

STATE OF MICHIGAN
COURT OF APPEALS

MARGARET SHAMEL, Conservator for the Estate
of CHRISTOPHER BURNS,

UNPUBLISHED
July 25, 2000

Plaintiff-Appellant,

v

No. 214756
Wexford Circuit Court
LC No. 97-013008-NI

JOSEPH HARD and PRISCILLA B. HARD,

Defendants-Appellees,

and

DOW CARD and PAUL BOSHER,

Defendants.

Before: Zahra, P.J., and Kelly and McDonald, JJ.

PER CURIAM.

Plaintiff appeals as of right from a May 1, 1998, order granting summary disposition for defendants Joseph and Priscilla Hard pursuant to MCR 2.116(C)(10) in this third party no-fault action. We affirm.

FACTS

On August 19, 1996, at approximately 9:30 p.m., defendant Priscilla Hard was driving a car owned by her and her husband, defendant Joseph Hard, eastbound on Two Mile Road in Wexford County. Defendant Joseph Hard was a passenger in the car. The portion of the road at issue is an unlit, two lane road with a fifty-five mile per hour speed limit.

A pickup truck parked by codefendant Dow Card was on the side of the road with a part of the truck protruding into the eastbound lane of travel.¹ Several people were standing next to the driver's side of the truck. In order to avoid the truck and those individuals, defendant Priscilla Hard

moved her vehicle into the westbound lane. As she passed the truck, her car struck the fifteen-year-old plaintiff. According to Hard, she never saw plaintiff, but knew she had struck something after the fact. The police investigator determined that plaintiff was hit by the right front bumper of the Hard vehicle, which propelled him onto the hood and into the passenger side of the front windshield. Plaintiff suffered broken bones and a closed head injury as a result of the impact.

Two of the people standing near the truck were deposed. Jason Richard testified that plaintiff was moving in and out of the middle of the road. Richard warned plaintiff to stay out of the road and pulled plaintiff out of the road on at least one occasion.² Jason Hepner testified that plaintiff was “horsing around” in the road and quoted plaintiff as saying that one hundred cars had passed without hitting him.

Plaintiff brought the present suit alleging defendant Priscilla Hard was negligent in either of two ways: (1) operating her car at a speed that was excessive for conditions in violation of MCL 257.627(1); MSA 9.2327(1); or (2) operating her vehicle recklessly in violation of MCL 257.626; MSA 9.2326. The trial court granted defendants Joseph and Priscilla Hard’s motion for summary disposition, ruling that a reasonable jury could not find that defendant Priscilla Hard was driving negligently because she was driving within the speed limit and she legally proceeded into the westbound lane when her lane was obstructed. The trial court also ruled that the assured clear distance rule³ was not applicable because Hard struck plaintiff while attempting to avoid hitting the illegally parked truck. After determining that defendant Priscilla Hard was not negligent in any of the ways indicated by plaintiff and concluding that defendants were entitled to summary disposition, the trial court stated:

Now for argument purposes, because if this case is appealed, I want to address the other allegation. Even if the Court is incorrect on the negligence issue, it is my opinion that no reasonable jury could find under these facts that have been adduced so far that driver Priscilla Hard is fifty percent or more negligent in view of facts of this case.

ANALYSIS

Plaintiff raises four issues on appeal.⁴ The first issue raised by plaintiff is that the trial court erred by granting summary disposition on the basis that defendant Priscilla Hard was less than fifty percent at fault when there were multiple defendants. We agree that because there were multiple defendants, the trial court’s focus should have been on the negligence of the plaintiff, not the negligence of a single defendant.⁵ However, as demonstrated above, this finding by the trial court was an alternative ground to support summary disposition. Because we find no error in the trial court’s conclusion that defendant Priscilla Hard was not negligent, the trial court’s erroneous analysis is harmless. The second and third issues raised by plaintiff are evidentiary issues. Plaintiff claims the trial court erred by considering evidence of plaintiff’s conduct prior to the accident to establish plaintiff’s negligence. Plaintiff also alleges the trial court erred by denying plaintiff a presumption of due care. Fourth, plaintiff argues that even if plaintiff is denied a presumption of due care, there is overwhelming evidence of defendant Priscilla Hard’s negligent conduct because she violated the assured clear distance statute and operated her vehicle recklessly, in part, by violating the statute mandating that a

driver remain right of the center line in the roadway. Issues two through four are discussed separately below.

A. STANDARD OF REVIEW

We review a trial court's grant or denial of a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Id.*; *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). A court must consider the affidavits, pleadings, depositions, admissions or any other documentary evidence submitted in a light most favorable to the nonmoving party in deciding whether a genuine issue of material fact exists. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999); *Rollert v Dep't of Civil Service*, 228 Mich App 534, 536; 579 NW2d 118 (1998). All reasonable inferences are resolved in the nonmoving party's favor. *Dagen v Hastings Mut Ins Co*, 166 Mich App 225, 229; 420 NW2d 111 (1987). However, speculation and conjecture are insufficient to establish an issue of fact. *City of Detroit v GMC*, 233 Mich App 132, 139; 592 NW2d 732 (1998).

