STATE OF MICHIGAN

COURT OF APPEALS

PAMELA HINES, Personal Representative of the Estate of Jeanette Hines,

Plaintiff-Appellant,

v

PIONEER STATE MUTUAL INSURANCE COMPANY and LINDEN SQUARE LIMITED DIVIDEND HOUSING ASSOCIATION, d/b/a Pine Shore Apartments,

Defendants-Appellees.

UNPUBLISHED
August 10, 2004

No. 247093
Genesee Circuit Court
LC No. 02-073709-NI

Before: Gage, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right from the dismissal of her lawsuit under MCR 2.116(C)(10) in this case involving automobile insurance and premises liability claims. We affirm.

On June 14, 2002, plaintiff filed a complaint in her capacity as the personal representative of the estate of Jeanette Hines (Hines), a deceased person. Plaintiff alleged that in November 2001, Hines "was alighting from an automobile owned and being driven by her daughter[1] at night time [sic] in the parking lot of the Pine Shore Apartments when she slipped and fell because oil had leaked from an unidentified motor vehicle." Hines sustained a brain injury from the fall and died from it approximately ten days afterwards.

Plaintiff alleged in Count I of the complaint that Hines did not own an automobile on the date of the accident but that she resided with her daughter, who did own an automobile and had no-fault automobile insurance, including an uninsured motorist policy, through defendant Pioneer State Mutual Insurance Company (Pioneer). Plaintiff claimed that she had been unable to determine the owner or operator of the vehicle from which the oil had leaked and that she

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[1] Hines' daughter, Pamela Hines, and plaintiff share the same name and, in all probability, are the same person, but there is no definitive evidence to this effect in the record. Accordingly, this opinion refers to plaintiff and to Hines' daughter as separate individuals.

therefore sought uninsured motorist benefits from Pioneer, which refused to pay them. Plaintiff stated that she was "entitled to collect under the uninsured motorist policy for the loss of love[] [and] companionship, and [plaintiff's] [e]state is entitled to collect for the pain and suffering that [p]laintiff's [d]ecedent endured prior to her becoming unconscious."

In Count II of the complaint, plaintiff claimed that defendant Linden Square Limited Dividend Housing Association (Linden Square) owned and operated the parking lot in which Hines fell. Plaintiff alleged that Linden Square acted negligently by allowing the parking lot to become hazardous and by failing to rectify the hazardous condition. Plaintiff stated "[t]hat as a direct and proximate result of the negligent acts of . . . Linden Square . . ., [p]laintiff's [d]ecedent's descendants are entitled to collect for their loss of love and companionship."

Although the complaint is not entirely clear on this point, it appears that, in addition to the uninsured motorist and premises liability claims set forth in Counts I and II of the complaint, plaintiff also sought to recover unpaid personal injury protection (PIP) benefits from Pioneer.[2]

On July 25, 2002, Pioneer moved for summary disposition of the uninsured motorist claim under MCR 2.116(C)(8) and MCR 2.116(C)(10). In an accompanying brief, Pioneer first claimed that it owed no benefits to plaintiff because there was an insufficient causal nexus between Hines' fall and the "ownership, maintenance or use of an uninsured motor vehicle." Pioneer claimed, for example, that the oil might have emanated not from a motor vehicle but from something hauled on a trailer. Pioneer additionally claimed that under the insurance policy at issue, Pioneer was obligated to pay uninsured motorist benefits if "a hit and run vehicle whose operator or owner cannot be identified" hit or caused an object to hit an insured person or a family member. Pioneer claimed that there was no evidence that an uninsured vehicle hit or caused an object to hit Hines.

Plaintiff filed a response to Pioneer's motion on September 17, 2002, stating that Hines' accident was indeed caused by the "ownership, maintenance or use of an uninsured motor vehicle" because "[a]n oil leak or spill is a condition that is inherent in the nature of a vehicle." Plaintiff attached to her response an affidavit from one Darwin Burnett, who averred, "Based upon my experience and my inspection of the parking spot identified as the parking spot where Ms. Hines slipped, the oil spilled in that parking spot appears to have come from a motor vehicle."[3] Plaintiff further alleged in her response that physical contact between Hines and an uninsured vehicle did indeed occur because "[t]he oil was an object cast off by the vehicle and there is a substantial physical nexus between the vehicle and the oil[] [because] the oil is necessary to operate a vehicle."

