STATE OF MICHIGAN

COURT OF APPEALS

DARREN L. DAVIS,

Plaintiff-Appellant,

V

WISCONSIN LOGISTICS, INC.,

Defendant-Appellee.

UNPUBLISHED
February 23, 2006

No. 264002
Jackson Circuit Court
LC No. 04-004857-NI

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

PER CURIAM.

Plaintiff, in this negligence action, appeals as of right the order granting summary disposition under MCR 2.116(C)(10) to defendant. We affirm.

This litigation arose from an October 9, 2001 multi-vehicle accident on I-94. Plaintiff was driving his employer's tractor-trailer eastbound on I-94. Meanwhile, George Powell, a truck driver for defendant Wisconsin Logistics, was traveling westbound on 1-94. Powell crossed the median and, within five to ten seconds, struck a tanker truck. Powell's truck then proceeded to strike plaintiff's vehicle head-on, after which, both vehicles became engulfed in flames. The medical examiner, Dr. Ruben Ortiz-Reyes, attributed Powell's cause of death to an acute myocardial infarction ("heart attack") that occurred prior to his vehicle's impact with plaintiff's vehicle. Plaintiff sustained injuries to his chest and required surgery to his left knee. Plaintiff filed a two-count complaint in circuit court against defendant alleging, among other things, a violation of the owner's liability act, MCL 257.401.[1]

At the conclusion of discovery, defendant filed a motion for summary disposition under MCR 2.116(C)(10). In reliance on Ortiz-Reyes' opinion testimony that Powell died prior to his

[1] The owner's liability statute, MCL 257.401, provides in relevant part:

> The owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligence consists of a violation of a statute of this state or the ordinary care standard required by common law.

collision with plaintiff's vehicle, given the size of Powell's lungs, the lack of carbon monoxide in Powell's blood, and the lack of any soot in his airways, defendant contended Powell's heart attack constituted an unforeseen sudden medical emergency eliminating any actionable negligence that could be attributed to defendant. Defendant asserted that it could be inferred Powell was dead before the impact with plaintiff's vehicle given that he did not die from the collision or the fire.

Plaintiff responded that the "sudden emergency doctrine" did not apply when the circumstances attendant to the accident were neither unusual nor unsuspected. He further argued that he established a prima facie case of negligence based on his deposition testimony that he observed Powell cross the median, in violation of a statute. According to plaintiff, defendant had the burden to establish that Powell was dead before he crossed the median, which ultimately was a question of fact for the jury to decide. Plaintiff argued that the lack of carbon monoxide in Powell's blood only established he was dead at the time his vehicle caught fire, not when he died or when he suffered his fatal heart attack. Plaintiff contended that it was equally plausible that Powell fell asleep and lost control of his vehicle, causing the vehicle to cross the median, after which he suffered his fatal heart attack and died. Plaintiff asserts this equally plausible scenario created an issue of fact which precluded the trial court from granting summary disposition.

After hearing arguments, the trial court granted defendant's motion for summary disposition, on the basis that the cause of the accident could be attributed to a sudden emergency. The trial court concluded, in relevant part:

> Normally, of course, crossing the [median] is going to establish negligence . . . crossing the median is obviously not -- something you're not supposed to do. In this case, it's uncontested, that the Defendant driver . . . had a heart attack. The testimony, which is going to be unrebutted, is that he was probably dead before the impact or immediately thereafter, based on the lungs and the lack of carbon monoxide and different things in the lungs.
>
> It's unclear exactly when this man started having the heart attack. It's unclear, you know if he lost consciousness. But this is all happening in, and even taking the facts in a light most favorable to the Plaintiff, a fairly short period of time. I mean, to come up with the alternative theory that he fell asleep and crossed the center line and then, either through the shock or surprise of winding up in the wrong lane or just completely by coincidence happened to have chose that minute to - - time to have a heart attack really seems like a stretch. I mean, it seems to me that's the point that we're asking a jury to speculate or to try to come up with some conjecture.

