STATE OF MICHIGAN

COURT OF APPEALS

JOHN BARTON, III, Plaintiff-Appellee,	UNPUBLISHED March 11, 2008
v	No. 276932 Monroe Circuit Court
MARK GAYER, Defendant-Appellant.	LC No. 05-020836-NI

Before: Meter, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Defendant Mark Gayer appeals by leave granted from the denial of his motion for summary disposition in this automobile accident case. We reverse.

The facts are, in large part, undisputed, because plaintiff has no memory[1] of the accident. Plaintiff admits that he had alcohol and marijuana in his system at the time of the accident, which occurred on April 16, 2005. Initially, plaintiff's vehicle veered into the left lane. In response, defendant steered his vehicle into the lane plaintiff was supposed to be in. Then plaintiff steered his vehicle back into his own lane, whereupon, the two vehicles collided. Plaintiff suffered severe injury.

Plaintiff sued defendant, claiming his negligence caused the collision. Defendant moved for summary disposition, arguing, inter alia, that there was insufficient evidence of negligence. The trial court disagreed, and denied the motion.

The issue on appeal is whether the trial court erred in finding a genuine issue of material fact regarding defendant's alleged negligence, and in denying the motion for summary disposition. This Court reviews summary dispositions de novo. *Roberts v Farmers Ins Exch*, 275 Mich App 58, 73; 737 NW2d 332 (2007), citing *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion filed under MCR 2.116(C)(10) tests the factual support for a claim, *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003), and

[1] It is unclear whether plaintiff's lack of memory was caused by his injury in the accident, or intoxication.

should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, *McManamon v Redford Charter Twp*, 273 Mich App 131, 134; 730 NW2d 757 (2006).

When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rely on mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co.*, 451 Mich 358, 362; 547 NW2d 314 (1996). A genuine issue of material fact exists when the record, viewed in the light most favorable to the nonmoving party, leaves open an issue on which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary materials filed in the action. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). But such materials shall only be considered to the extent that they would be admissible as evidence. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006).

In a negligence action, plaintiff has the burden of proving duty, breach (i.e., negligence), causation and damages. *Haliw v City of Sterling Heights*, 464 Mich 297, 309-310; 627 NW2d 581 (2001). As a general rule, the issue of negligence should not be decided by summary disposition. *Gamet v Jenks*, 38 Mich App 719, 722-723; 197 NW2d 160 (1972); compare *Richardson v Michigan Humane Society*, 221 Mich App 526, 528; NW2d (1997) ("Although summary disposition is not favored in a negligence action, summary disposition is appropriate where the plaintiff has failed to establish a prima facie case of negligence"). However, *Gamet* went on to affirm summary disposition for defendant on the issue of negligence, where defendant driver had signaled to the plaintiff, a pedestrian, to cross the street, and plaintiff was subsequently hit by another driver, and where plaintiff stated in his deposition that he did not rely on defendant's signal to judge the safety of crossing the highway. See also *Richardson, supra* at 528 ("plaintiff is unable to establish a breach of duty on the part of defendant"). Generally, the mere occurrence of an accident is not evidence of negligence. See generally *Woodard v Custer*, 473 Mich 1, 8; 702 NW2d 522 (2005).

There are instances when negligence may be decided as a matter of law. *Campbell v Kovich*, 273 Mich App 227, 231-232; 731 NW2d 112 (2006). Where plaintiff fails, by evidence, to generate a genuine issue of material fact regarding defendant's negligence, the question of negligence may be decided as a matter of law. *Id*. *Campbell* stated:

> We reject plaintiffs' arguments that summary disposition was inappropriate[,] because to do so would impose on Ashton a duty to exercise more care than is exercised by persons of ordinary prudence. Ashton [who was mowing a lawn] was not required to exercise extraordinary care. *Case v Consumers Power Co*, 463 Mich 1, 5; 615 NW2d 17 (2000). . . . The evidence suggest that Ashton exercised ordinary care . . . . Viewing the evidence in a light

> most favorable to plaintiffs, reasonable minds could not disagree that Ashton exercised due care. . . . [*Campbell, supra* at 231-232.]

Because the material facts are clear,[2] and are in large part undisputed,[3] there is no need for a trial of the facts, and the issue of negligence may be decided as a question of law. See *Campbell, supra* at 232. There is insufficient evidence that defendant was negligent. *Id*. at 231-232. Defendant's reaction to plaintiff's swerving into the wrong lane, viz., to go into the left lane himself, was reasonable, and in accord with what a reasonably prudent person would do under the circumstances. See *id*. Defendant had no duty to anticipate the negligent or unlawful conduct of plaintiff. *Hainault v Vincent*, 365 Mich 370, 376; 112 NW2d 569 (1961) (motorist approaching school bus, which was traveling toward him and which had left turn signal on, was not required to anticipate the negligent or unlawful act of school bus driver in suddenly turning in front of the motorist). Even difficult questions, such as reasonableness, must be decided as a matter of law upon undisputed facts. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 508; 741 NW2d 539 (2007) (citation omitted).[4]

