STATE OF MICHIGAN

COURT OF APPEALS

RICHARD BROWN,

Plaintiff-Appellant,

v

KEVIN DALE FITCH,

Defendant-Appellee.

UNPUBLISHED
December 20, 2016

No. 329001
Genesee Circuit Court
LC No. 14-103774-NI

Before: SAAD, P.J., and METER and MURRAY, JJ.

PER CURIAM.

Plaintiff appeals as of right an August 20, 2015, order granting summary disposition to defendant under MCR 2.116(C)(10). We affirm.

On February 11, 2012, at approximately 11:15 p.m., defendant was driving his van eastbound on five-lane[1] West Bristol Road in Flint Township when he encountered a stopped vehicle in the eastbound left traveling lane and thus moved his van to the right traveling lane. The passenger side mirror of his van struck plaintiff, who allegedly sustained injuries. Plaintiff had been walking from left to right in front of defendant's van and was not in a crosswalk. On November 4, 2014, plaintiff filed a complaint against defendant, alleging negligence and seeking both economic and noneconomic damages. On June 17, 2015, defendant filed a motion for summary disposition under MCR 2.116(C)(10), along with a brief and supporting documents. Defendant alleged that he had an absolute defense under MCL 600.2955a because, based on plaintiff's blood-alcohol content (BAC) of .238 (based on a test taken several hours after the accident) and other evidence, plaintiff's intoxication resulted in an impaired ability to function and he was 50% or more at fault for the accident.

Plaintiff filed a response on July 20, 2015, emphasizing that the BAC test was taken at 5:38 a.m. on February 12, 2012, and that it was unreliable evidence because plaintiff had consumed three beers and a vodka drink between the accident and the test. Plaintiff contended that there were genuine issues of material fact regarding defendant's negligence, given that

[1] There are two traveling lanes in each direction and one turning lane.

defendant had been traveling around 40 to 45 miles an hour despite the darkness and blowing snow that night.

The motion hearing took place on July 27, 2015. Defendant made an argument at the hearing that, even disregarding the alcohol issue, the case could be dismissed "under comparative fault principles." The trial court ruled for defendant, stating:

> I think that on all points where it's urged that [defendant] did something wrong, I think [plaintiff] did something wrong equally. Then on top of that, being in the road as he was where he shouldn't have been and I'm going to find that there was some alcohol involvement. I can't say it's .238. But there was some alcohol involvement. In a sense though the alcohol is mitigated. It's involved and is mitigated because apparently he wasn't so drunk that he couldn't go complete his business, get his drinks, get his pizza and keep right on drinking. At that same time, that's not the test.
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> The test is whether or not there could be an extrapolation of the blood alcohol level. And it seems to me, although it's not a big factor here, it seems to me that does not inure to the plaintiff's benefit either.
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> So, for those reasons and the reasons stated in the brief, I'm going to find, one, I can decide comparative fault (inaudible) matter that the jury would not have to hear [sic]. And, two, I still am having a hard time figuring out what it is [defendant] did wrong, other than hit somebody who shouldn't be in the road on the highway anyway.
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> So, the motion for summary disposition is granted.

In its written order, the trial court stated that it was granting the motion for summary disposition "for the reasons stated on the record . . . ."

The parties emphasize their deposition testimony, and thus we will briefly summarize it. Plaintiff testified as follows: He crossed the street because he was going to a party store to buy food and alcohol for himself and a friend. At the place he crossed, there was no crosswalk or traffic signal. He had had "a couple" of beers beforehand but was not "inebriated." He "knew what was going on" but was "having trouble seeing from the [blowing] snow and the wind . . . ." The road was slick. As he walked southbound, he saw one car to his right, in the turning lane and waiting to turn left, and another car coming into the turning lane. He walked in front of the car that was in the turning lane but did not see defendant's van at any point. He looked to his right but did not see it.

When asked why he had not seen defendant's vehicle, plaintiff answered, "I have no clue." He stated that "it should have been there" but that the next thing he remembered was

having people help him off the ground. He stated, "I should have seen it" and that he thought that perhaps the vehicle's headlights had been off.[2]

Plaintiff stated that he declined medical treatment at the scene and instead bought his food and alcohol, consuming three or four drinks between the accident and going to the hospital—a strong vodka drink and beer. Plaintiff admitted that the police identified him as having taken a "hazardous action" but did not do the same for defendant. He admitted once again that he "should have" seen defendant's van.

Defendant testified as follows: It was cold and dark at the time of the accident but it was not snowing and the road was dry. His van's headlights were on. The traffic was light and the speed limit was 45 miles an hour.[3] He was traveling approximately 40 to 45 miles an hour. He was in the eastbound left traveling lane when he saw a car stopped or coming to a stop in front of him in that same lane, so he changed lanes, maintaining his speed but getting into the far right lane, adjacent to the curb. He then saw plaintiff coming from the left (or north), walking in front of a stopped car.

Defendant stated:

> I just remember as he walked out in front -- in front of his [sic] car, I had two choices to make. I could either go right, the way he was walking and I would have hit -- probably hit him head on, or I go left and get as close as I could to the car that was parked there stopped and try not to smash his car because I didn't want to bounce off his car and hit him and [plaintiff]. So I tried to get left. I put on the brakes as hard as I could, got as close as I could to the car, and he went by and as he walked by he -- I hit him with my right passenger mirror.