Accordingly, the trial court granted defendant's motion for summary disposition, concluding that plaintiff did not have an actionable negligence claim because defendant had established "sudden

emergency" as a valid defense.[2] The trial court denied plaintiff's motion for reconsideration, rejecting plaintiff's claim that the trial court impermissibly made a finding of fact that Powell was dead before he crossed the median. Specifically, the trial court held:

> In this case, I found there was no material issue of fact, and granted Summary Disposition pursuant to MCR 2.116(C)(10) because this accident unquestionably occurred as a result of a sudden medical emergency. There did not appear to be any material dispute about this based on the doctor's testimony and the witnesses' testimony regarding the lack of brake lights and skid marks. This Motion incorrectly states that the Motion was based on a finding that the driver was dead before he crossed the [median]. We will never know whether the driver died shortly before crossing the [median], or shortly after crossing the [median], but it is clear that this driver was in a sudden medical emergency that resulted from his death.

Plaintiff now appeals.

II

This Court reviews a trial court's decision on a motion for summary disposition de novo. *VanVorous v Burmeister*, 262 Mich App 467, 476; 687 NW2d 132 (2004), citing *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). 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 could differ. *Id*.

III

Plaintiff first asserts the trial court considered inadmissible evidence in granting defendant's motion for summary disposition. We disagree. The movant on a (C)(10) motion bears the initial burden to produce supporting documentary evidence. Therefore, the moving party must specifically identify the issues as to which there is no genuine issue of material fact, and support its position with affidavits, depositions, admissions, or documentary evidence. MCR 2.116(G)(3)(b); *Maiden, supra at* 120. In order to be considered for purposes of a motion for summary disposition under MCR 2.116(C)(10), the proffered evidence must be substantively admissible. *Id*. at 121. "Opinions, conclusory denials, unsworn averments, and inadmissible

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[2] Plaintiff's complaint also alleged a claim of negligent entrustment. However, in response to defendant's motion for summary disposition, plaintiff conceded he had no evidence to prevail on the claim; therefore, we consider the claim abandoned. MCR 2.116(G)(4).

hearsay do not satisfy the court rule; disputed fact (or the lack of it) must be established by admissible evidence." *SSC Associates Ltd Partnership v General Retirement System of the City of Detroit*, 192 Mich App 360, 363-364; 480 NW2d 275 (1991) (citation omitted).

Here, in addition to Ortiz-Reyes' deposition, defendant attached police and traffic accident reports to its motion for summary disposition to establish (1) that a witness to the accident did not observe any brake lights on when Powell crossed the median, and (2) that no skid marks were observed at the scene. Absent a foundation, police reports are inadmissible hearsay. *Moncrief v Detroit*, 398 Mich 181, 189; 247 NW2d 783 (1976); see also *Maiden, supra* at 124-125 (if the document to be admitted contains a second level of hearsay, it also must qualify under an exception to the hearsay rule). Because the police and traffic reports were not submitted with accompanying affidavits or depositions to establish an exception under the hearsay rule, they could not be considered in supporting the motion for summary disposition.

However, plaintiff has not established that the trial court impermissibly relied on hearsay evidence when it granted defendant's motion. The trial court made no reference to the absence of brake lights or skid marks when it granted the motion for summary disposition. Further, as discussed below, Ortiz-Reyes' unrefuted opinion supports a reasonable inference based on the evidence that Powell was dead before the impact with the tanker and plaintiff's vehicle. *Libralter Plastics v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993).

Plaintiff next argues the trial court impermissibly made a finding of fact in determining that the "sudden emergency" doctrine is applicable to the facts of this case. Plaintiff contends the trial court, in overcoming the presumption that Powell's act of crossing the median constituted prima facie case of negligence, made a finding that Powell was dead at the moment he crossed the median. We disagree.

