STATE OF MICHIGAN

COURT OF APPEALS

JANET DUFFINEY, Personal Representative of the ESTATE OF THEODORE R. DUFFINEY,

Plaintiff-Appellant,

v

HOME OWNERS INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
September 28, 2010

No. 292583
St. Clair Circuit Court
LC No. 08-001835-NZ

Before: TALBOT, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order granting summary disposition to defendant, plaintiff's decedent's insurer. We reverse and remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's decedent was killed in a single-vehicle accident that took place on October 18, 2005, at approximately 3:39 p.m. The decedent was driving on westbound I-94 near the intersection with I-69, in St. Clair County, when he lost control of his vehicle, which crossed the median, flipped repeatedly, and came to rest on its top on the surface of eastbound I-94. A person employed at a nearby business described hearing what sounded like hard metal hitting the road, immediately followed by the squealing of tires. The witness saw the subject vehicle slide and then tumble and also saw flying debris such as water cases, chains, levels, and other tools. A police detective reported that an item had struck the underside of the subject vehicle and caused serious damage, that gouges in the roadway indicated where the collision took place, and that a large industrial valve was found in a ditch to the right of that location.

A truck driver learned of the accident in the news and reported that he was driving at the place in question on October 18, 2005, at approximately 3:30 p.m., when he saw a tow truck "carrying what appeared to him to be a large valve and car parts on the back," that this load was not secured and appeared loose, and that the valve he saw appeared similar to that shown in a photograph of what was apparently the valve recovered from the accident scene.

A police officer testified at a deposition that he received a radio call about the subject accident and recalled that shortly beforehand, he was driving in the area of the accident, noticed "a large circular piece . . . sliding across from the right lane into my lane and on to the shoulder

of the road," looked to see if there was a truck nearby, saw none, sped up to see the vehicles that had most recently passed the area, and found no truck among them.

A police detective attested that the accident scene had no overpass from which a valve could have been thrown onto the freeway and that there were no reports of pedestrians in the area.

The decedent's automobile insurance policy with defendant included uninsured motorist coverage, which defined "uninsured automobile" to include a "hit and run" vehicle, which in turn was defined as a vehicle whose owner or operator is unknown and "that causes **bodily injury** by actual physical contact with the injured person or the **automobile** the injured person is occupying" (bold in the original).

Plaintiff filed a claim with defendant, who refused to pay, prompting plaintiff to file the instant action. Defendant sought summary disposition on the ground that plaintiff's allegation that the industrial valve had just fallen off a vehicle was based on speculation and conjecture. The trial court described the question as a close one, granted the motion on the ground that it "cannot glean from the evidence . . . that the Plaintiff has established a sufficient physical nexus between the phantom vehicle and the Plaintiff's vehicle," and then suggested that an appeal would be appropriate.

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999).

> In reviewing a motion under MCR 2.116(C)(10), 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).]

"[P]arties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact." *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). A plaintiff may not submit a causation theory that, although factually supported, "is, at best, just as possible as another theory." *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994). Instead, "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." *Id*. at 164-165. We conclude that plaintiff has offered more than conjecture or speculation in support of her theory of the accident.

Again, the insurance policy in question provides coverage for bodily injury caused by actual physical contact of a vehicle with the injured insured or that person's automobile. The physical contact requirement is broadly construed "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." *Berry v State Farm Auto Ins Co*, 219 Mich App 340, 347; 556 NW2d 207 (1996). "[T]he presence of a continuous and contemporaneously transmitted force is a significant, but not dispositive, factor to be considered in indirect contact cases in determining

whether the requisite substantial physical nexus has been established." *Id*. at 351 (internal quotation marks omitted).

Berry concerned a plaintiff who lost control of her vehicle when she drove over an object that was in the road in front of her. *Id*. at 343. Shortly before the accident a witness had observed a truck with a trailer filled with scrap metal stopped on the side of the road about one-half mile from the accident site. *Id*. That witness then saw a piece of metal in the road at the accident site; the witness had not seen this when the witness had passed approximately 15 minutes earlier. *Id*. at 343-344. This Court held that the presence of the trailer carrying scrap metal "at a time and location that was temporally and spatially proximate to plaintiff's striking a piece of metal in the road" was sufficient to establish "a substantial physical nexus between the hit-and-run vehicle and the object struck by plaintiff . . . ." *Id*. at 350.

The trial court distinguished the instant case from *Berry* on the ground that in this case there was no evidence of the vehicle from which the valve allegedly came. However, again, one witness reported that, on October 18, 2005, at approximately 3:30 p.m. and near the accident scene, he saw a tow truck carrying a loose load that appeared to include a large valve resembling the one involved in this accident. Defendant argues, without elaboration, that this report "does not establish that the valve falling off of a negligently loaded vehicle was the proximate cause of the decedent's accident and resulting injuries." We hold that this account does, in fact, permit the reasonable inference that the negligent loading of a truck caused part of that load, a large valve, to fall from it. The evidence of the road being gouged, and the valve being found nearby, along with the damage to the subject vehicle's underside, allowed the reasonable inference that the vehicle's striking of that valve caused it to go out of control.

While a police officer described seeing the valve moving across the road with no truck in view, this does not mean that summary disposition for defendant was warranted. The police officer described observing the valve in motion while offering no clue concerning where it came from. The testimony from the other witness described above supported an inference that the valve came from a poorly loaded truck. We reiterate that we must view the evidence in the light most favorable to plaintiff.

Recent published authority from this Court, *Dancey v Travelers Prop Cas Co*, ___ Mich App ___; ___ NW2d ___ (Docket No. 288615, issued April 6, 2010, at 9:00 a.m.), further militates in favor of reversal here. That case concerned a claim for uninsured motorist benefits in connection with a driver who was involved in a single-vehicle accident after striking a ladder in the road. *Id*., slip op at 1. This Court noted that "there was no evidence that another vehicle caused the ladder to hit [the] plaintiff's car," but held that the location of the accident supported an inference that the ladder must have fallen from another vehicle. *Id*. at 11. This Court noted that the accident occurred at the intersection of I-696 and I-75, an area inaccessible to pedestrians and non-vehicular traffic, and that witnesses testified that no construction was taking place in the area. *Id*. at 11-13. This Court held that

> a reasonable juror could conclude that the presence of a ladder in the roadway, under these circumstances and in the absence of any other reasonable explanation for the ladder's presence, established a substantial physical nexus between a hit-and-run vehicle and the ladder struck by [the] plaintiff. [*Id*. at 13 (internal quotation marks omitted).]

Similarly, in this case, plaintiff's theory of a negligently loaded truck from which the valve fell is the most reasonable explanation for the presence of a large piece of industrial equipment on the road. There is no indication of any project in the area that would have put the valve to use, and the area in question was not accessible to pedestrians or other non-vehicular traffic. Defendant's theory that someone might have elected to dispose of the valve at the side of the road is speculative indeed.[1]

For these reasons, we conclude that the trial court erred in granting defendant's motion for summary disposition. We therefore reverse the order granting defendant summary disposition and remand this case to the trial court for further proceedings.

Reversed and remanded. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Patrick M. Meter
/s/ Pat M. Donofrio

[1] In a supplemental pleading in this Court, defendant cites *Mason v Auto Club Ins Ass'n*, unpublished opinion per curiam of the Court of Appeals, issued August 3, 2010 (Docket No. 289719). However, *Mason* does not control in the instant case because the insurance policy in *Mason* contained materially different wording from that at issue here, see *Mason*, slip op at 2, and because unpublished opinions are not binding on this Court, MCR 7.215(C)(1).