STATE OF MICHIGAN

COURT OF APPEALS

CARL MICHAEL DAVIS,

Plaintiff-Appellant,

v

JACKIE L. WILLIAMS, KATHY'S TRUCKING COMPANY, INC., O & I TRANSPORT, INC. and O & I TRANSPORT OF MICHIGAN, INC.,

Defendants-Appellees.

UNPUBLISHED
December 4, 2008

No. 278713
Washtenaw Circuit Court
LC No. 05-001378-NI

Before: Fitzgerald, P.J., and Bandstra and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition to defendants. We affirm.

This case arises from an automobile, tractor-trailer collision. Since plaintiff has no memory of what occurred, the facts are almost exclusively developed from defendant Jackie Williams's recollection of the events.

Plaintiff and defendant Williams were traveling on eastbound I-94. Williams, a driver for defendant Kathy's Trucking Company, Inc., was transporting a load of steel coils. Plaintiff was driving his parents' Mazda Miati to Ann Arbor to see his then girlfriend. According to Williams, he was traveling in front of plaintiff in the right lane and plaintiff was traveling in the left lane. Williams could see the lights of plaintiff's vehicle approaching at a high rate of speed from the rear. Williams estimated that plaintiff was driving between 75 mph and 80 mph compared to Williams's 55 mph. After plaintiff passed along side Williams, plaintiff began to cut across to the right, closely in front of Williams's tractor-trailer. At about the same time, Williams observed what he believed to be an animal dart across the roadway in front of plaintiff's car. According to Williams, plaintiff swerved to miss the animal and lost control of his car. Plaintiff's car spun sideways in the roadway causing the vehicle to come within the lane in which Williams was traveling. Williams testified that he attempted to avoid a collision with plaintiff by applying his brakes to slow the tractor-trailer down and trying to merge the tractor-trailer to the right onto the shoulder of the roadway. Williams did not initially slam on his brakes full force because he feared the steel coils he carried would either spill onto the roadway or shoot like a missile through the cabin and kill him. Despite Williams's efforts, his tractor-trailer collided with plaintiff's car and plaintiff suffered severe injuries.

Defendants moved for summary disposition asserting that no genuine issue of material fact existed that plaintiff was not more than 50 percent negligent, thus precluding plaintiff's claim as a matter of law. The trial court agreed and granted defendants' motion, also concluding that the assured clear distance statute did not apply and that Williams's negligence, if any, was excused by the sudden emergency doctrine.

"This Court reviews de novo the grant or denial of a motion for summary disposition to determine if the moving party is entitled to judgment as a matter of law." *In re Handelsman*, 266 Mich App 433, 435; 702 NW2d 641 (2005), citing *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The moving party is entitled to judgment as a matter of law when viewing the evidence in the light most favorable to the nonmoving party, *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004), and drawing all reasonable inferences in favor of the nonmovent, *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005), the court finds that no genuine issue of material fact exists, *Maiden*, *supra* at 120.

Plaintiff raises several arguments on appeal. First, plaintiff argues that the trial court erred when it concluded, as a matter of law, that plaintiff was more than 50 percent negligent. We disagree.

MCL 500.3135(2)(b) prohibits recovery for non-economic damages when a party is found to be more than 50 percent at fault for his or her injuries. Comparative fault is usually a question of fact for the jury. *Poch v Anderson*, 229 Mich App 40, 51; 580 NW2d 456 (1998). However, in *Huggins v Scripter*, 469 Mich 898; 669 NW2d 813 (2003), our Supreme Court held that when "no reasonable juror could find that defendant was more at fault than the decedent in the accident as required by MCL 500.3135(2)(b)[,]" a court may resolve as a matter of law a comparative fault issue.

Here, the trial court properly held that plaintiff failed to establish any facts that could lead a reasonable juror to conclude that plaintiff was not less than 50 percent at fault:

> In this matter, this Court finds as a matter of law that no reasonable juror could find that defendant was more at fault than plaintiff. . . . Williams's description of the accident is the only substantively admissible evidence of what happened. It is clear from his testimony that plaintiff swerved to avoid a small animal and, as a result, lost control of his vehicle immediately in front of Williams's tractor-trailer. Williams testified that he was proceeding at the speed limit and that plaintiff was traveling faster. Williams testified that before plaintiff had gone more than one car length beyond his tractor-trailer, plaintiff swerved into the line of traffic Williams was in and then lost control of his vehicle. Williams testified that he was unable to stop in time or move to the right far enough to avoid striking plaintiff's car. This substantively admissible evidence is not challenged by any other direct evidence, any other direct eye witness testimony and this court finds that no reasonable juror could conclude, based upon this testimony, that plaintiff was less than 50 percent at fault for the accident. The undeniable conclusion must be that plaintiff was more than 50 percent at fault.