Defendant stated that the first time he saw plaintiff was "when he stepped out in front of that guy's car into my lane." He claimed that plaintiff was "probably 40, 50, 60 feet away" from defendant and was wearing dark clothing. Defendant stopped his vehicle and called 911 and then proceeded to a church parking lot to wait for the police. According to defendant, the police officer who spoke with him indicated that plaintiff was very intoxicated and that the accident was plaintiff's fault. Defendant stated that plaintiff's actions made him think plaintiff was intoxicated because, "[w]hen he was walking across the street in front of me, he was walking and didn't make eye contact with me and had a look of intoxication on his face." Defendant described plaintiff as having a "dazed and confused look" and stated that he was "walking very slow . . . ."

Plaintiff contends that the deposition testimony demonstrates genuine issues of material fact and that the trial court erred in granting defendant's motion for summary disposition. We

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[2] Plaintiff is no longer making this assertion about the headlights.

[3] Although plaintiff had originally thought the speed limit was 40 miles an hour, he does not dispute defendant's assertion on appeal that it was 45 miles an hour.

review de novo a trial court's decision regarding a motion for summary disposition. *Barnes v Farmers Ins Exch*, 308 Mich App 1, 5; 862 NW2d 681 (2014). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, affidavits, depositions, admissions, and other documentary evidence . . . ." *Id*. "Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence submitted by the parties, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Pennington v Longabaugh*, 271 Mich App 101, 104; 719 NW2d 616 (2006).

MCL 600.2955a states:

> (1) 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% or more the cause of the accident or event that resulted in the death or injury. If the individual described in this subsection was less than 50% the cause of the accident or event, an award of damages shall be reduced by that percentage.
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> (2) As used in this section:
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> * * *
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> (b) "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. An individual is presumed under this section to have an impaired ability to function due to the influence of intoxicating liquor or a controlled substance if, under a standard prescribed by section 625a of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being section 257.625a of the Michigan Compiled Laws, a presumption would arise that the individual's ability to operate a vehicle was impaired.

MCL 257.625a states, in part:

> (6) The following provisions apply with respect to chemical tests and analysis of a person's blood, urine, or breath, other than a preliminary chemical breath analysis:
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> (a) The amount of alcohol or presence of a controlled substance or other intoxicating substance in a driver's blood or urine or the amount of alcohol in a person's breath at the time alleged as shown by chemical analysis of the person's blood, urine, or breath is admissible into evidence in any civil or criminal

> proceeding and is presumed to be the same as at the time the person operated the vehicle.[4]

In addition, MCL 257.625(1)(b) states that a person is considered to be operating a vehicle while intoxicated if

> [t]he person has an alcohol content of 0.08 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or, beginning October 1, 2018, the person has an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.[5]

Application of the plain language of these statutes leads to a presumption that plaintiff had an impaired ability to function due to the influence of intoxicating liquor, given that his measured BAC was .238. Plaintiff contends that any such presumption has been overcome because he consumed additional drinks between the accident and the blood test. Being mindful of our duty to view the evidence in the light most favorable to plaintiff, we agree that plaintiff has negated the presumption by presenting evidence of additional alcohol consumption. Defendant presented no expert witnesses indicating how the blood-test results should be interpreted in light of the additional alcohol consumed by plaintiff and neither party provided details regarding exactly when these additional drinks were consumed.[6]

Nevertheless, we reiterate the following language from MCL 600.2955a(2)(b):

> "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.

Although plaintiff denied being "inebriated" at the time of the accident, he admitted that he had been drinking beforehand. Importantly, he also stated that he had no explanation for why he did not see defendant's van, stating that he "ha[d] no clue" why he did not see it and stating twice that he should have seen it. Defendant observed that plaintiff had a look of intoxication, and a

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[4] The recent amendments to this statute are immaterial to this appeal.

[5] The recent amendments to this statute are also immaterial to this appeal.

[6] Defendant attempts to pinpoint the time that plaintiff was transported to the hospital but in doing so relies on an ambulance report that is not included in the lower court record. A party may not expand the record on appeal. *Detroit Leasing Co v Detroit*, 269 Mich App 233, 237; 713 NW2d 269 (2005).

police officer indicated that plaintiff was very intoxicated at the time of the accident.[7] This evidence, viewed as a whole, leads to only one reasonable conclusion: while plaintiff may not have identified himself as being "inebriated," he had an impaired ability to function as set forth in MCL 600.2955a.

In addition, as a result of that impaired ability, plaintiff was 50% or more the cause of the accident. *Id*. Indeed, plaintiff himself could provide no rational explanation for why he walked into oncoming traffic. Like the trial court, we discern no improper action on the part of defendant. Defendant was traveling at or under the speed limit and, when he encountered a stopped vehicle in his lane, he moved his van to the far-right lane. Plaintiff contends that because of the alleged snow and because of the stopped vehicle, defendant should have slowed his vehicle. However, defendant had no way to predict that a person would be walking, in dark clothing and without the benefit of a crosswalk or traffic signal, in front of the stopped vehicle and into the far-right lane.[8]

Affirmed.

/s/ Henry William Saad
/s/ Patrick M. Meter
/s/ Christopher M. Murray

[7] We note that no objection was lodged to this testimony regarding the police officer's statement, and it was admissible in content if not in form. See *Barnard Mfg Co v Gates Performance Engineering, Inc*, 285 Mich App 362, 373; 775 NW2d 618 (2009).

[8] Even disregarding the issue of plaintiff's alcohol consumption, the lack of a genuine issue of material fact regarding defendant's negligence would provide an independent basis for the grant of summary disposition.