

STATE OF MICHIGAN
COURT OF APPEALS

JOHN MCCUISH,

Plaintiff-Appellant,

v

HALLIE NICOLE JAFFE and RYAN JAFFE,

Defendants-Appellees.

UNPUBLISHED

September 24, 2009

No. 286807

Oakland Circuit Court

LC No. 2007-083921-NI

Before: Murphy, P.J., and Meter and Beckering, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendants' motion for summary disposition under MCR 2.116(C)(10) in this automobile negligence action. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The trial court's ruling on a motion for summary disposition is reviewed de novo on appeal. *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 344; 745 NW2d 137 (2007). "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." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When reviewing a motion under subrule (C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant record evidence "in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists warranting a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "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, supra* at 183.

The happening of an accident is not, in and of itself, evidence of negligence. *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 9; 279 NW2d 318 (1979). The plaintiff must present some facts that either directly or circumstantially establish negligence. *Id.* To prove negligence, a plaintiff must establish not only a breach of duty owed by the defendant, but that the defendant's breach of duty was both a factual and legal cause of the plaintiff's injuries. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994).

A driver has a statutory duty to drive at a careful and prudent speed in light of existing conditions. MCL 257.627(1). A driver must not drive at a speed greater than that which will allow him or her to stop within the assured, clear distance ahead. *Id.* This means "that a driver

shall not operate his vehicle so fast that he cannot bring it to a complete stop within that distance ahead of him in which he can clearly perceive any object that might appear in his path.” *Cole v Barber*, 353 Mich 427, 431; 91 NW2d 848 (1958). However, a violation of the statute is not negligence or evidence of negligence if the driver was faced with a sudden emergency not of his own making. *McKinney v Anderson*, 373 Mich 414, 419; 129 NW2d 851 (1964). If a driver is confronted with a sudden emergency not of his own making, the assured clear distance statute is inapplicable. *Vander Laan v Miedema*, 385 Mich 226, 231; 188 NW2d 564 (1971).

Apart from any statutory duty, a driver owes a duty to other motorists and pedestrians to exercise ordinary and reasonable care and caution in the operation of his car. *Zarzecki v Hatch*, 347 Mich 138, 141; 79 NW2d 605 (1956); *Poe v Detroit*, 179 Mich App 564, 571; 446 NW2d 523 (1989). He must make a reasonable allowance for traffic, weather, and road conditions. *DePriest v Kooiman*, 379 Mich 44, 46; 149 NW2d 449 (1967). However, a driver is not required “to guard against every conceivable result, to take extravagant precautions, to exercise undue care” and is “entitled to assume that others using the highway in question would under the circumstances at the time use reasonable care themselves and take proper steps to avoid the risk of injury.” *Hale v Cooper*, 271 Mich 348, 354; 261 NW 54 (1935), *aff’d on reh* 271 Mich 357 (1935). A pedestrian must also exercise reasonable care when using highways, which means walking on sidewalks if provided, MCL 257.655, and crossing within a marked or unmarked crosswalk at an intersection, MCL 257.613. A pedestrian who sees an oncoming car must keep watch on its progress and exercise reasonable care to avoid being hit. *Heger v Meissner*, 340 Mich 586, 589; 66 NW2d 220 (1954). A driver who is driving in a lane he or she has a right to be in and is not aware of a pedestrian’s presence is not required to anticipate that a pedestrian will suddenly appear in his or her path. *Gamet v Jenks*, 38 Mich App 719, 724-725; 197 NW2d 160 (1972); see also *Houck v Carigan*, 359 Mich 224, 227; 102 NW2d 191 (1960). If a driver fails to observe a pedestrian who is able to be seen coming into his or her path and the driver fails to stop when he or she is capable of doing so, a case of negligence is made out. See *Johnson v Hughes*, 362 Mich 74, 77-78; 106 NW2d 223 (1960).

In this case, the accident occurred some time between 3:30 p.m. and 4:15 p.m. on November 7, 2005. Defendant Hallie Jaffe was driving southbound on Baldwin Road. Plaintiff, a senior in high school at the time, and a group of his friends were standing on the west side of the road waiting for traffic to clear so they could cross it; they were not at a crosswalk. Defendant testified that she saw them standing there, but did not see them make any movements indicating that they would enter the road in front of her. She testified that suddenly, she “heard a thud” and then saw plaintiff on the ground. All witnesses stated that plaintiff entered into the road and ran into the side of defendant’s car, either because he saw her car and mistakenly thought he could avoid it or because he did not see her car and stepped into its path. Given the lack of evidence that defendant swerved toward plaintiff, the damage to defendant’s car, which was confined to the front passenger side, indicated that plaintiff walked or ran into the car as it came abreast of him. Thus, even if one could infer that defendant might have anticipated that plaintiff would enter the road, it was clear that, by the time he did so, she had no time to take any evasive action.

Further, the circumstantial evidence offered by plaintiff, which suggested only a possibility of negligence by defendant, was insufficient to permit an inference of negligence because the jury is not permitted to guess. *Skinner, supra* at 166; *Daigneau v Young*, 349 Mich

632, 636; 85 NW2d 88 (1957). Specifically, if the “evidence lends equal support to inconsistent conclusions or is equally consistent with contradictory hypotheses, negligence is not established.” *Skinner, supra* at 166-167, quoting 57A Am Jur 2d, Negligence, § 461, p 442. The evidence did not permit a reasonable inference that defendant was speeding. Defendant testified that she was traveling 40 miles per hour in a zone marked 45 miles per hour. One pedestrian witness estimated defendant’s speed at somewhere between 45 to 50 miles per hour, but did not affirmatively state that she appeared to be exceeding the speed limit. Thus, the jury could only speculate that defendant was in fact speeding, or that excess speed played a role in the accident.¹ Nor did the evidence permit a reasonable inference that defendant was distracted by talking on her cell phone. She testified that she was not using her cell phone at the time of the accident. Billing records indicated that she had used her phone several times between 3:49 p.m. and 4:39 p.m., but absent any evidence as to the exact time of the accident, or a witness’s observation that she was on her phone at the time, the jury could only speculate that defendant was in fact on her phone when the accident occurred. Given the lack of evidence that defendant failed to exercise reasonable care in the operation of her vehicle, the trial court did not err in granting defendants’ motion for summary disposition.

Affirmed.

/s/ William B. Murphy

/s/ Patrick M. Meter

/s/ Jane M. Beckering

¹ A party can introduce evidence of a car’s speed using skid marks and collision damage as evaluated by an accident reconstruction or impact analysis expert, but no such evidence with respect to defendant’s speed was offered in this case.