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[2] Despite the unclear nature of the complaint with respect to whether plaintiff was suing to recover unpaid PIP benefits, both plaintiff and Pioneer proceeded below and proceed on appeal as if the complaint did in fact seek these benefits.

[3] Burnett did not explain in his affidavit how he was qualified to make this assertion.

On October 4, 2002, Pioneer briefly replied to plaintiff's response to its motion for summary disposition, stating, inter alia, that any claimed physical contact between Hines and an uninsured vehicle "is attenuated or inferentially established."

On October 8, 2002, Pioneer moved for summary disposition of plaintiff's PIP claim under MCR 2.116(C)(8) and MCR 2.116(C)(10). In an accompanying brief, Pioneer argued that it owed PIP benefits for injuries relating to a parked vehicle only under certain circumstances, such as when the injured person was occupying, entering into, or alighting from the parked vehicle. Pioneer claimed that Hines "had completed the process of alighting from the vehicle when she was injured and was therefore not alighting from the vehicle at the time she was injured." Pioneer added, "The fact that she was next to the vehicle when she fell gave the vehicle at most an incidental causal connection to her injuries."

Plaintiff filed a response on October 16, 2002, to Pioneer's motion concerning the PIP claim. Plaintiff claimed, inter alia, that Hines was indeed in the process of alighting from the vehicle when she fell. In support of this assertion, plaintiff attached to her response excerpts from the deposition of Hines' daughter, Pamela Hines (Pamela),[4] in which Pamela stated that the passenger door of the vehicle was still open when she turned and saw Hines on the ground after the accident.

Pamela's deposition was filed with the court on November 5, 2002. In the deposition, she testified as follows: Hines was sixty-six years old and in end-stage kidney failure at the time of the accident. She could walk on her own, but she often used a walker because some of her toes had been amputated and she had a bad back. The accident occurred close to midnight. Pamela drove Hines to her apartment complex in an extended-cab truck. Pamela got out of the driver's side of the truck, pulled out Hines' walker, and walked up to the apartment building to unlock the front door. She then heard a sound and saw that her mother had fallen. She noticed that the passenger door to the truck was still open. Hines asked Pamela to look at her head and stated "that she must have slipped and fallen on something, but she didn't know what." Before the accident, Pamela had noticed both standing oil and an oil stain in the area where Hines fell. Pamela did not see any part of the fall and did not know "if [Hines] tripped or if she slipped[.]" However, Pamela later reiterated that Hines "told me she slipped and fell." Pamela discovered oil stains on Hines' pants after the accident.

On November 25, 2002, the trial court granted Pioneer's motion for summary disposition of the uninsured motorist claim. At the motion hearing on November 4, 2002, the trial court ruled, in part:

> . . . we don't know when the leak occurred if it leaked. We can have a bicycle leaking, we could have someone pouring oil or a hundred different possibilities as to this situation, and whether it is more probable than not, I can't say, but

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[4] See note 1, *supra.*

certainly there is nothing close to a continuous sequence of events that would allow this particular aspect of the claim to go forward.

And also, as I previously mentioned, the policy language regarding an uninsured motor vehicle is certainly even tougher and speaks to a vehicle whose operator or owner cannot be identified and which hits or causes an object to hit you or a family member.

So with respect to that part of the claim under (C)(10) the [c]ourt grants summary disposition.

The court denied summary disposition to Pioneer with regard to the PIP claim, stating:

. . . right this minute unless there is some other witness, I'm not completely clear enough to decide whether I could grant this motion. So I'm denying it without prejudice. If I have overlooked some deposition testimony[] [or if] there is some other witness that should be provided, I'd be happy to look at it, but I'm not clear as to whether or not both the mother's feet were, quote, planted firmly on the ground, today. So that part of the motion is denied.

On January 21, 2003, Pioneer filed a new motion for summary disposition of the PIP claim under MCR 2.116(C)(10), arguing that the claim for PIP benefits should be dismissed because there was no evidence that Hines fell while "alighting from" a vehicle as required by MCL 500.3106(1)(c). In a responsive brief, plaintiff argued that Hines clearly had been in the process of alighting from the vehicle at the time of the accident because the truck's door was still open at the time she fell and because she was "lying between the car and its door" after her fall. Pioneer then argued that if Hines' feet had both been on the ground at the time she fell, she would not have been "alighting from" the vehicle at the time of the fall.

