STATE OF MICHIGAN

COURT OF APPEALS

ANDY MANNI, as personal representative of the estates of AMER BASHI, NAWAF ZORA, and SAAD ZORA,

Plaintiff-Appellant,

v

A-1 EXPRESS, INC.,

Defendant-Appellee,

and

DARYL HARDISON and HARPER LIQUOR SHOPPE, INC., d/b/a HARPER LIQUOR SHOPPE,

Defendants.

UNPUBLISHED
January 27, 2004

No. 242897
Wayne Circuit Court
LC No. 00-030011-NO

Before: Smolenski, P.J., and Saad and Kelly, JJ.

PER CURIAM.

This wrongful death action arose from the tragic deaths of three young men. On November 12, 1998, Amer Bashi, Nawaf Zora, and Saad Zora were working at Harper Liquor Shoppe in Detroit when a kerosene heater behind the cash registers exploded and killed them. It was determined that the explosion and subsequent fire were caused by the use of gasoline in the kerosene heater. Plaintiff filed this action on behalf of the estates of the three men against Harper Liquor Shoppe, Daryl Hardison, the person who bought the gasoline apparently used in the heater, and A-1 Express, Inc., the gas station that sold the gasoline. Defendant A-1 Express[1] filed a motion for summary disposition pursuant to MCR 2.116(C)(10). The trial court granted

[1] Because the other defendants are not parties to this appeal and were dismissed by stipulation after the claims against A-1 Express, Inc. were dismissed, "defendant" refers to A-1 Express only. The other defendants are referenced by name.

the motion finding that there was no evidence on which to hold defendant liable for the decedents' deaths. Plaintiff now appeals as of right. We affirm.

A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. We review de novo a trial court's decision to grant summary disposition. When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76-77; 597 NW2d 517 (1999).

> Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. 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 might differ. [*West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003) (citations omitted).]

Plaintiff first argues that the trial court erred in concluding that defendant owed no duty to the decedents. However, we are unable to discern from the record that the trial court made such a determination. Regardless, we agree with plaintiff that MCL 750.502 proscribed defendant's duty. A duty can arise from a statute, as well as through common law. *Phillips v Deihm*, 213 Mich App 389, 397; 541 NW2d 566 (1995). MCL 750.502 provided, in pertinent part:[2]

> Every person dealing at wholesale or retail in gasoline, benzine or naphtha shall deliver the same from tank wagons, tanks, casks, barrels, pumps or other receptacles to the purchaser only in barrels, casks, jugs, packages, pumps or cans painted vermillion bright red, and having the word "gasoline", "benzine" or "naphtha" plainly lettered in English thereon, and all tank wagons and wholesale receptacles shall likewise be labeled with the word "gasoline", "benzine" or "naphtha" as the use of such tank wagon or receptacle would indicate. . . . Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

Thus, defendant had a duty to sell Hardison gasoline only in a properly marked red container.

Defendant argues that because there is no evidence that it had actual or constructive knowledge that Hardison filled a non-red container with gasoline, it cannot be held liable. As support for its position, defendant relies on *Holloway v Martin Oil Service*, 79 Mich App 475; 262 NW2d 858 (1977), which held that the defendant owed no duty to the unforeseeable plaintiffs where the gas station attendant sold gasoline in a blue container to some young men who used it to commit arson, resulting in the plaintiffs' injuries. But defendant's reliance on this case is misplaced. In *Holloway*, the plaintiffs asserted a common law duty, not one based in statute. Therefore, in order for the defendant to owe the plaintiffs a duty, the plaintiffs had to be

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[2] Effective May 1, 2002, this statute was repealed. 2002 PA 252.

foreseeable. *Id*. at 477-478. The color of the gas container was not at issue. Had the plaintiffs asserted that the defendant's duty arose under MCL 750.502, as plaintiff does here, the trial court would have had to conclude that the defendant breached its duty by selling gasoline in a blue container. However, this would not have ended the court's analysis.

