STATE OF MICHIGAN

COURT OF APPEALS

TIMOTHY SHURTZ, Plaintiff-Appellant,	UNPUBLISHED February 13, 2014
v	No. 313202 Wayne Circuit Court
U-HAUL COMPANY OF MICHIGAN, a/k/a U-HAUL COMPANY OF DETROIT, Defendant-Appellee.	LC No. 11-009148-NF

Before: MURPHY, C. J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's[1] motion for summary disposition in this premises liability action. We affirm.

This action arises out of an incident that occurred on February 23, 2009, at defendant's U-Haul facility in Detroit. At approximately 8:45 a.m., when it was still "partially dark" because "it was an overcast day" and "kind of cloudy," plaintiff traveled to defendant's premises to pick up a truck that he had reserved. Plaintiff parked approximately "seven or eight spots down from the entrance," and went into the building to pick up the U-Haul. After confirming his reservation, one of defendant's employees drove the vehicle around to the front of the building. After walking around and inspecting the vehicle with one of defendant's employees, plaintiff went back into the building, gathered his belongings, placed them in the passenger side of the vehicle, and then walked around "the backside of the truck and came up to get into the truck." As plaintiff was getting into the vehicle, he stepped up with his right foot, and his left foot slipped. His right foot went "up underneath the brake pedal and got caught there as the rest of [his] body turned and went out the door." Plaintiff was lying with his "shoulder area" on the ground and then pulled himself up using the door of the vehicle.

Plaintiff never informed anyone at defendant's facility that he had been injured. Instead, he got into the truck and began driving to Ohio, where he was going to use the truck, and on his

[1] According to the record below, U-Haul Company of Detroit is merely an assumed name of U-Haul Company of Michigan and is incorrectly identified as a separate defendant.

way called and scheduled an appointment with his "orthopedic guy," advising him of his injury. Plaintiff stated that he did not actually see what he slipped on, and he did not feel any icy surfaces when he was on the ground, but testified that the only thing he could "figure" was that he "slipped on a patch of ice." However, he also stated that it could have been oil, and he simply did not know anything about the surface other than the fact that he slipped. He noted that the jacket he had been wearing when he fell was wet. Later, plaintiff filed a premises liability action against defendant alleging that he was a business invitee on defendant's premises when he slipped and fell on ice and sustained an injury.

Plaintiff first argues that the lower court erred by granting defendant's motion for summary disposition because he established a genuine issue of material fact regarding the causation element that went beyond mere speculation. We disagree.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10). A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id*., 120. A genuine issue of material fact exists "when, viewing the evidence in a light most favorable to the nonmoving party, the record which might be developed . . . would leave open an issue upon which reasonable minds might differ." *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013) (internal citations omitted).

Among other matters a plaintiff must prove in a premises liability action, plaintiff must prove that defendant breached a duty and that the breach caused his injuries. *Buhalis v Trinity Continuing Care Services*, 296 Mich App 685, 693; 822 NW2d 254 (2012). Plaintiff may prove causation with circumstantial evidence, but the circumstantial evidence "must facilitate reasonable inferences of causation, not mere speculation," or conjecture. *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994). The distinction is that plaintiff's circumstantial evidence must go beyond simply being consistent with his proposed theory, but must rather tend to narrow the range of possibilities to a single likely explanation. *Id*. In other words, the circumstantial evidence must make plaintiff's proposed theory of how he came to be injured more likely than not, instead of merely plausible. *Id*. at 164-165.

Plaintiff fails to establish that his theory here is more than guesswork. Plaintiff has provided an eminently plausible explanation of how there could have been ice under his foot when he slipped, pointing to the cold temperatures, the condensation from defendant's trucks' exhaust, and the fact that vehicles had been washed elsewhere on defendant's lot and water could have run off to where plaintiff slipped. However, he explicitly testified that he did not see any puddles on the day of the incident, he did not feel anything on the ground other than "cold," and it would be pure speculation that water had run off to the vicinity of the truck. The dampness of plaintiff's coat suggests that he fell in a liquid rather than on solid ice. Furthermore, in the absence of any corroboration in the record, such as other reports of ice, we are simply unable to accept plaintiff's apparent assertion that because he slipped while climbing up into a truck, he must have slipped on ice.

Plaintiff has merely shown what the Court in *Skinner* was attempting to avoid: a theory that is quite plausible, but ultimately not supported by evidence that necessarily implies an absence of other plausible theories. *Skinner*, 445 Mich at 164-165. This Court has been clear that "if [the] evidence lends equal support to inconsistent conclusions or is equally consistent with contradictory hypotheses, negligence is not established." *Karbel v Comerica Bank*, 247 Mich App 90, 98; 635 NW2d 69 (2001) (internal citations omitted). Without any further evidence regarding any hazardous condition on the ground near the vehicle, plaintiff cannot show causation because his theory of the cause of his fall does not go beyond mere speculation. Mere speculation is not enough to survive summary disposition, and thus, the lower court did not err in granting defendants' motion for summary disposition.[2]

Next, plaintiff argues that the lower court also erred by denying his motion for reconsideration. He argues that at that motion, he was able to establish a genuine issue of material fact regarding the causation element, so defendant's motion for summary disposition was improperly granted. We disagree.

This Court reviews a trial court's decision on a motion for reconsideration for an abuse of discretion. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 629; 750 NW2d 228 (2008). A trial court has "discretion on a motion for reconsideration to decline to consider new legal theories or evidence that could have been presented when the motion was initially decided." *Yoost v Caspari*, 295 Mich App 209, 220; 813 NW2d 783 (2012). In fact, this Court has held that there is no abuse of discretion "in the denial of a motion for reconsideration that rests on testimony that could have been presented the first time the issue was argued." *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

Plaintiff did not present any new theories, but simply reiterated his arguments regarding the causation element stated in his response to defendant's motion for summary disposition. Plaintiff did present excerpts from defendant's general manager, Timothy Sawyer's, deposition, which was not at part of the record for the motion for summary disposition or plaintiff's

[2] It is therefore unnecessary for us to address any arguments regarding whether the open and obvious doctrine would independently warrant summary disposition.

response. However, this deposition testimony was taken before defendant's motion for summary disposition, and thus, was available to plaintiff when he filed his response to defendant's motion for summary disposition. Regardless, Sawyer's testimony does not provide substantially new information that would have impacted plaintiff's argument. Plaintiff relied on Sawyer's testimony regarding condensation puddles from the exhaust pipes of the trucks when they were parked, with the engines running, around the area where plaintiff fell. However, plaintiff already presented his own testimony regarding this condensation occurrence. The lower court did not abuse its discretion in denying plaintiff's motion for reconsideration because plaintiff did not present any new theories or evidence that was not available to him previously.

Affirmed.

/s/ William B. Murphy
/s/ Michael J. Kelly
/s/ Amy Ronayne Krause