STATE OF MICHIGAN

COURT OF APPEALS

NANCY LAUSENG, Personal Representative of the Estate of David Kemeny, Deceased,

Plaintiff-Appellee,

v

CAROL J. ZINK,

Defendant-Appellant.

UNPUBLISHED
December 17, 2009

No. 287995
Monroe Circuit Court
LC No. 08-24547-NI

Before: Donofrio, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

In this wrongful death case, defendant appeals by leave granted from the trial court's order denying her motion for summary disposition. We reverse and remand for proceedings consistent with this opinion.

I. Facts

This case arose from a fatal motor vehicle/pedestrian accident on October 15, 2006. The parties agree on most of the facts. Defendant was driving eastbound on a two-lane road with a speed limit of 50 mph. The accident occurred after dark some time around 7:50 p.m. Decedent, David Kemeny, was wearing dark clothing and either was crossing the road or was walking on it or the shoulder. The facts surrounding decedent's movements cannot be established. Defendant did not leave the roadway. Defendant's vehicle struck decedent, killing him.

Defendant claims that she initially believed she had hit a deer. Her car sustained damage, so she pulled over to the side of the road and got out of her car. A motorist, who also was traveling eastbound, stopped to offer assistance. In the darkness, neither he nor defendant could see what she had hit. The motorist found a flashlight in his vehicle and discovered decedent's body. He told defendant to call 911, which she did at 7:52 p.m.

Defendant's blood alcohol content (BAC) test was negative. Decedent's BAC, however, was calculated at 0.21 percent. Police determined that defendant's speed was lower than the posted speed limit of 50 mph at the time of the crash and that decedent was in defendant's lane when defendant struck him. Because of this, police concluded that defendant had the right of

way, and that decedent was at fault in the accident. The police did not issue any citation to defendant, nor were any criminal charges ever filed against her in this matter.

Plaintiff filed this lawsuit for money damages against defendant. Defendant moved for summary disposition, arguing that plaintiff had shown insufficient evidence of defendant's negligence. Plaintiff answered that the facts, when considered in a light most favorable to her, showed that defendant failed to use reasonable care in operating her vehicle. The trial court denied defendant's motion. Defendant now appeals by leave granted.

II. Summary Disposition

Defendant argues that the circuit court erred in denying her motion for summary disposition where plaintiff did not provide admissible evidence of negligence. We agree.

Defendant appeals the circuit court's denial of her motion for summary disposition, which this Court reviews de novo. See *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In considering a motion pursuant to MCR 2.116(C)(10), a court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in a light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120. A litigant's mere pledge to establish at trial that a genuine issue of material fact exists is not sufficient to overcome summary disposition. *Id*

There are instances when negligence may be decided as a matter of law. *Campbell v Kovich,* 273 Mich App 227, 231-232; 731 NW2d 112 (2006). Where plaintiff fails, by evidence, to generate a genuine issue of material fact regarding defendant's negligence, the question of negligence may be decided as a matter of law. *Id.*

To sustain a claim of negligence against defendant, plaintiff must show that: (1) a duty existed from defendant; (2) defendant breached that duty; (3) the breach was the proximate cause of the injury; and (4) damages. *Latham v National Car Rental Systems, Inc*, 239 Mich App 330, 340; 608 NW2d 66 (2000).

The plaintiff has the burden of producing evidence sufficient to support a prima facie case of negligence. *Berryman v Kmart Corp*, 193 Mich App 88, 91-92; 483 NW2d 642 (1992). "The mere occurrence of an accident is not, in and of itself, evidence of negligence." *Clark v Kmart Corp*, 242 Mich App 137, 140; 617 NW2d 729 (2000), rev'd on other grounds 465 Mich 416; 634 NW2d 347 (2001). The plaintiff must present facts that establish, either directly or circumstantially, negligence. *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 9; 279 NW2d 318 (1979). "Where the circumstances are such as to take the case out of the realm of conjecture and bring it within the field of legitimate inference from established facts, the plaintiff makes at least a prima facie case." *Clark, supra* at 140-141. If the plaintiff fails to establish a causal link between the accident and any negligence by the defendant, summary disposition under MCR 2.116(C)(10) is appropriate. *Pete v Iron Co*, 192 Mich App 687, 689; 481 NW2d 731 (1992).

In this case, plaintiff has failed to establish that defendant breached her duty to exercise reasonable care in the operation of her motor vehicle. The record evidence shows that defendant was not exceeding the speed limit. Defendant did not leave her lane of travel. The headlights on

defendant's car were lit. Defendant had the right of way. Those facts lead to the conclusion that defendant did not breach a duty. Plaintiff has offered no evidence to contradict that conclusion.

Plaintiff contends, however, that defendant was distracted by the use of her cell phone while driving. Defendant denies using her cell phone at the time accident occurred. While plaintiff has introduced defendant's cell phone records, the record does not establish, and plaintiff has not presented, any evidence that defendant was in fact using her cell phone at the moment the accident occurred. Plaintiff has not presented evidence that defendant was otherwise distracted at the time of the accident. Plaintiff has not provided any witness testimony from which one can infer negligence. Plaintiff may not base her claim on speculation and conjecture. See *Skinner v Square D Co*, 445 Mich 153; 516 NW2d 475 (1994). A conjecture is an explanation consistent with known facts, but not deducible from them as a reasonable inference. *Libralter Plastics, Inc v Chubb Group of Ins Companies*, 199 Mich App 482, 486; 502 NW2d 742 (1993). Had any of the other facts suggested that defendant were distracted, such as her speed or a deviation from her lane of travel, then plaintiff's claim of distraction perhaps might not be speculative. But, the other facts do not support a conclusion that defendant was distracted.