Non-compliance with MCL 750.502 resulted in *criminal* liability. In Michigan, a statutory violation does not establish negligence as a matter of law. *Zeni v Anderson*, 397 Mich 117, 128-129; 243 NW2d 270 (1976); *Gould v Atwell*, 205 Mich App 154, 158; 517 NW2d 283 (1994). Violation of a penal statute creates a prima facie case of negligence from which a jury *may* draw an inference of negligence. *Id.* Provided that, however, the statute is intended to protect against the result of the violation, the plaintiff is within the class intended to be protected by the statute, and the evidence will support a finding that violation of the statute was a proximate cause of the injury.[3] *Williams v Coleman*, 194 Mich App 606, 622; 488 NW2d 464 (1992).

Had the *Holloway* Court embarked on this analysis, its result would have been the same because injuries from arson were not the harm that the statute was intended to protect against. The statute was passed as a measure to protect individuals from harms that occurred because of a mistake as to a container's contents, given the outward similarities of the liquids. *Stone v Sinclair Refining*, 225 Mich 344, 347; 196 NW 339 (1923); *Molin v Wisconsin Land & Lumber Co*, 117 Mich 524, 527; 143 NW 624 (1913).[4] In this case, plaintiff alleges that Hardison was supposed to purchase kerosene and the decedents' deaths resulted from their mistaken belief that the white container contained kerosene, not gasoline; the type of harm that MCL 750.502 was intended to protect against.

Acknowledging that defendant had a duty to the decedents, the issue becomes whether defendant sold Hardison gasoline in a non-red container, i.e., whether defendant breached its duty. The determination of whether a defendant breached a duty of care is ordinarily a question of fact for the jury, but if the moving party can show either that an essential element of the nonmoving party's case is lacking or that the nonmoving party's evidence is insufficient to establish an element of the claim, summary disposition is proper. *Latham v Nat'l Car Rental Systems, Inc*, 239 Mich App 330, 340; 608 NW2d 66 (2000).

Defendant's argument regarding the lack of its actual or constructive knowledge that Hardison filled a non-red container with gasoline more appropriately pertains to the question of breach. It is undisputed that no evidence was presented to indicate that defendant's employee actually knew that Hardison used a non-red container. With regard to defendant's constructive knowledge, the more immediate factual dispute surrounds the question of whether Hardison did in fact use a non-red container. Plaintiff argues that there is sufficient circumstantial evidence to

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[3] To the extent that the trial court asserted that violation of the statute rendered the issue of proximate cause irrelevant, the court was in error.

[4] These cases dealt with predecessor statutes to MCL 750.502 which were substantially similar. We find no indication that the statute's purpose changed.

create a question of fact regarding this issue. However, we find it unnecessary to address this issue because, even assuming that Hardison used a non-red container and defendant had constructive knowledge of this fact, we conclude that there is no genuine issue of material fact as to the cause in fact element of proximate cause.

To permit a reasonable inference of causation from circumstantial evidence, a causation theory must have some basis in established fact. It may not be predicated on mere speculation. The plaintiff must present substantial evidence from which a jury could conclude that, more likely than not, but for the defendant's conduct the plaintiff's injuries would not have occurred. The plaintiff's presentation of a possibility consistent with his claim is not sufficient. *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994).

Plaintiff asserts that Hardison's conflicting accounts regarding why he was sent to the gas station and what color container he used, when considered in conjunction with the evidence at the scene of the fire, are sufficient to support a reasonable inference of causation. We disagree. The only evidence to support plaintiff's theory that the decedents used gasoline in the kerosene heater because they were under the mistaken belief that the container held kerosene is a hearsay statement allegedly made by Hardison to Dolar Bashi, the owner of Harper's Liquor Shoppe. Bashi testified that a few weeks after the fire Hardison told him that Amer Bashi, one of the decedents, gave him a white container to fill with kerosene, but he bought gasoline by mistake.