We agree with defendant's argument that plaintiff's own testimony confirms that defendant acted as a reasonably prudent person under the circumstances. Plaintiff admitted at deposition that if he were presented with a vehicle traveling toward him in his lane, and a deep ditch on his right side, he would avoid the vehicle by crossing left into the other lane, to avoid going into the ditch. Plaintiff's admission in his deposition must be considered in opposition to his claim that there is a genuine issue of fact. *Gamet, supra* at 722-723. Moreover, the testimony of plaintiff's expert "consulting engineer," Duane Dunlap, that plaintiff's reaction was "much more appropriate" than defendant's, flies in the face of the fact witnesses' testimony, which all indicates that defendant reacted to plaintiff's action of first moving into the left lane, where he did not belong. All the evidence contradicts Dunlap's apparent conclusion that defendant was more at fault than plaintiff.

In addition, it is not sufficient for plaintiff to show *some* negligence by defendant. In Michigan, "[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 50% at fault*." MCL 500.3135(2)(b)

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[2] Plaintiff nowhere contradicts that he was the first to swerve into the wrong lane.

[3] Plaintiff admits that he had alcohol and marijuana in his system at the time of the accident.

[4] Further, speculation and conjecture may not be used to establish a question of fact. See *Morden v Grand Traverse Co*, 275 Mich App 325, 335; 738 NW2d 278 (2007) ("While plaintiff's psychiatrist-expert concluded that the decedent died from NMS, this testimony amounts to speculation and conjecture, because it does not exclude other possibilities to a reasonable degree of certainty"), citing *Robins v Garg*, 270 Mich App 519, 527; 716 NW2d 318 (2006), and *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 496; 668 NW2d 402 (2003). Here, although plaintiff's consulting engineer expert testified that plaintiff's reaction was much more appropriate, he could not cite to any evidence that plaintiff was unimpaired by intoxicants that plaintiff admits were in his system. Therefore, plaintiff's argument that defendant's alleged negligence caused the accident (and was more than 50 percent the cause thereof) amounts to speculation and conjecture.

(emphasis added). Thus, plaintiff must generate a genuine issue of material fact not just indicating some negligence by defendant's driving, but indicating that defendant was more than 50 percent at fault (there was no third party alleged to be at fault).

In addition, a plaintiff whose impaired ability to function because of alcohol or drug intoxication was 50 percent or more the cause of the accident, cannot recover. MCL 600.2955a(1). This statute provides:

> It is an absolute defense in an action for the death of an individual or for injury to a person or property that the individual upon whose death or injury the action is based had an impaired ability to function due to the influence of intoxicating liquor or a controlled substance, and as a result of that impaired ability, the individual was 50 percent or more the cause of the accident or event that resulted in death or injury. [MCL 600.2955a(1).]

The statute further provides:

> "Impaired ability to function due to the influence of intoxicating liquor or a controlled substance" means that, as a result of an individual drinking, ingesting, smoking, or otherwise consuming intoxicating liquor or a controlled substance, the individual's senses are impaired to the point that the ability to react is diminished from what it would be had the individual not consumed liquor or a controlled substance. [MCL 600.2955a(2)(b).]

Thus, in order to survive defendant's summary disposition motion, plaintiff must have presented evidence indicating that defendant's fault was 50 percent or more the cause of the accident.

The evidence does not establish that defendant was more than 50 percent at fault in this accident. Despite plaintiff's contention that because defendant's vehicle crossed the centerline there is a rebuttable presumption that defendant was negligent, any presumption of negligence may be rebutted with a showing of an adequate excuse or justification under the circumstances. *White v Taylor Distributing Co, Inc*, 275 Mich App 615, 621; 739 NW2d 132 (2007). Under the facts here, where plaintiff's own actions in first crossing the centerline caused defendant to cross the centerline to avoid plaintiff's vehicle, there was clearly adequate justification under the circumstances. Plaintiff also fails to show why defendant's crossing the centerline made defendant more than 50 percent at fault, since defendant's crossing the center line was prompted by plaintiff's first doing so. Plaintiff, a drunk driver, set in motion a chain of events that directly caused this accident. The fact that defendant swerved in response to plaintiff's actions is insufficient evidence that defendant was more than 50 percent at fault. Therefore, the trial court erred in denying defendant's motion for summary disposition.

Plaintiff also lacks evidence that his intoxication was not more than 50 percent the cause of this accident. Plaintiff relies exclusively on Dunlap's testimony, since plaintiff has no memory of the accident. But Dunlap's testimony, that plaintiff's "quick response" indicates

plaintiff was "unimpaired by the influence of intoxicants," flies in the face of the actual evidence, which suggests that it was defendant who responded quickly, to a situation created by plaintiff. On this issue, too, plaintiff fails to raise a genuine issue of material fact. *Campbell, supra* at 231-232.[5]

Reversed and remanded for entry of summary disposition in defendant's favor. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ David H. Sawyer
/s/ Kurtis T. Wilder

[5] In light of the paucity of evidence of defendant's negligence, it is unnecessary for us to consider defendant's argument that the sudden emergency doctrine applies.