STATE OF MICHIGAN

COURT OF APPEALS

CARL ELLIOTT and BLANCA ELLIOTT,

Plaintiffs-Appellants,

v

RONALD IRVIN POPE, JR.,

Defendant-Appellee,

and

BOARD OF COUNTY ROAD COMMISSIONERS, FOR THE COUNTY OF BAY,

Defendant.

UNPUBLISHED
November 18, 1997

No. 198384
Bay Circuit Court
LC No. 94-033503-NI

Before: Hoekstra, P.J., and Wahls and Gribbs, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting summary disposition to defendant Ronald Irvin Pope, Jr. (defendant) pursuant to MCR 2.116(C)(10) in this negligence action. We affirm.

On December 10, 1992, plaintiffs were passengers in a 1989 Plymouth Horizon traveling north on Seven Mile Road toward the intersection of Beaver Road in Bay County. The driver of the Horizon, Gary J. Schneider, stopped at a stop sign when he reached Beaver Road and then proceeded into the intersection. In the intersection, the Horizon was struck by a 1986 Ford Tempo, which was owned and operated by defendant, that was traveling east on Beaver Road. Plaintiffs were seriously injured in this crash, and Schneider was killed. Plaintiff Carl Elliott suffered a loss of all memory regarding the crash, and Plaintiff Blanca Elliott was looking in the opposite direction at the time of the crash and did not see what occurred. Plaintiffs brought this action, alleging that the accident occurred because of defendant's negligence.

Plaintiffs' claim on appeal is that the trial court erred in granting summary disposition to defendant because whether defendant was operating his vehicle negligently at the time of the accident was a question of fact that should have been decided by the jury. We disagree. Orders granting or denying summary disposition are reviewed de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). This Court must review the record to determine whether the party for whom judgment was granted would have been entitled to judgment as a matter of law. *Borman v State Farm Fire & Casualty Co*, 198 Mich App 675, 678; 499 NW2d 419 (1993) aff'd 446 Mich 482 (1994). Under MCR 2.116(C)(10), a motion for summary disposition may be granted when, with the exception of the amount of damages, there is no genuine issue of material fact to be decided. *Pinckney Community Schools*, *supra* at 525. The trial court must review the record, giving the benefit of reasonable doubt to the nonmoving party and decide whether a record might be developed that would reveal an issue on which reasonable minds could differ. *Id*.

Here, the facts established that defendant was traveling at approximately fifty miles per hour when the accident occurred. Based on his experience and his observations of the accident scene, Trooper Eberly did not believe that defendant had been traveling at a speed that would prevent him from maintaining control over his vehicle or that exceeded fifty-five miles per hour, which was the posted speed limit. Defendant testified that the roads were slightly damp and drying when the accident occurred. According to the police report, the roads were wet, the temperature was above freezing and a light snow was falling. Trooper Eberly indicated that the police report reflected the weather and roadway conditions at the time that the officers arrived, which was twenty minutes after the accident occurred. He also believed that defendant's description of the weather at the time of the accident may have been accurate. These statements do not indicate that a speed of fifty to fifty-five miles per hour would have prevented defendant from maintaining control over his vehicle at all times. We conclude, like the trial court, that no genuine question of fact remained to be decided by the jury, and that the evidence cannot support any claim of negligence on the part of defendant.

Plaintiffs also contend that the trial court erred in not following several presumptions and concluding that Schneider's acts were the proximate cause of the accident. Plaintiffs first rely on the presumption in favor of a party that suffers a loss of memory about the event as a result of the event applies. This presumption allows the trier of fact to infer that the party was not negligent, but additionally requires that all the evidence be weighed in determining whether that party who suffered memory loss was negligent. *Knickerbocker v Samson*, 364 Mich 439, 448; 111 NW2d 113 (1961); *Thompson v Southern Michigan Transportation Co*, 261 Mich 440, 446; 246 NW 174 (1933); SJI2d 10.09. The second presumption allows the trier of fact to presume that a party who has died was not negligent, but the trier of fact should weigh all the evidence to determine whether the party exercised due care. SJI2d 10.08. However, if there is clear, positive and credible evidence that the decedent was negligent, the decedent is not entitled to this presumption. *Potts v Shepard Marine Construction Co*, 151 Mich App 19, 27-28; 391 NW2d 357 (1986). These presumptions, however, do not apply here because Schneider is not a party to this action and negligence by plaintiff Carl Elliott is not at issue.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Myron H. Wahls
/s/ Roman S. Gribbs