STATE OF MICHIGAN

COURT OF APPEALS

TODD A. GARRISON and RHONDA SUE GARRISON,

Plaintiffs-Appellants,

v

MOUNT CLEMENS GENERAL HOSPITAL,

Defendant-Appellee,

and

PAMELA FAY REID,

Defendant.

UNPUBLISHED
May 18, 2001

No. 220774
Macomb Circuit Court
LC No. 95-004427-NI

Before: McDonald, P.J., and Hood and Smolenski, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a circuit court order granting defendant hospital's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff Todd Garrison was injured outside the hospital when he was struck by Reid's car, which rolled into him while unattended. He sought to impose liability on the hospital under theories of automobile negligence, respondeat superior, and bailment. His wife brought a derivative claim for loss of consortium.[1] The court found that plaintiffs had failed to present any evidence to show that the hospital was negligent or was responsible for Reid's conduct.

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Gibson v Neelis*, 227 Mich App 187, 189; 575 NW2d 313 (1997). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must

[1] It appears from the record that plaintiffs were divorced during the pendency of the case, resulting in Rhonda Garrison's dismissal as a party plaintiff; Todd Garrison alone filed this claim of appeal.

consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. Summary disposition is appropriate only if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Smith v Globe Life Ins Co,* 460 Mich 446, 455; 597 NW2d 28 (1999).

On appeal, plaintiff challenges the trial court's ruling as to the issue of negligence. The plaintiff has the burden of producing evidence sufficient to make out a prima facie case. *Id*.; *Snider v Bob Thibodeau Ford, Inc,* 42 Mich App 708, 712; 202 NW2d 727 (1972). The happening of an accident is not, in and of itself, evidence of negligence. The plaintiff must present some facts that either directly or circumstantially establish negligence. *Whitmore v Sears, Roebuck & Co,* 89 Mich App 3, 9; 279 NW2d 318 (1979).

The evidence submitted below showed that Reid left the car without setting the parking brake and the car rolled down the drive and hit plaintiff. The gearshift was found in neutral and the key was not in the ignition; Reid had taken her keys inside and given them to the desk nurse. Immediately after the accident, plaintiff said the engine was running, but he later admitted at his deposition that he wasn't sure if it actually had been running. Documents recording plaintiff's initial statements regarding the engine are not admissible under MRE 803(5) because plaintiff has not shown that his memory of the incident is insufficient to permit him to testify accurately or that he reviewed the documents at the time they were made to ascertain that they accurately reflected his knowledge. *People v Hoffman,* 205 Mich App 1, 16; 518 NW2d 817 (1994); *People v Kubasiak,* 98 Mich App 529, 536-537; 296 NW2d 298 (1980). While the defense experts opined that the key had to be in the ignition for the car to travel along the path it took, there must be facts in evidence to support that conclusion. *Skinner v Square D Co,* 445 Mich 153, 173; 516 NW2d 475 (1994). In this case, there is simply no evidence supporting the experts' conjecture; plaintiff has offered none and the experts themselves could not explain how the key could have been in the ignition if it was with the desk nurse.

Plaintiff contends that the court should have drawn an inference that a hospital employee did set the car in motion because defendant destroyed a security surveillance tape. A party's intentional destruction of relevant evidence creates a presumption that the evidence would have been adverse to that party. A party's failure to produce relevant evidence under his control where there is no reasonable excuse for that failure permits an inference that the evidence would have been adverse, but the factfinder is not required to draw such an inference. *Lagalo v Allied Corp (On Remand),* 233 Mich App 514, 520-521; 592 NW2d 786 (1999); *Brenner v Kolk,* 226 Mich App 149, 155-156; 573 NW2d 65 (1997).

Plaintiff has not shown that the hospital intentionally destroyed the tape to prevent its use in this case. Moreover, it appears from the record that still shots from the tape were preserved. In addition, a security officer who viewed the tape at the time of the accident testified that Reid's car could not be seen through the lobby windows due to glare from the sunlight. Given that plus the fact that the court was not required to draw an adverse inference against defendant, it would be inappropriate for this Court to "resolve the issue definitively." *Berryman v Kmart Corp,* 193 Mich App 88, 102; 483 NW2d 642 (1992).

Plaintiff's final claim is that the trial court erred in entering the October 8, 1998, order granting defendant's motion for sanctions under MRE 2.405. However, plaintiff has failed to address the merits of the claim and thus it is deemed abandoned. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). The argument presented concerns an unrelated issue pertaining to a motion plaintiffs filed in November 1998 to apply the law of the case doctrine and strike Reid's affirmative defenses that someone other than herself was at fault. That issue was not raised in the statement of questions presented and thus has not been preserved for appeal, *City of Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995), and review is inappropriate. *Marx v Dep't of Commerce*, 220 Mich App 66, 81; 558 NW2d 460 (1996).

Affirmed.

/s/ Gary R. McDonald
/s/ Harold Hood
/s/ Michael R. Smolenski