We agree with this analysis of Williams's testimony as the only direct and admissible account of how the accident occurred. We further note that Williams's testimony was consistent with and

corroborated by the police report and testimony regarding their on scene investigation and discovery of a recently killed raccoon and skid marks, physical evidence that was also corroborative of Williams's account. Because plaintiff had no recollection of how the accident occurred, all of this was unrefuted in any manner. Therefore, it was not improper for the trial court to decide the comparative fault issue as a matter of law.

Plaintiff claims that the trial court could not find as a matter of law that plaintiff was more than 50 percent negligent because he is entitled to a presumption of non-negligence. When a party involved in an accident suffers memory loss due to injuries related to the accident, the party is entitled to a presumption of non-negligence. SJI 2d 10.09. However, the presumption of non-negligence is not absolute. *Knickerbbocker v Samson*, 364 Mich 439, 448-449; 111 NW2d 113 (1961). If there is "clear, positive and credible evidence opposing the presumption," the party is no longer entitled to the presumption. *Id*. Because defendants here presented clear, positive and credible evidence establishing plaintiff's negligence, he was not entitled to a presumption of non-negligence.

Plaintiff further argues that when deciding the comparative fault issue, the trial court either ignored facts alleged by plaintiff or failed to give all the facts proper jurisprudential weight. Again, we disagree.

It is true that, when deciding a motion for summary disposition, the court must view the evidence in the light most favorable to the nonmoving party, *Corley*, *supra*, and draw all reasonable inferences in favor of the non-movant, *Scalise*, *supra*. However, a court is not required to blindly accept the non-movent's arguments. A logical connection must exist between the facts and the inferences drawn. See *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994). If there is a logical gap between the facts alleged and the established facts, the court must disregard the alleged facts as mere conjecture and speculation. *Id*.

Plaintiff presented the affidavits of two expert witnesses which he claimed created material factual disputes. However, neither of the experts had any first hand or personal knowledge of how the accident occurred. Further, the facts that they assumed regarding the accident were directly contrary to the Williams account and the corroborative police investigation described above. In other words, to support their theories of Williams's negligence, the experts had to assume facts that were contradicted by the record. While it is true that experts are not required to have personal knowledge about a series of events, their opinions must be derived from facts established in some manner by the record. MRE 702; *People v Dobek*, 274 Mich App 58, 94-95; 732 NW2d 546 (2007). As the trial court noted:

> The Plaintiff presents the affidavit of its expert in accident reconstruction to support his argument that even considering Williams's testimony there remains a question of fact regarding the apportionment of fault between Williams and Plaintiff. This Court is not persuaded. The accident reconstructionist does not have any personal knowledge about the accident. He must rely on the testimony regarding how the accident happened, which testimony comes directly from Williams. If he finds that Williams is not credible, he can't then come up with his own alternate version of how the accident occurred, which would be, as counsel pointed out, pure speculation.

We agree with that analysis.[1] As noted above, the only established facts on which the expert opinions could be based were provided by Williams's description of the accident, and by police testimony indicating that the accident scene was consistent with that description. There were no other established facts upon which plaintiff's experts could rely. Thus, any version of events, inconsistent with Williams's testimony and the corroborating physical and testimonial evidence presented to the trial court, necessarily is speculative or depends on disparaging Williams's powers of observation. Therefore, the trial court did not abuse its discretion by disregarding the experts' affidavits. *Skinner, supra*; *Green v Jerome-Duncan Ford, Inc*, 195 Mich App 493, 498; 491 NW2d 243 (1992).

In a related way, plaintiff also argues that the trial court erred by rejecting plaintiff's experts' affidavits without first conducting a searching inquiry to determine whether those opinions are reliable. We disagree.

A trial court's decision to admit or exclude expert testimony is within the court's discretion and will not be reversed absent an abuse of discretion. *Green, supra*; *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 214; 457 NW2d 42 (1990). A trial court abuses its discretion when its "decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006), or "when an unprejudiced person considering the facts upon which the decision was made would say that there was no justification or excuse for decision." *Novi v Robert Adell Children's Funded Trust*, 473 Mich. 242, 254; 701 NW2d 144 (2005).