The trial court reasoned that defendant's failure to brake before impact tended to show that her cell phone distracted her. That, too, is conjecture. One could also suggest that defendant failed to brake because decedent suddenly stepped into her path of travel. Further, that defendant did not know what she hit could be explained by the level of darkness, the camouflage effect of decedent's dark clothing, or by the fact that it is far more likely for a driver in Michigan to hit a deer, than to hit a person. Under the circumstances, a reasonable jury would not have enough admissible evidence to conclude that defendant was distracted by the use of her cell phone. Based on this record, the only way to arrive at this conclusion is by speculation and conjecture, not inference from known facts.

Furthermore, even if defendant had been talking on her cell phone at the moment of impact, there is no law in Michigan prohibiting the use of cell phones while driving. Talking on a cell phone while driving does not constitute negligence per se. Even if plaintiff could prove that defendant was talking on her cell phone at the exact time she struck decedent, the remaining evidence that she was driving within the speed limit and staying in her own lane supports the conclusion that she was using reasonable care.

Because the material facts are clear, and are in large part undisputed, there is no need for a trial of the facts, and the issue of negligence may be decided as a question of law. See *Campbell, supra* at 232. There is insufficient evidence that defendant was negligent. *Id.* at 231-232. Defendant had no duty to anticipate the negligent or unlawful conduct of decedent. *Hainault v Vincent*, 365 Mich 370, 376; 112 NW2d 569 (1961) (motorist approaching school bus, which was traveling toward him and which had left turn signal on, was not required to anticipate the negligent or unlawful act of school bus driver in suddenly turning in front of the motorist). Even difficult questions, such as reasonableness, must be decided as a matter of law upon undisputed facts. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 508; 741 NW2d 539 (2007).

Consequently, plaintiff has not shown a prima facie case of negligence. The circuit court should have granted summary disposition in defendant's favor. We reverse and remand for entry of summary disposition in defendant's favor.

III. Decedent's Fault

Defendant contends that decedent was more than 50 percent at fault for the accident. We agree.

Typically, comparative negligence is a decision for the trier of fact. *Poch v Anderson*, 229 Mich App 40, 51; 580 NW2d 456 (1998). Notwithstanding, the court may summarily decide comparative negligence where "no reasonable juror could find that defendant was more at fault than decedent in the accident as required by MCL 500.3135(2)(b)." *Huggins v Scripter*, 469 Mich 898, 898-899; 669 NW2d 813 (2003). Summary disposition is appropriate where no genuine issue of material fact exists that one party was substantially more at fault than the other. See *id*.

In this case, it is undisputed that decedent was walking on (or too near) a two-lane road with a speed limit of 50 mph, after dark, while wearing dark clothing. He was intoxicated. While plaintiff maintains that a trier of fact could reasonably determine that he had a high tolerance for alcohol such that the alcohol did not affect his actions, the fact that he either moved into defendant's lane of travel or positioned himself in the roadway would support a finding that the alcohol did affect his actions, or, at the very least that he behaved negligently so as to interfere with defendant's right of way. Further, plaintiff has offered no admissible evidence to contradict that decedent's BAC was 0.21 percent. Plaintiff argues that the medical examiner's conclusions are questionable because the medical examiner made an error in identifying an injury as having occurred to the left leg, when actually the right leg sustained the injury. Plaintiff urges this Court to question the accuracy of the reported BAC. There is no evidence that the medical examiner made any error in determining decedent's BAC: a mistake in a portion of the report unrelated to decedent's blood work is not reason to disregard the medical examiner's report, particularly in lieu of the fact that decedent was found carrying a beer can. Therefore, plaintiff cannot dispute that the intoxicated decedent was himself negligent. The question now becomes whether decedent was more than fifty percent negligent.

Plaintiff here, the nonmovant, may not rely on mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that a genuine issue exists for trial. See *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). As noted, when deciding a motion for summary disposition under MCR 2.116(C)(10), a court considers pleadings, affidavits, depositions, admissions, and other documentary materials. MCR 2.116(G)(5); *Maiden*, *supra*. Such materials, however, shall only be considered to the extent that they would be admissible as evidence. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006).

Plaintiff has offered no admissible evidence to counter a finding that decedent was more than 50 percent negligent. Decedent was wearing dark clothing. It was so dark at the time of the accident that the passerby required a flashlight to see decedent's body after defendant's car had struck it. Decedent was intoxicated, walking the wrong way, and either entered into a lane of traffic where defendant's vehicle had the right of way or interfered with defendant's right of

way. Those facts support a finding that decedent himself was more negligent than was defendant, who was driving under the speed limit and never left her lane of traffic.

IV. MCL 600.2955a(1)

Defendant argues that MCL 600.2955a(1) should provide her with an absolute defense in this case because decedent was more than 50 percent at fault.

MCL 600.2955a provides an absolute defense if the injured party was impaired by intoxicating liquor and the individual was 50 percent or more the cause of the accident due to that impairment.[1] Plaintiff did not dispute, with admissible evidence, that decedent had a BAC of 0.21 percent; she merely argues that he did not have an impaired ability to function. Under these facts, and for the reasoning outlined *supra*, we cannot accept plaintiff's assertion that decedent was not impaired and that his impairment was not 50 percent or more the cause of the accident. Consequently, MCL 600.2955a provides an alternative basis for requiring the trial court to grant summary disposition in favor of defendant.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Donald S. Owens

[1] Section one of that statute provides: "(1) It is an absolute defense in an action for the death of an individual or for injury to a person or property that the individual upon whose death or injury the action is based had an impaired ability to function due to the influence of intoxicating liquor or a controlled substance, and as a result of that impaired ability, the individual was 50% or more the cause of the accident or event that resulted in the death or injury. If the individual described in this subsection was less than 50% the cause of the accident or event, an award of damages shall be reduced by that percentage."