

STATE OF MICHIGAN
COURT OF APPEALS

SHIRLEY AEBIG, Individually and as Personal
Representative of the Estate of MARVIN E.
AEBIG, Deceased,

UNPUBLISHED
December 16, 2004

Plaintiff-Appellant,

v

JASON LEE POOLE and FARM BUREAU
INSURANCE COMPANY,

No. 250278
Oceana Circuit Court
LC No. 02-003105-NI

Defendants-Appellees.

Before: Murphy, P.J., and White and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). This case is being decided without oral argument pursuant to MCR 7.214(E). We affirm.

Plaintiff filed this negligence action seeking damages for the wrongful death of the decedent and a derivative claim for loss of consortium after a pickup truck driven by defendant Jason Poole struck and killed the decedent when the decedent suddenly turned his battery-operated "Rascal" scooter into the path of Poole's oncoming truck. The submitted evidence established that Poole was traveling below the posted speed limit and immediately braked and veered away from the decedent, but the back end of his truck swung around and struck the decedent. The trial court determined that there was no genuine issue of material fact that Poole's "reaction was reasonable given the circumstance and there could be no other interpretation to that." Plaintiff now appeals.

This Court reviews de novo a trial court's resolution of a motion for summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 539; 683 NW2d 200 (2004). Summary disposition should be granted if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10) and (G)(4); *Kraft, supra* at 540.

"To establish a prima facie case of negligence, a plaintiff must introduce evidence sufficient to establish that (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach was a proximate cause of the plaintiff's injuries, and (4) the plaintiff suffered damages." *Latham v National Car Rental Systems, Inc*, 239 Mich App 330, 340; 608 NW2d 66 (2000) (citations and internal quotations omitted). The second element is at issue here. The question whether a defendant has breached a duty of care is ordinarily a question of fact for the jury and not appropriate for summary disposition. *Id.* However, when the moving party can show either that an essential element of the nonmoving party's case is missing, or that the nonmoving party's evidence is insufficient to establish an element of its claim, summary disposition is properly granted. *Id.*

In an action seeking recovery of noneconomic damages arising from automobile negligence, damages may not be assessed in favor of a party who is more than fifty percent at fault. MCL 500.3135(2)(b). Here, the undisputed evidence showed that the decedent, who was traveling south in the northbound lane, suddenly crossed the northbound lane of traffic into the path of Poole's southbound vehicle. Poole immediately braked and attempted to avoid hitting the decedent by veering to the right. We agree with the trial court that the submitted evidence does not permit a determination that Poole responded in a manner that could be considered negligent.

Plaintiff argues that Poole should have foreseen the decedent's sudden maneuver and either slowed down or alerted the decedent, by horn, before the decedent crossed the road, because the decedent's only other options were to remain on a collision course with northbound traffic or turn to the east, where he would have rolled into a ditch. This argument actually supports defendants' claim that the decedent was more than fifty percent responsible for the accident, because it indicates that the decedent was operating the Rascal scooter head-on against the flow of traffic, under circumstances where he could not safely move to either the left or the right. Regardless, it is not reasonable to expect Poole to recognize every hazard faced by other persons on the road and predict how they will respond to those hazards.

Plaintiff also argues that Poole could have avoided the accident if he had simply braked without turning, or if he had veered to the left instead of the right. These claims are made with the benefit of hindsight; moreover, the former is based on plaintiff's expert's scientific reconstruction of the accident and the latter on plaintiff's inference from deposition testimony that the northbound vehicles were at a safe enough distance for defendant to move to the left. In any event, as this Court stated in *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004):

Simply alleging that an actor could have done more is insufficient [to prove negligence] under Michigan law, because, with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result. . . . Even the most exacting standard of conduct, the negligence standard, does not require one to exhaust every conceivable precaution to be considered not negligent.

Plaintiff failed to establish a genuine issue of material fact whether Poole was negligent, and the trial court properly granted summary disposition in defendants' favor.

Affirmed.

/s/ William B. Murphy

/s/ Helene N. White

/s/ Kirsten Frank Kelly