MRE 702 governs the admissibility of expert testimony. That rule provides:

> If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

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[1] Further, on the "pure speculation" front, we note that the reasoning by which the experts assumed various facts to support their theories is suspect at best. For example, expert Gary Mattiacci baldly states that it would be "impossible" for plaintiff to have swerved right in front of Williams considering the high speeds of the vehicles when, in everyday reality, such a maneuver is commonplace. Mattiacci criticizes Williams's account of the accident because the dead raccoon was not found on the road but instead on its edge and well short of where the vehicles ended up following the collision. That seems, however, exactly where the carcass should have been after being struck by plaintiff's vehicle, under the Williams account. Both of plaintiff's experts argue that the truck must have been loaded improperly because Williams testified that he did not initially apply full pressure to his brakes, worrying that the load might shift forward and cause dire consequences. However, that cautionary impulse on Williams's part is certainly understandable and to be expected even if the truck was properly loaded.

As this Court explained in *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008),

> Under Michigan evidentiary law, which incorporates the requirements of the United States Supreme Court's decision in *Daubert v Merrell Dow Pharmaceuticals*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), the proponent of expert testimony must establish that the testimony is reliable by showing that it "is based on sufficient facts or data," and that it "is the product of reliable principles and methods," and that the proposed expert witness has "applied the principles and methods reliably to the facts of the case."

In *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779; 685 NW2d 391 (2004), our Supreme Court observed that MRE 702 requires the trial court, in its role as gatekeeper, to ensure that each aspect of an expert witness's proffered testimony, including the underlying data upon which the expert's opinions are based, is reliable. And, "[c]areful vetting of all aspects of expert testimony is especially important when an expert provides testimony about causation." *Id.* at 782. A trial court "may admit evidence only once it ensures, pursuant to MRE 702, that expert testimony meets that rule's standard of reliability," by conducting "a searching inquiry" of the data underlying the expert testimony, as well as of "the manner in which the expert interprets and extrapolates from those data." *Id.* "The inquiry is into whether the opinion is rationally derived from a sound foundation." *Chapin v A & L Parts, Inc*, 274 Mich App 122, 139; 732 NW2d 578 (2007). An expert "must have an evidentiary basis for his own conclusions." *Green, supra*. "[A]n expert's opinion is objectionable where it is based on assumptions that are not in accord with the established facts. This is true where an expert witness'[s] testimony is inconsistent with the testimony of a witness who personally observed an event in question, and the expert is unable to reconcile his inconsistent testimony other than by disparaging the witness'[s] power of observation." *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 286; 602 NW2d 854 (1999) (citations omitted). As noted above, the proponent of expert witness testimony has the burden of establishing the expert's qualifications and the reliability of the expert's opinions and conclusions. *Unger, supra* at 217; *Gilbert, supra* at 781.

Plaintiff asserts that the trial court failed to conduct a sufficiently searching inquiry before rejecting his experts' affidavits.[2] However, the record establishes otherwise. It is clear from the trial court's analysis of the experts' affidavits, that it undertook a careful review of the

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[2] Plaintiff also claims that the trial court should have conducted a *Davis-Frye* hearing before rejecting the affidavits. However, as our Supreme Court explained in *Gilbert, supra* at 779 n 44, MRE 702 was amended, effective January 1, 2004, to particularize the kind of gatekeeper inquiry the trial court is required to make. As amended, MRE 702 "explicitly incorporate[s] *Daubert's* standards of reliability" thus expanding the factors that the trial court may consider in determining whether expert opinion evidence is admissible beyond the *Davis-Frye* "general acceptance" standard. *Id.* at 781. Therefore, the proper inquiry here is not whether the trial court held, or should have held a *Davis-Frye* hearing, but rather, whether the trial court complied with its obligation as gatekeeper to conduct the "searching inquiry" required by MRE 702, into whether both the facts and data underlying the experts' opinions and the methods the experts used to reach their conclusions, were reliable. *Id.* at 779-783.

factual basis for the opinions expressed in the affidavits, as well as of the facts established by the testimony and evidence on record, before determining that the experts' opinions were not based upon sufficient facts or data as required under MRE 702.[3]

Finally, plaintiff argues it was error for the trial court to dismiss his claim for economic damages. We disagree.

MCL 500.3153(3)(c) merely gives a party an opportunity to pursue a negligence claim for excess economic damages. *Kreiner v Fischer*, 471 Mich 109, 114-115; 683 NW2d 611 (2004). To succeed, the party must still establish a prima facie case of negligence. *See id*; *Great American Ins Co v Queen*, 410 Mich 73, 91; 300 NW2d 895 (1980). Here, we agree with the trial court that plaintiff failed to establish a prima facie case of negligence.