The trial court granted Pioneer's motion with respect to the PIP claim on February 24, 2003. At the February 10, 2003, motion hearing, the court stated, in part:

. . . there is no doubt she fell, but the fact is nobody knows how it happened or [during] what stage of the process of exiting the vehicle.

To be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation[,] not mere speculation.

Since she can't testify and nobody saw it, the [c]ourt has no evidence. The [c]ourt grants the motion.

Linden Square moved for summary disposition, under MCR 2.116(C)(10), on November 13, 2002, stating that Pamela, "who was the only person present at the time of . . . Hines' fall, did not see how she fell and is unable to explain how the fall occurred." Linden Square argued that "the mere occurrence of a plaintiff's fall is not enough to raise an inference of negligence on the part of defendant." In a responsive brief, plaintiff stated, "It is entirely possible, viewing the

facts in a light most favorable to the [p]laintiff, as required in determining a motion for summary [sic] pursuant to MCR 2.116(C)(10), that Ms. Hines slipped on oil in the parking lot and that reasonable minds could reach this decision based upon the facts presented." Linden Square filed a reply on January 7, 2003, claiming that Hines' statement to Pamela that she had slipped was inadmissible hearsay and that plaintiff simply could not establish how or why Hines actually fell.

The court granted Linden Square's motion on February 4, 2003. The court stated that the evidence of Hines' statement to Pamela about slipping was hearsay and that "even if the statement came in, it certainly lacked specificity as to the cause of this particular fall[.]" The court stated that "about 50 different things could have caused . . . Hines to slip and/or fall on this particular occasion." It concluded that "we do not have any evidence actually linking any oily spot to . . . Hines' fall on this occasion, to the exclusion of others" and that "there is no evidence that would support the claim that has been brought in this case against [Linden Square] . . . ."

On appeal, plaintiff claims that the trial court erred in dismissing her premises liability, uninsured motorist, and PIP claims. We review de novo a trial court's decision to grant summary disposition. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). Here, the trial court granted the pertinent motions under MCR 2.116(C)(10). Under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party, and summary disposition is appropriate if there is no genuine issue with regard to any material fact. *Ritchie-Gamester v City of Berkley,* 461 Mich 73, 76; 597 NW2d 517 (1999).

We find no error with regard to the trial court's dismissal of the premises liability claim. In *Stefan v White,* 76 Mich App 654, 655; 257 NW2d 206 (1977), the plaintiff filed a negligence suit after she fell in the defendant's home. At her deposition, the plaintiff stated that she fell but that she did not know what caused the fall. *Id.* at 657. She stated that she did not trip or slip but that she merely fell. *Id.* This Court affirmed the grant of summary disposition to the defendant, stating that the plaintiff's case was based on mere conjecture. *Id.* at 661. The Court stated, "The mere occurrence of plaintiff's fall is not enough to raise an inference of negligence on the part of defendant." We find *Stefan* analogous to the instant case in that plaintiff's case is based on mere conjecture. Indeed, even assuming the admissibility of Hines' statement to Pamela that she must have slipped on something, the statement simply does not establish that Hines slipped on oil as opposed to slipping on her walker or some other object. While this case is not as clear-cut as *Stefan* (because in *Stefan,* the plaintiff testified that she did not trip or slip on anything), plaintiff's claim nevertheless relies on mere conjecture.

Plaintiff contends that reversal is required with respect to the premises liability claim in light of *Vella v Hyatt Corp,* 166 F Supp 2d 1193 (2001). In *Vella, id.* at 1195, the plaintiff slipped and fell on the defendant's premises. She testified that she did not know what caused her fall but that whatever it was, it was "'slippery, very slippery.'" *Id.* In her lawsuit, plaintiff theorized that the floor had been slippery because the defendant negligently waxed the floor where the fall occurred. *Id.* at 1196. The court denied the defendant's motion for summary disposition. *Id.* at 1201-1202.

Vella does not mandate reversal in the instant case, for two reasons. First, *Vella* is a federal district court case and is not strictly binding on us. Second, the *Vella* court emphasized the following:

> It is apparent from [the deposition testimony] that [p]laintiff's theory is that she fell because the floor was wet and slippery. What her deposition testimony indicates is not that she is uncertain of the cause of her fall, but that she is not exactly sure of what the substance on which she slipped was. Viewing the facts in a light most favorable to [p]laintiff, it is entirely possible that she slipped on wax residue. . . . It is sufficient to survive summary judgment that she establishes a causal connection between the slippery substance and her fall.

