr. and Mrs. Schmidt when her car hydroplaned and skidded out of control, hitting the concrete retaining wall on the left side of the road. Mr. Schmidt drove around Colarossi's vehicle and pulled off the road to render assistance. Mr. and Mrs. Schmidt walked back to Colarossi's vehicle, finding her unhurt but visibly upset. Mrs. Schmidt then returned to her vehicle to turn on its hazard lights, while Mr. Schmidt entered Colarossi's vehicle to do the same. Meanwhile, a car driven by defendant Jemes Collins struck Colarossi's vehicle from behind. A fourth vehicle driven by defendant Raymond Bresett then collided with Collins' vehicle, driving it further into Colarossi's vehicle. Bresett had attempted to swerve around Collins' vehicle, but was hit by yet a fifth car, driven by third-party defendant Richard Montz.

On appeal, plaintiffs argue that summary disposition in favor of Bresett was improper because there is a genuine issue of material fact as to whether Mr. Schmidt was in Colarossi's vehicle at the time of the second impact. We agree. This Court reviews an order granting or denying summary disposition de novo on appeal. *Moore v First Security Casualty Co*, 224 Mich App 370, 375; 568 NW2d 841 (1997). In determining whether summary disposition under MCR 2.116(C)(10) was proper, we consider the pleadings, depositions, admissions, and affidavits and, giving the benefit of reasonable doubt to the nonmoving party, determine whether a record might be developed that would leave open a genuine issue of material fact upon which reasonable minds might differ. *Id*.; *Royce v Citizens Ins Co*, 219 Mich App 537, 541; 557 NW2d 144 (1996).

In *Skinner v Square D Co*, 445 Mich 153; 516 NW2d 475 (1994), our Supreme Court explained that, in order to establish cause in fact in negligence cases, 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. Where there are multiple defendants involved, 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.]

In the present case, Collins testified at his second deposition that he saw someone get out of the Colarossi vehicle before the second impact, and that the person appeared to be a man. However, Collins acknowledged in his first deposition that he could not "be specific in that area" because he was not paying much attention to Colarossi's vehicle. In relying solely on Collins' testimony given at his second deposition, it appears that the trial court made an impermissible credibility determination. *Skinner*, *supra* at 161. Moreover, the trial court completely disregarded Mr. Schmidt's testimony that, after the first impact, he was still in Colarossi's vehicle when it was "hit again," and that it was after this second impact that he exited the vehicle.[1] Mrs. Schmidt also heard a second impact, although she did not see it because she had been knocked to the ground by Collins' vehicle after the initial impact. The trial court also disregarded Colarossi's testimony that she believed Mr. Schmidt was still in her vehicle when she began walking to the gas station shortly before the second impact. Although the precise timing of the events is not clear, there is no dispute that Bresett ran into Collins' vehicle, pushing it further into Colarossi's. The impact apparently was so severe that, according to Mr. Schmidt's undisputed testimony, Bresett's car was "buried all the way into the seats, the front seats of the Collins vehicle." Bresett was thrown completely from his car as a result.

Based on the testimony presented, we conclude that a jury could reasonably infer that Mr. Schmidt was still in Colarossi's vehicle at the time Bresett's vehicle struck Collins' vehicle, that this was the second "bad" impact that Mr. Schmidt testified to feeling, and, therefore, that Bresett's alleged negligence more likely than not was a substantial factor in causing Mr. Schmidt's injuries. Accordingly, the trial court erred in granting summary disposition to Bresett.

Reversed and remanded. We do not retain jurisdiction.

/s/ Robert P. Young, Jr.
/s/ Michael J. Kelly
/s/ Martin M. Doctoroff

[1] Mr. Schmidt also testified that, as he climbed out of Colarossi's vehicle following the second impact, he saw a man kneeling on the ground next to Mrs. Schmidt saying that he could not see. This testimony is consistent with Bressett's testimony that, after he was thrown from his vehicle, he crawled to side of the road, knelt next to the median and tried to get his vision back.