

STATE OF MICHIGAN
COURT OF APPEALS

BRENT A. MITCHELL,

Plaintiff-Appellant,

v

MARTIN MITCHELL and JANICE
MITCHELL,

Defendants-Appellees.

UNPUBLISHED

August 19, 1997

No. 196952

Alcona Circuit Court

LC No. 95-009054-NO

Before: Wahls, P.J., and Taylor and Hoekstra, JJ.

PER CURIAM.

Plaintiff, an adult, filed a lawsuit against his parents, alleging that he was injured as a result of their negligence in failing to properly repair or discard a ladder, in furnishing the unsafe ladder for his use, and in failing to warn him about the condition of the ladder. The lower court granted summary disposition for defendants pursuant to MCR 2.116(C)(10). Plaintiff appeals as of right. We affirm.

Plaintiff first argues that the trial court erred in finding that there was no genuine issue of material fact regarding the issue of proximate cause. We disagree. The trial court found that plaintiff had failed to establish a link between the alleged defects in the ladder and his injuries. On appeal, a trial court's grant or denial of summary disposition will be reviewed de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). Plaintiff points out that he asserted in his affidavit that the accident occurred because the ladder failed, and that this is evidence establishing the cause of the accident. However, in his earlier deposition testimony, plaintiff conceded that he did not know why he fell. A party or witness may not create a factual dispute by submitting an affidavit that contradicts his own prior conduct or sworn testimony. *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 154-155; ___ NW2d ___ (1997); *Aetna Casualty & Surety Co v Ralph Wilson Plastics Co*, 202 Mich App 540, 548; 509 NW2d 520 (1993). Therefore, plaintiff's assertion in his affidavit that he fell because the ladder failed could not have properly been considered by the lower court in deciding the motion for summary disposition.

Plaintiff also argues that the ladder must have failed because the only other possible cause of the accident--that he lost his balance--is refuted by the affidavit of his sister. However, plaintiff's sister admitted in her affidavit that she was facing away from plaintiff immediately before the fall; therefore, the affidavit does not rule out the theory that plaintiff fell because he lost his balance. Moreover, the ladder was not being steadied by plaintiff's sister at the time of the accident and, therefore, the ladder may have slipped rather than suffered structural collapse. Plaintiff's sister's affidavit does not present any information making it more likely that the parents' previous repair of the ladder was the cause of the accident.

Plaintiff also argues that his expert witness presented evidence by way of an affidavit to establish that the accident resulted from failure of the ladder. We disagree. In granting summary disposition for defendants, the trial court concluded that, although the expert's explanation of the cause of the accident was a possibility, there were other possibilities. The court noted that, under Michigan law, causation cannot be inferred merely from the occurrence of an accident "in the vicinity of a defective product," citing *Skinner v Square D Co*, 445 Mich 153, 174; 516 NW2d 475 (1994).

Expert opinion grounded only in hypothetical statements of situations is not sufficient to establish that defective equipment caused an injury. There must be facts in evidence to support an expert's opinion testimony. *Skinner, supra*. In the present case, plaintiff's expert based his conclusion that the ladder failed on evidence in the case, including the depositions and affidavits that had been submitted, and photographs of the ladder showing loose supports after the accident. However, expert testimony that merely presents a conclusory statement regarding the cause of a plaintiff's accident is insufficient to justify sending the case to a jury. Cf. *Palazzola, supra* at 152.

In *Auto Club Ins Ass'n v General Motors Corp*, 217 Mich App 594, 605; 552 NW2d 523 (1996), this Court affirmed a trial court's directed verdict for the defendant, in spite of testimony from the plaintiff's expert that a fire was caused by a defective fuel line in a truck manufactured by the defendant. In that case, the plaintiff's expert "did not demonstrate by a reasonable probability that a defect in the fuel line, which would be attributable to defendants, was more probable than any other theory of the fire's cause," such as the theory of the defendant's expert that the fire was caused by the truck owner's continuing to drive with a tire that was flat or underinflated. *Id.* Similarly, in the present case, plaintiff's expert asserted that the ladder's loose supports caused plaintiff's accident, but did not explain why the loose supports would more likely have been the cause of the accident than would other proposed causes such as plaintiff losing his balance, or the ladder slipping while plaintiff's sisters did not steady it. "Because the probabilities of plaintiff's and defendants' theories were evenly balanced, any conclusion from the jury would have been pure speculation or conjecture." *Id.* A jury cannot be allowed to speculate between two or more equally plausible causes of injury. *Moody v Chevron Chemical Co*, 201 Mich App 232, 238; 505 NW2d 900 (1993) (affirming a trial court's grant of summary disposition to the defendant manufacturer, where the plaintiff did not demonstrate that the particular bee that stung plaintiff's decedent came from the particular nest sprayed with the defendant's pesticide). Therefore, the lower court correctly granted summary disposition for defendants.

Plaintiff further argues that, because the ladder was repaired before it could be physically inspected by his expert witness, he was entitled to an inference that the unrepaired ladder would have

been evidence unfavorable to defendants. Plaintiff's reliance on *Hamann v Ridge Tool Co*, 213 Mich App 252; 539 NW2d 753 (1995), *Welch v United States*, 844 F2d 1239 (CA 6, 1988), *Unigard Security Ins Co v Lakewood Engineering*, 982 F2d 363 (CA 9, 1992), and *Dillon v Nissan Motor Co*, 986 F2d 263 (CA 8, 1993), is misplaced because these cases addressed situations in which a party, or the party's agent, spoiled or failed to produce evidence, while in the present case the ladder was modified without defendants' knowledge or consent. Plaintiff's reliance on SJI2d 6.01 is similarly unavailing because the modification of the ladder without defendants' knowledge or consent constituted a reasonable excuse for their inability to present the ladder in its unrepaired state. Plaintiff was not entitled to an inference that the unrepaired ladder would have been evidence unfavorable to defendants.

Affirmed.

/s/ Myron H. Wahls
/s/ Clifford W. Taylor
/s/ Joel P. Hoekstra