To establish a prima facie case of negligence, a plaintiff must prove that a defendant owed the plaintiff a duty, the defendant breached that duty, the defendant's breach caused the plaintiff's injuries, and the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Whether a defendant owes a duty to a plaintiff is a question of law. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004). A duty can be created by statute. *Cipri v Bellingham* (*After Remand*), 235 Mich App 1, 15; 596 NW2d 620 (1999).

Plaintiff alleges that Williams's violation of the assured clear distance statute, MCL 257.627, establishes defendants' negligence. MCL 257.627(1) provides, in relevant part, that "[a] person shall not operate a vehicle upon a highway at a speed greater than that which will permit a stop within the assured, clear distance ahead." Our Supreme Court has held that violation of the assured clear distance statute constitutes negligence per se. *Vander Laan v Miedema*, 385 Mich 226, 231; 188 NW2d 564 (1971). However, violation of the statute does not mean strict liability. *Zeni v Anderson*, 397 Mich 117, 132-134; 143 NW2d 270 (1970). Instead, a presumption of negligence arises which the driver can rebut upon showing of an adequate excuse. *McKinney v Anderson*, 373 Mich 414, 419; 129 NW2d 851 (1964). The statute is inapplicable where an object suddenly darts into the assured clear distance. *Green v Richardson*, 69 Mich App 133; 244 NW2d 385 (1976). In this case, the trial court properly concluded that the assured clear distance statute did not apply because plaintiff suddenly swerved into Williams's assured clear distance. Plaintiff argues that because Williams testified that he had seen plaintiff's car quickly approaching from the rear, the trial court erred when it held that the assured clear distance statute did not apply. Plaintiff is in error. The assured clear distance statute is not implicated until there is a visible object in front of the driver. See *Nask v Mossner*, 363 Mich 128, 131-132; 108 NW2d 881 (1961). Thus, it was immaterial whether Williams observed plaintiff in his rear view mirror.

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[3] Because the trial court determined that the experts' factual bases for their opinions were flawed, it was not necessary for the trial court to determine whether the methods the experts used were otherwise reliable. Even if the methods used were otherwise reliable, if the experts reached their conclusions based on factually incorrect information, that necessarily renders the experts' opinions unreliable under MRE 702. *Gilbert, supra; Green, supra*.

Even if this Court were to conclude that the trial court erred in holding that there was no support for plaintiff's claim of negligence under the assured clear distance statute otherwise, plaintiff's claim must still fail. Defendants correctly argue that Williams's negligence, if any, is excused by the sudden emergency doctrine:

> One who suddenly finds himself in a place of danger, and is required to act without time to consider the best means that may be adopted to avoid impending danger is not guilty of negligence if he fails to adopt what subsequently and upon reflection may appear to have been a better method, unless the emergency in which he finds himself is brought about by his own negligence. [*Lepley v Bryant*, 336 Mich 224, 235; 57 NW2d 507 (1953).]

An emergency exists if the circumstances surrounding the accident were unusual or unsuspected, *Vander Laan, supra* at 232, such as when plaintiff's car abruptly swerved in front of Williams.

Plaintiff argues the sudden emergency doctrine is not applicable because Williams failed to slow down or take precautionary measures when he observed plaintiff's car quickly approaching from the rear. Drivers do not have a duty to anticipate the negligence of another or to avoid a collision no matter the circumstances. See *Corpron v Skiprick*, 334 Mich 311, 318; 54 NW2d 601 (1952). Nevertheless, plaintiff argues that Williams should have expected plaintiff to swerve to miss an animal citing *Hill v Wilson*, 209 Mich App 356; 361 NW2d 744 (1995). Although *Hill* involved a family of ducks crossing in front of the defendant's car, this Court expressly stated that the ducks played no part in its decision. *Hill, supra* at 361. Instead, the controlling fact was that "the parties were driving in heavy, rush-hour traffic where sudden stops should be 'reasonably expected.'" *Id*. (citations omitted). Such a situation did not exist in this case.

Plaintiff also argues this Court should find the sudden emergency doctrine does not apply because Williams did not fully slam on his brakes to avoid the accident. Plaintiff's argument is unconvincing. "[A] person confronted by a sudden emergency is not guilty of negligence if he or she fails to adopt what subsequently and upon reflection may appear to have been a better method . . . ." *White v Taylor Distributing Co, Inc*, 275 Mich App 615, 623; 739 NW2d 132 (2007), citing *Socony Vacuum Oil Co v Marvin*, 313 Mich 528, 546; 21 NW2d 841 (1946); see also *Lepley, supra*. Because we find that plaintiff's actions created a sudden emergency, defendants cannot be held negligent as a matter of law.

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Peter D. O'Connell