

STATE OF MICHIGAN
COURT OF APPEALS

JAMES NURSE and SHARON NURSE,

Plaintiff-Appellants,

v

TOWNSHIP OF WATERFORD,

Defendant-Appellee.

UNPUBLISHED

September 21, 1999

No. 208956

Oakland Circuit Court

LC No. 96-517579 NO

Before: Collins, P.J., and Jansen and White, JJ.

WHITE, J. (dissenting).

I respectfully dissent. I conclude that plaintiff presented sufficient evidentiary proof to create a genuine issue whether the alleged defect was a cause in fact of his injury. Plaintiff presented sufficient evidence from which one could reasonably conclude that there is a reasonable likelihood of probability rather than a possibility that defendant's alleged negligence caused plaintiff's injury. *Skinner v Square D Co*, 445 Mich 153, 166; 516 NW2d 475 (1994).

While plaintiff admitted that he did not actually see a loop in the dog leash, he described physical circumstances, including his position, the dog's position, and the length and composition of the leash, from which one could reasonably conclude that it was probable, not merely possible, that the leash was dragging on the ground in a manner that would enable it to become snagged on a protruding object.

Further, plaintiff explained, and other witnesses supported, that there was a sudden jerk of the leash from behind, that had the effect of stopping the bicycle suddenly and sending plaintiff flying. Although there is no direct evidence that the leash became caught on the pipe cap, there was circumstantial evidence tending to support this conclusion and disprove alternative explanations. This is all that is required:

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 that 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. [*Skinner*, 445 at 166, citing 57A Am Jur 2d, Negligence, § 461, p 442. Emphasis added.]

Plaintiff provided an affidavit explaining the physical circumstances of the accident. He stated that the dog did not pull him from the bicycle; that the leash was not entangled in the rear wheel immediately after the accident and showed no physical signs of having been caught in the wheel so as to cause the bicycle to come to a sudden stop; that had the leash been caught in the rear wheel, it would have slowed the bicycle rather than stopped it abruptly; and that he observed nothing else in the surrounding area that could have ensnared the leash that would have caused such a sudden and violent backward force.

Defendant argued below that plaintiff's affidavit contradicted his deposition testimony, but supported this contention only by reference to plaintiff's testimony that he *surmised* that the cap was responsible for his accident. The affidavit is not inconsistent with this testimony.

Defendant speculated that there may have been a twig, rock or other object on the front lawn that pulled the leash. However, no one observed such an object, and the force with which the bicycle was suddenly stopped makes it probable that the leash became caught on a rigid and secure object, rather than a twig or small rock not readily observable.

In sum, I conclude that plaintiff presented sufficient evidence from which a jury could reasonably conclude, based on the evidence and reasonable inferences, rather than speculation and conjecture, that the alleged defect was more likely than not the cause of the accident.

I would remand for further proceedings, including proceedings addressing defendant's remaining defenses.

/s/ Helene N. White