Violation of a statute constitutes negligence per se, although whether or not the violation was the proximate cause of the accident is a question of fact for the jury. *Morton v Wibright*, 31 Mich App 8, 11; 187 NW2d 254 (1971); *Shepherd v Short*, 53 Mich App 9, 11; 218 NW2d 416 (1974). However, as explained by the Supreme Court, under the "sudden emergency" doctrine, " '[o]ne who suddenly finds himself in a place of danger and is required to act without time to consider the best means [of avoiding] the impending danger is not guilty of negligence if he fails to [use what, upon hindsight,] may appear to have been a better method, unless the emergency is brought about by his own negligence." *Lepley v Bryant*, 336 Mich 224, 235; 57 NW2d 507 (1953) (citations omitted). The circumstances attending the accident must be either "unusual or unsuspected." *Vander Laan v Miedema*, 385 Mich 226, 232; 188 NW2d 564 (1971).

Defendant cites to several cases from other jurisdictions for the proposition that a driver who loses consciousness due to a heart attack may not be held liable for motor vehicle accidents if the loss of consciousness was not foreseeable, i.e. "unusual or unsuspected." We need not turn to other jurisdictions for guidance as Michigan law currently recognizes that the chain of proximate causation may sometimes be broken by an intervening cause, which is one that actively operates to produce the harm after the negligent conduct of the defendant has occurred. See *McMillian v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985); *Vander Laan, supra* at 226; *Rogalski v Tavernier*, 208 Mich App 302, 306; 527 NW2d 73 (1995).

An intervening cause relieves a defendant from liability unless the intervening act was reasonably foreseeable. *McMillian, supra* at 576. The issues of proximate cause and superseding or intervening cause in a negligence action are generally questions of fact for the jury. *Helmus v Dep't of Transportation*, 238 Mich App 250, 256; 604 NW2d 793 (1999). However, where the facts bearing on proximate cause are not disputed and if reasonable minds could not differ, then the issue is one of law. *Id*.; *Rogalski, supra* at 306.

In this case, the trial court essentially determined that Powell's heart attack was unforeseeable, thus constituting an intervening cause. We find no error. Defendant presented substantive evidence that Powell passed his health physicals in 2001 and 2003, and that he was certified to drive trucks for defendant. In contrast, plaintiff failed to present any evidence other than an unsupported claim from which a reasonable factfinder could infer Powell's heart attack was foreseeable.

We further find plaintiff failed to present substantive evidence to refute Ortiz-Reyes' conclusion that Powell was dead before impact. Instead, plaintiff only theorized that Powell fell asleep before he crossed the median. Plaintiff's theory that Powell fell asleep before he crossed the median, while arguably possible, is nonetheless speculative without supporting substantive evidence. "A conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference." *Libralter, supra* at 486 (citations omitted). As noted in *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994):

> [A] causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the 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.

In this case, the trial court properly determined that plaintiff did not submit sufficient evidence to create a material issue of fact that defendant's negligence caused his injuries. Plaintiff failed to provide *any* evidence to support an inference that Powell was asleep when he crossed the median to refute defendant's evidence that Powell was dead within five seconds of crossing the center median. Because the submitted evidence supports a reasonable inference of an intervening heart attack, we conclude plaintiff's claims are "[m]ere conclusory allegations . . . devoid of detail," and insufficient to satisfy the obligation of a party opposing a motion for summary disposition. *Quinto v Cross & Peters Co*, 451 Mich 358, 371-372; 547 NW2d 314 (1996). Under the circumstances, the trial court properly granted defendant's motion for summary disposition. Plaintiff failed to present any evidence to rebut the inference that Powell's heart attack was the proximate cause of the accident.

Affirmed.[3]

/s/ Helene N. White
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder

[3] Given plaintiff's lack of supporting substantive evidence and our conclusion that the trial court properly granted defendant's motion for summary disposition, we need not address plaintiff's claim that an abuse of discretion occurred when the trial court considered inadmissible evidence in denying plaintiff's motion for reconsideration.