Plaintiff argues that this evidence is admissible under the residual exception to the hearsay rule, MRE 803(24).[5] As our Supreme Court recently stated in *People v Katt*, 468 Mich 272, 290; 662 NW2d 12 (2003), in order to be admissible under this exception "a hearsay statement must: (1) demonstrate circumstantial guarantees of trustworthiness equivalent to the categorical exceptions, (2) be relevant to a material fact, (3) be the most probative evidence of that fact reasonably available, and (4) serve the interests of justice by its admission." There is no complete list of factors to consider when determining a statement has "particularized guarantees of trustworthiness." *Id*. at 291-291. Instead, a court must examine the "totality of the circumstances" and "consider all factors that add to or detract from the statement's reliability." *Id*. at 291-292.

However, our Supreme Court did reference the Federal Rules of Evidence Manual and stated that the factors contained therein, while not all-inclusive, provided general guidelines for the court. This list of factors included:

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[5] MRE 803(24) provides:

> A statement not specifically covered by any of the foregoing [hearsay] exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

> (1) The relationship between the declarant and the person to whom the statement was made; (2) The capacity of the declarant at the time of the statement; (3) The personal truthfulness of the declarant; (4) Whether the declarant appeared to carefully consider his statement; (5) Whether the declarant recanted or repudiated the statement after it was made; (6) Whether the declarant has made other statements that were either consistent or inconsistent with the proffered statement; (7) Whether the behavior of the declarant was consistent with the content of the statement; (8) Whether the declarant had personal knowledge of the event or condition described; (9) Whether the declarant's memory might have been impaired due to the lapse of time between the event and the statement; (10) Whether the statement, as well as the event described by the statement, is clear and factual, or instead is vague and ambiguous; (11) Whether the statement was made under formal circumstances or pursuant to formal duties, such that the declarant would have been likely to consider the accuracy of the statement when making it; (12) Whether the statement appears to have been made in anticipation of litigation and is favorable to the person who made or prepared the statement; (13) Whether the declarant was cross-examined by one who had interests similar to those of the party against whom the statement is offered; (14) Whether the statement was given voluntarily or instead pursuant to a grant of immunity; (15) Whether the declarant was a disinterested bystander or rather an interested party. [*Id*. at 291 n 11.]

In this case, Bashi appeared to be a person who Hardison trusted, Hardison had personal knowledge since he was the one who purchased the gasoline, and, at the time the alleged statements were made, litigation had not commenced against Hardison or Bashi. There is no evidence regarding Hardison's physical condition at the time the statements were made or whether Hardison had a reputation for being truthful. The statements were not voluntary in that they were given as the result of Bashi seeking out Hardison and questioning him regarding the events the day of the fire. However, Hardison was under no obligation to speak to Bashi.

What is clear is that at the time Bashi related the statements at his deposition, he, as owner of Harper's Liquor, was a defendant in this action. Hardison was deposed after Bashi, but there is no evidence that Hardison was asked whether he gave these statements to Bashi. Hardison also spoke to a private investigator a few months after the fire and, during the interview, gave several conflicting accounts of what happened, all of which conflicted with his deposition testimony. At his deposition, Hardison insisted that he only filled a red container with gasoline; however, this testimony was also not a model of clarity. Considering all the circumstances, we simply cannot find that Hardison's alleged statements to Bashi have the "indicia of reliability" that is required to admit hearsay evidence.

Without this hearsay testimony, there is not "substantial evidence" that would allow a reasonable jury to conclude that it is more probable than not that the gasoline was used by mistake in the heater. It is just as likely that the gasoline was used on purpose or that a container other than the one Hardison filled, assuming he used a non-red container, was the one found by the heater. The record indicates that several white containers were kept at the liquor store. It is not sufficient to present a causation theory that, even if factually supported, is, at best, just as

possible as another theory. *Skinner*, *supra* at 164. Therefore, we find that the trial court properly granted defendant's motion for summary disposition.

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Kirsten Frank Kelly