B. OTHER ACTS EVIDENCE

Plaintiff argues that the trial court erred when it considered evidence of plaintiff's prior conduct in ruling on defendant's motion, in violation of MRE 404(b). Because plaintiff failed to raise this claim in the trial court, it is not preserved for review. A party may not object to the admission of evidence for the first time on appeal absent manifest injustice. *Phinney v Perlmutter*, 222 Mich App 513, 558; 564 NW2d 532 (1997); *In re Forfeiture of \$19,250*, 209 Mich App 20, 32; 530 NW2d 759 (1995). Here, the statements regarding plaintiff's acts approximately ten minutes before being struck by defendant were admissible under the multi-step procedure outlined in *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994).⁶ Accordingly, our refusal to further consider this issue would not result in manifest injustice.

C. PRESUMPTION OF DUE CARE

Next, plaintiff argues that he is entitled to a presumption of due care because he has no memory of the accident. If a plaintiff suffers from traumatic amnesia, he is entitled to a presumption that he was exercising due care until the presumption is overborne by factual evidence. *Knickerbocker v Samson*, 364 Mich 439, 448-449; 111 NW2d 113 (1961). The presumption is rebutted when positive and credible evidence of the plaintiff's negligence is produced. *Id.* at 449. Here, defendants presented the testimony of several witnesses who stated that plaintiff was intentionally playing in the road minutes before the accident, that plaintiff was told to keep out of the road and physically removed from the road on at least one occasion, that plaintiff said he had been passed by over one hundred cars without being hit, and that plaintiff "played chicken" with cars on other occasions.

Plaintiff argues that he must have been stopped at the center line waiting for defendants' car to pass so that he could cross the street. However, plaintiff cannot testify to that effect because he has no

memory of the accident. Contrary to plaintiff's assertion, the evidence of plaintiff's actions minutes before the accident lead to the conclusion that plaintiff had no legitimate reason for standing in the middle of the road. Therefore, we find no error in the trial court's conclusion that plaintiff was not entitled to a presumption that he exercised due care for his own well being.

D. ASSURED CLEAR DISTANCE STATUTE

Plaintiff also argues that the trial court erred in ruling that the assured clear distance statute does not apply to this case. MCL 257.627(1); MSA 9.2327(1). A violation of a civil statute can establish a prima facie case from which negligence can be inferred. *Johnson v Bobbie's Party Store*, 189 Mich App 652, 661; 473 NW2d 796 (1991); see *Krass v Tri-County Security, Inc.*, 233 Mich App 661, 675-676; 593 NW2d 578 (1999), citing *Sponkowski v Ingham Co Rd Comm*, 152 Mich App 123, 128; 393 NW2d 579 (1986).

The assured clear distance statute provides:

(1) A person driving a vehicle on a highway shall drive at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface, and width of the highway and of any other condition then existing. A person shall not drive a vehicle upon a highway at a speed greater than that which will permit a stop within the assured, clear distance ahead. [MCL 257.627(1); MSA 9.2327(1).]

That statute is inapplicable where an object suddenly intersects the assured clear distance of a motorist. *Green v Richardson*, 69 Mich App 133, 139; 244 NW2d 385 (1976), citing *Cole v Barber*, 353 Mich 427; 91 NW2d 848 (1958); *Barner v Kish*, 341 Mich 501; 67 NW2d 693 (1954); *Meehl v Barr Transfer Co*, 296 Mich 697; 296 NW 844 (1941). Here, there is no evidence to dispute the testimony that defendant Priscilla Hard was driving at or below the posted speed limit of fifty-five miles per hour and that she proceeded into the westbound lane of traffic to avoid the obstruction in her lane of travel. According to eye witnesses, plaintiff made a game out of seeing how close he could come to passing cars without being hit. There is no evidence to establish that plaintiff was visible to defendants prior to the accident. Under such circumstances, the assured clear distance does not apply. *Green, supra*.

We also conclude that the trial court correctly ruled that defendant Priscilla Hard did operate her vehicle recklessly, in violation of MCL 257.626; MSA 9.2326. There is no evidence defendant Priscilla Hard was speeding or otherwise operating her vehicle recklessly at the time of the collision.

We conclude further that the trial court correctly ruled that defendant Priscilla Hard did not violate the statute mandating that a driver remain right of the centerline. MCL 257.634; MSA 9.2334.⁷ The statute includes a specific exception for avoiding obstructions. MCL 257.634(1)(b); MSA 9.2334(1)(b). The pickup truck was obstructing the eastbound lane and, therefore, Hard was entitled to cross the centerline. *Id.*; see *Young v Flood*, 182 Mich App 538, 541-542; 452 NW2d 869 (1990).

CONCLUSION

Overall, there is no evidence suggesting the Hard vehicle was operated unlawfully or negligently.⁸ Thus, defendants Joseph and Priscilla Hard are not liable to plaintiff for negligence as a matter of law. Plaintiff's own conduct supports our conclusion that defendants did not act unreasonably.

