STATE OF MICHIGAN

COURT OF APPEALS

RUDY DENHA,

Plaintiff-Appellant,

v

DART PROPERTIES, INC.,

Defendant-Appellee,

and

JARVIS PAINTING, INC., d/b/a/ JARVIS CONSTRUCTION COMPANY, and ASPHALT SPECIALISTS,

Defendants.

UNPUBLISHED
January 6, 2009

No. 282142
Macomb Circuit Court
LC No. 2006-002299-NI

Before: Zahra, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right from the circuit court's order granting summary disposition to defendant-appellee.[1] We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was riding a motorcycle when a car coming from the opposite direction turned left in front of him to enter an apartment complex. Plaintiff collided with that car and suffered severe injuries. Plaintiff and some witnesses maintained that the turning vehicle had appeared to have sufficient time to complete the turn, but abruptly slowed or stopped as it began to enter the

[1] Plaintiff and defendant Jarvis Painting settled, and so the latter is not participating in this appeal. Defendant Asphalt Specialists was granted summary disposition along with defendant-appellee, but plaintiff claimed his appeal in connection with defendant-appellee exclusively, and so Asphalt Specialists is likewise not participating in this appeal.

driveway it was approaching. The driver of that vehicle testified on deposition that she did not recall any such slowing or stopping.

There was some construction taking place at that location. Plaintiff maintains that much of the driveway pavement was broken up or removed, which caused the other driver to slow or stop upon visually discovering the problem. The parties differ over the extent to which the construction area was blocked off or otherwise marked with indications that it was not accessible.

Plaintiff filed suit to recover in negligence. Defendant-appellee moved for summary disposition. In granting the motion, the trial court noted that defendant-appellee and the turning driver had a landlord-tenant relationship, and thus that defendant-appellee had a statutory duty to maintain the premises,[2] but opined that this duty did not extend to plaintiff, who collided with the other driver in the street, not upon defendant-appellee's premises. The court further opined that the construction activities would have been open and obvious to a casual observer, and thus that defendant-appellee had no duty to plaintiff in the matter. Alternatively, the court noted that the turning driver had testified that she had been aware of construction on the premises, and "explained she was able to turn into the driveway where she needed to go," and so opined that the construction itself did not require "that she stop or slow down . . . ."

Plaintiff argues that the court erred both in regarding the open and obvious doctrine as applicable to a plaintiff who never encountered the condition in question, and in attributing causation entirely to the turning driver and not to the construction on the premises.

We review a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). In this case, the trial court noted that the parties presented argument beyond the pleadings, and so treated the motion as one brought under MCR 2.116(C)(10). In reviewing a decision on such a motion, "this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

An action in negligence requires proof of causation, along with duty, breach, and damages. See *Benton v Dart Properties, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). The trial court in this case held that causation could be attributed only to the turning driver, not the complained-of construction.

We note that plaintiff, in his brief on appeal, does not assert that the turning driver had in fact, when plaintiff struck her vehicle, driven onto broken pavement or an area that was depressed because of missing pavement, or had stopped immediately ahead of such a hazard, or had driven very gingerly into such a hazard, let alone does plaintiff present evidence to show that

[2] See MCL 554.139.

such immediate confrontation with the construction surface corresponded with any decision to slow or stop.

Plaintiff testified at deposition that the pavement "was all ripped out, . . . not the approach, just after the sidewalk." One of plaintiff's companions, who was among the drivers behind plaintiff at the time in question, testified that he did not see the collision itself, but that the turning driver's vehicle ended up parked "in the entrance way" of the apartment complex, completely off the road from which she had turned, and agreed that this was between the sidewalk and where the construction started. An illustration presented by both parties indicates that there was indeed room enough between the road from which the turning driver was turning, and where the construction started on the driveway, to have allowed that driver to complete her turn and leave the street unimpeded without driving onto the area where the pavement had been broken up or removed.

Moreover, the evidence that the turning driver did suddenly slow or stop without completing her turn invites explanation other than that she found herself immediately upon a hazardous surface. She might have been excessively cautious with regard to approaching the construction surface still some distance ahead at the expense of exercising sufficient caution with regard to traffic on the street from which she was turning. Or she might simply have considered aborting her turn entirely upon sensing that the construction activity ahead would require that she use an alternate entrance to the complex.

For these reasons, the trial court did not err in interpreting the evidence as failing to support the assertion that the construction in fact caused the turning driver reasonably to slow or stop abruptly while blocking the street traffic of which plaintiff was a part.

Because we conclude that the trial court properly granted defendant-appellee summary disposition on the ground that plaintiff failed to provide adequate evidentiary support for his theory of causation, we need not reach the question of the applicability of the open and obvious doctrine, or the pertinent statutory exception to it.

Affirmed.

/s/ Brian K. Zahra
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood