

STATE OF MICHIGAN
COURT OF APPEALS

PHYLLIS RUSSELL, Personal Representative of the
Estate of DELMAR FREDERICK RUSSELL,
Deceased,

UNPUBLISHED
April 30, 1999

Plaintiff-Appellant,

v

JON ANDREW RULE and G.M. FREIGHT, INC.,
a Michigan corporation,

No. 206115
Washtenaw Circuit Court
LC No. 96 00 3495 NI

Defendants-Appellees.

Before: Gribbs, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

Plaintiff, as personal representative of the estate of her husband, brought a wrongful death action based on defendants' alleged negligence. Plaintiff appeals as of right from the trial court order that granted summary disposition to defendants. We affirm.

Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). We note that the circuit court did not specify which subrule provided the ground for its grant of summary disposition to defendants. However, because the parties submitted documentary evidence with their motions and relied on matters outside the pleadings in their arguments, we review this matter pursuant to MCR 2.116(C)(10). See *Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 524; 542 NW2d 912 (1995). This Court reviews a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* The opposing party may not rest upon mere allegations or denials in the pleadings but must, by affidavit or other documentary evidence, set forth specific facts showing there is a genuine issue of material fact for trial. MCR 2.116(G)(4); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

In the lower court and on appeal, defendants argue that plaintiff failed to submit sufficient evidence to withstand their motion for summary disposition on the issues of duty and proximate cause. Although the issues of duty and proximate cause are interrelated, see *Moning v Alfonso*, 400 Mich 425,

439; 254 NW2d 759 (1977), *Balcer v Forbes*, 188 Mich App 509; 470 NW2d 453 (1991), assuming without deciding, that defendants may have assumed some duty toward plaintiff, we agree with defendants that plaintiff failed to submit sufficient evidence to create a genuine issue of material fact regarding proximate cause. MCR 2.116(G)(4). To establish proximate cause, plaintiff must prove both cause in fact (but for the defendant's actions the plaintiff's injuries would not have occurred), and legal or proximate cause. *Skinner v Square D Co*, 445 Mich 153, 162-153; 516 NW2d 475 (1994). See also *Brisboy v Fibreboard Corp*, 429 Mich 540, 547-548; 418 NW2d 650 (1988). A mere possibility of causation is not enough. *Id.* at 165. The existence of disputed fact must be established by admissible evidence; speculation and conjecture on the part of the moving party will not suffice. *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). The unchallenged evidence in this case was that plaintiff's decedent was crushed because the parking brake on the tug was inadequate. There was no evidence that the backward movement of the tug was caused by the manner in which the tow chain was affixed. Plaintiff failed to introduce evidence that shows the existence of a genuine issue of material fact upon which reasonable minds could differ, and defendants were entitled to judgment as a matter of law. *Skinner, supra*.

Next, plaintiff argues that the lower court erred in granting summary disposition before the expiration of the discovery period. We disagree. Summary disposition is not premature if the discovery does not stand a fair chance of uncovering factual support for opposing the motion for summary disposition. *State Treasurer v Sheko*, 218 Mich App 185, 190; 553 NW2d 654 (1996). Here, the motion for summary disposition hearing took place two weeks before the close of discovery. Plaintiff states the need to depose one witness; however, the identity of the witness has been known to plaintiff throughout and the witness has given an affidavit. Plaintiff does not indicate how the witness' testimony or any unspecified further discovery could impact on the issue of proximate cause. Therefore, the motion for summary disposition was not granted prematurely.

Affirmed.

/s/ Roman S. Gibbs
/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder