

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT NUNNALLY,

Plaintiff-Appellant,

v

GENERAL ASSEMBLY,

Defendant-Appellee,

and

DUNHAM'S ATHLEISURE CORPORATION
and PACIFIC CYCLE, INC.,

Defendants.

UNPUBLISHED

January 28, 2014

No. 310634

Wayne Circuit Court

LC No. 11-002311-NP

Before: MURPHY, C.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant General Assembly (GA). We reverse the trial court's order and remand for further proceedings.

Plaintiff purchased a bicycle manufactured by defendant Pacific Cycle, Inc., from defendant Dunham's Athleisure Corporation (Dunham's). The bike was purchased at Dunham's Riverview store. As plaintiff was riding the bike; the bike's left crank arm and pedal fell off, causing plaintiff to fall off the bike and incur injuries. GA is a company engaged in the business of assembling products, including bikes, for display and purchase at various retail stores. Plaintiff alleged that GA had negligently assembled the bike that he purchased at Dunham's. GA filed a motion for summary disposition, arguing that there was insufficient evidence to establish that GA had assembled plaintiff's bike. The trial court granted the motion, ruling that a jury would have to speculate regarding whether GA, a Dunham's employee, or another bike assembly company actually assembled the bike.

In *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013), this Court recited the well-established principles regarding a motion brought pursuant to MCR 2.116(C)(10):

In general, MCR 2.116(C)(10) provides for summary disposition when there is no genuine issue regarding any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. A motion brought under MCR 2.116(C)(10) tests the factual support for a party's claim. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). [Citations and internal quotation marks omitted.]

Additionally, this Court “makes all legitimate inferences in favor of the nonmoving party.” *Skinner v Square D Co*, 445 Mich 153, 162; 516 NW2d 475 (1994).

“To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages.” *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). The causation element encompasses both cause in fact and proximate or legal cause. *Id.* at n 6.

“The cause in fact element generally requires showing that ‘but for’ the defendant’s actions, the plaintiff’s injury would not have occurred.” *Skinner*, 445 Mich at 163. Circumstantial evidence may be used to establish a “causal link between a defect and an injury in products liability cases.” *Id.* “[C]ircumstantial proof must facilitate reasonable inferences of causation, not mere speculation.” *Id.* at 164. It is not sufficient to proffer “a causation theory that, while factually supported, is, at best, just as possible as another theory.” *Id.* A “plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred.” *Id.* at 164-165. The *Skinner* Court further observed:

Michigan law does not permit us to infer causation simply because a tragedy occurred in the vicinity of a defective product. The plaintiffs were required to set forth specific facts that would support a reasonable inference of a logical sequence of cause and effect. Instead, the plaintiffs posited a causation theory premised on mere conjecture and possibilities.

We recognize that motions for summary judgment implicate considerations of the jury's role to decide questions of material fact. At the same time, however, litigants do not have any right to submit an evidentiary record to the jury that would allow the jury to do nothing more than guess. [*Id.* at 174.]

Here, the causation issue is a bit atypical in that we are examining whether GA even engaged in the assembly of the bike, and not whether any alleged negligence in the assembly

process or defect in the bike resulting from the assembly caused the left crank arm or pedal to fall off and resulted in plaintiff's injuries. Nonetheless, it must be established that it was GA's conduct or actions that set forth a causal chain of events leading to the injuries. We initially note that there is no dispute that plaintiff purchased the bike from Dunham's at its Riverview store. Additionally, it is also uncontested that GA's invoices, which generally documented the bikes GA worked on, and which invoices served as the basis for Dunham's to make payment to GA, did not reflect that GA had worked on plaintiff's particular bike. Nonetheless, we hold that there was other evidence, circumstantial in nature, that was sufficient to preclude summary disposition of plaintiff's claim.

Leo Garcia, a district manager for Dunham's who oversaw 12 stores, including Dunham's Riverview store, testified that, during the timeframe at issue, GA and a company called Pro-Tech assembled bikes for Dunham's. Garcia testified, however, that Pro-Tech *never* assembled bikes for the Riverview store. While Garcia could not state with 100 percent certainty that a Dunham's employee did not assemble the bike in question, it would have blatantly violated Dunham's policies and procedures. Garcia stated, "Procedurally we instruct no one to put bikes together but General Assembly." James Duggan, the Riverview store manager, confirmed Garcia's testimony regarding company procedures. Duggan indicated that if unassembled bikes were at the store but not on the sales floor because the assembling company had not been around to assemble the bikes for display, he, like other Dunham's managers, would just deal with being yelled at by regional directors inspecting the store and complaining about the lack of bikes on the floor. According to Garcia, Dunham employed outside assemblers given the complexity of today's bikes.

Garcia further testified:

Q. So based upon your experience, knowledge, observation through the years as the District Manager including of the Riverview store, are you comfortable as we sit here today in saying that with reasonable certainty that the final assembly on the Nunnally Mongoose bike had to have been done by General Assembly?

A. Yes.

Q. And if for whatever reason we do not have, nor ever do have documents with that particular serial number associated with General Assembly, would you still feel that confident?

A. Yes.

Garcia did testify that unless the price tag had been left on the bike by an initial purchaser, which tags have store numbers on them, there would be no way to know if the bike plaintiff bought had originally been assembled and purchased at another Dunham's store and then returned by that customer to the Riverview store at which point it was purchased by plaintiff. In other words, plaintiff's bike could possibly have been assembled at a different store and by a different assembler, which is one of the arguments posed by GA. We note, however, that David Kanclerz, a Dunham's employee, testified that "generally speaking, we didn't take

bikes back[.]” and that if a customer returned a bike, the next time a bike tech from an assembly company, such as GA, came to the store, the tech would inspect the bike to make sure that it was in good operating condition before it was placed on the sales floor.

On the strength of the testimony cited above and viewing the evidence in a light most favorable to plaintiff, we conclude that plaintiff presented specific documentary facts that would support a reasonable inference that it is more likely than not that GA assembled the bike. *Skinner*, 445 Mich at 164-165, 174. Plaintiff did not posit a causation theory premised on mere possibilities and conjecture. *Id.* at 174. With respect to GA’s argument that a Dunham’s employee may have assembled the bike, Garcia and Duggan both indicated that company procedures did not allow for an employee to assemble bikes. Indeed, instead of having an employee attempt to assemble a bike for placement on the sales floor if an assembling company had not been to the store, Duggan simply bore the brunt of regional supervisors’ complaints about the lack of bikes on the sales floor. Although Garcia and Duggan could not state with 100 percent certainty that an employee did not assemble the bike, “[t]he evidence *need not negate* all other possible causes” and absolute certainty on causation is not required, nor is it even achievable when reliance is placed on circumstantial evidence. *Skinner*, 445 Mich at 153, quoting 57A Am Jur 2d, Negligence, § 461, p 442. The same can be said with respect to GA’s argument that plaintiff’s bike may have been assembled at a different store by a different assembler and then returned to the Riverview store before plaintiff’s purchase. Additionally, on that issue, the evidence indicated that bike returns were rarely allowed and that, regardless, the assembly company would still inspect the returned bike before it was made available for sale.

To the extent that there was evidence that contradicted the evidence alluded to above, this simply creates a factual dispute that must be resolved at trial. Accordingly, we reverse the trial court’s ruling granting summary disposition in favor of GA.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Having fully prevailed on appeal, plaintiff is awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Jane E. Markey