Affirmed.

/s/ Brian K. Zahra

/s/ Michael J. Kelly

/s/ Gary R. McDonald

¹ Plaintiff argues that it was not yet a settled fact regarding who owned the truck operated by Card. While this may be true, this factual dispute is not material to any of the claims asserted against Joseph and Priscilla Hard. Moreover, plaintiff's claims against Card were settled.

² The police report reflects that Richard told an officer that plaintiff was intentionally trying to see how close he could get to passing cars. However, in deposition, Richard testified that he did not believe plaintiff was "playing chicken" on the night in question. Richard defined the term "playing chicken" as the act of walking in front of oncoming cars and trying to dodge them. Richard testified that plaintiff admitted to "playing chicken" previously, but Richard did not believe plaintiff would play chicken in Richard's presence.

³ MCL 257.627(1); MSA 9.2327(1).

⁴ Plaintiff's brief identifies only three issues. For purposes of clarity, we have separated plaintiff's presumption of due care argument into two issues: (1) whether plaintiff was entitled to a presumption of due care; and (2) whether there is evidence of defendant's negligence.

⁵ We recognize that the trial court ruled, as an alternative means of granting summary disposition, that plaintiff's claim is precluded by MCL 500.3135(2)(b); MSA 24.13135(2)(b) because no reasonable jury could find that defendant Priscilla Hard was more than fifty percent negligent. MCL 500.3135(2)(b); MSA 24.13135(2)(b) provides that "[d]amages shall be assessed on the basis of comparative fault, *except that damages shall not be assessed in favor of a party who is more than fifty percent at fault.*" (emphasis added.)

Where there are multiple defendants, the court's focus under MCL 500.3135(2)(b); MSA 24.13135(2)(b) should not be on whether any one defendant's negligence exceeds fifty percent of the total negligence. Rather, recovery would be barred only if the plaintiff's negligence exceeded fifty percent of the total negligence. This matter involved the possible negligence of three parties: Priscilla Hard, Card and plaintiff. Because of the third actor, the court should have looked at either the combined negligence of the defendants or the total negligence of the plaintiff. The statute speaks of the

plaintiff's percentage of negligence, not the defendants' percentage of negligence. In cases involving only two actors, if the defendant is less than fifty percent negligent, the plaintiff would necessarily be more than fifty percent at fault. However, in cases where there are more than two actors, as in this case, the court must determine whether a reasonable jury could find that plaintiff was less than fifty percent negligent.

The trial court erroneously looked to defendant Priscilla Hard's percentage of negligence instead of plaintiff's percentage of negligence. This error is purely academic, however, given there is no genuine issue of fact as to defendants Joseph and Priscilla Hard's negligence.

⁶ Likewise, testimony that plaintiff had "played chicken" with passing cars in the past would be admissible pursuant to MRE 404(b) to show plaintiff's "scheme, plan, or system in doing an act..." *Id.*

⁷ Plaintiff did not specifically allege violation of that statute in his Second Amended Complaint. However, we briefly consider its applicability now because it appears plaintiff's omission of a claim based on that statute was accidental given its inclusion in plaintiff's original complaint and given that both parties presented argument below regarding the statute and the trial court ruled the evidence established it was not violated.

⁸ We note that plaintiff's negligence claims against defendants Joseph and Priscilla Hard are based only on the alleged statutory violations and are not based on common law negligence. Plaintiff's Second Amended Complaint specifically alleged that the negligence and gross negligence of defendants Joseph and Priscilla Hard,

[C]onsisted of the following:

a. In operating her motor vehicle in a reckless fashion, in utter and wanton disregard for the rights and safety of others who may be on the highway, in violation of MCLA 257.626.

b. In operating said motor vehicle at a speed and in a manner that was neither careful nor prudent and was greater than reasonable and proper having due regard to the traffic surface and width of the highway and of any other condition then existing, specifically the presence of Defendant Dow Chad's [Sic] vehicle, which Defendant Priscilla Hard did observe, and the presence of plaintiff's ward in the west bound lane of the highway, which Defendant Priscilla did not, but should have, with due care, observed, and driving said vehicle upon Two Mile Road at a speed greater than would permit her to bring the vehicle to a stop within the assured clear distance ahead, in violation of MCLA 257.627.

While plaintiff contended at times below that defendant Priscilla Hard operated her vehicle at a high rate of speed and failed to see and avoid plaintiff, these arguments were advanced solely to support the contention that defendant Priscilla Hard violated the assured clear distance statute. MCR 2.111(B)(1)

requires each allegation within a complaint to be stated with such specificity that it reasonably informs the adverse party of the nature of the claims the adverse party is called to defend. See MCR 2.113(E)(3) (requiring each statement of a claim for relief to be stated in a separately numbered count). Given that the above-cited allegations set forth in plaintiff's Second Amended Complaint indicate plaintiff pleaded negligence based only on alleged statutory violations, we do not consider whether there is evidence of common law negligence sufficient to create a genuine issue of material fact.