In *Vella,* the plaintiff could establish that she fell because of a slippery substance on the floor. Here, the evidence is not so definite; Hines stated "that she that she must have slipped and fallen on something, but she didn't know what." She did not indicate that she fell because of a slippery substance on the ground. *Vella* is distinguishable and does not mandate reversal here.

While it is true that in *Kaminski v Grand Trunk Western Railroad Co,* 347 Mich 417, 422; 79 NW2d 899 (1956), the Supreme Court stated that an actionable theory of causation need not rule out other possible theories, the Court stated as follows in the more recent case of *Skinner v Square D Co,* 445 Mich 153, 164-165; 516 NW2d 475 (1994):

> 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.

Here, plaintiff presented no such "substantial evidence." Reversal is unwarranted with regard to the premises liability claim.

Nor is reversal warranted with regard to the claim for uninsured motorist benefits. The insurance policy at issue here essentially indicated that such benefits would be paid if physical contact between the plaintiff and the uninsured vehicle caused the plaintiff's injury. See *Berry v State Farm Mut Automobile Ins Co,* 219 Mich App 340, 347; 556 NW2d 207 (1996) (discussing the "physical contact" requirement). *Berry* went on to state:

> . . . this Court has construed the physical contact requirement broadly to include indirect physical contact, such as where a rock is thrown or an object is cast off by the hit-and-run vehicle, as long as a substantial physical nexus between the disappearing vehicle and the object cast off or struck is established by the proofs. [*Id*.]

Here, assuming, arguendo, that Hines slipped in a puddle of oil, there was insufficient evidence of a substantial physical nexus between a missing vehicle and the oil on the ground. Indeed, it is simply unclear from where the oil emanated and when it was deposited on the ground. See, generally, *Ricciuti v Detroit Automobile Inter-Ins Exchange,* 101 Mich App 683, 686; 300 NW2d 681 (1980) (where the plaintiff skidded on a wet license plate that had fallen off a vehicle at least two days earlier, plaintiff's accident was merely "incidentally or fortuitously related to the ownership, use, or maintenance of a motor vehicle"). We conclude that plaintiff's claim for uninsured motorist benefits borders on the specious, and the trial court did not err in dismissing it.

Finally, although it presents a closer issue than does the uninsured motorist claim, we conclude that the trial court did not err in dismissing the claim for PIP benefits. PIP benefits are available only if the plaintiff's injury arose out of the "ownership, operation, maintenance or use of a motor vehicle as a motor vehicle[.]" MCL 500.3105(1). When a parked vehicle is involved, the plaintiff may recover PIP benefits if she was entering or alighting from the vehicle at the time she incurred her injuries. MCL 500.3106(1)(c). Plaintiff cites *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626; 563 NW2d 683 (1997), abrogation in part recognized in *Rice v Auto Club Ins Ass'n*, 252 Mich App 25 (2002), in support of her position with respect to the claim for PIP benefits. In *Putkamer, supra* at 636, the plaintiff was entitled to PIP benefits because "[t]here was no dispute that, after opening the door of her parked vehicle, she lifted her right leg into the vehicle, shifted her weight to her left leg, and slipped on the ice while stepping into the vehicle." Here, by contrast, there is simply insufficient evidence that Hines fell while alighting from the vehicle. Indeed, even though the truck's door was open at the time of her fall, this in no way precludes the possibility that Hines had already disembarked from the truck at the time she fell. If she had "physically left" the vehicle at the time of the fall, then PIP benefits are unavailable. See *Harkins v State Farm Mut Automobile Ins Co*, 149 Mich App 98, 101; 385 NW2d 741 (1986), and *Royston v State Farm Mut Automobile Ins Co*, 130 Mich App 602, 607; 344 NW2d 14 (1983). As stated in *Krueger v Lumberman's Mut Casualty Co*, 112 Mich App 511, 515; 316 NW2d 474 (1982), "an individual has not finished 'alighting' from a vehicle at least until both feet are planted firmly on the ground." It is entirely possible, in this case, that Hines fell *after* planting her feet on the ground. Given this possibility, plaintiff's claim was based on mere conjecture, and the trial court did not err in granting summary disposition to Pioneer with respect to the claim for PIP benefits.

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter