STATE OF MICHIGAN

COURT OF APPEALS

J.T. HUEY, Personal Representative of the Estate of DIANN HUEY,

Plaintiff-Appellant,

v

ALLSTATE INSURANCE COMPANY and JEMMIE L. RUFFIN,

Defendants-Appellees.

UNPUBLISHED
January 13, 2009

No. 282136
Wayne Circuit Court
LC No. 07-701469-NF

Before: Zahra, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

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

Plaintiff's decedent, Diann Huey, was involved in a collision with defendant Jemmie Ruffin, an uninsured driver, at 3:00 a.m. on May 25, 2006. It was undisputed that Huey, a pedestrian, was attempting to cross the street in the middle of the block. Apparently Huey was intoxicated, and she had no memory of anything that happened after she stepped into the street. Ruffin testified that she slowed and then stopped her vehicle after Huey stepped out in front of a parked car. She waited for Huey to cross, but Huey stood there without moving. Ruffin then started to move her car, but at that moment Huey began to take a step forward, and Ruffin again stopped. After Ruffin again stopped her car, Huey did not move. According to Ruffin, she pulled to the left to go around Huey, but Huey suddenly leapt onto Ruffin's windshield. Ruffin immediately stopped the car, and Huey fell to the ground, sustaining injuries to her left arm.

Although a driver is subject to tort liability under certain circumstances, MCL 500.3135(1), "[d]amages shall be assessed on the basis of comparative fault, except that damages shall not be assessed in favor of a party who is more than 50 % at fault." MCL 500.3135(2)(b). Defendants moved for summary disposition, arguing that the evidence established that Huey was solely at fault. The trial court agreed and granted defendants' motion.

We review de novo the trial court's ruling on a motion for summary disposition. *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 344; 745 NW2d 137 (2007). A motion brought under MCR 2.116(C)(10) tests whether there is an issue of fact for trial. "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). "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 v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

A driver has a statutory duty to drive at a careful and prudent speed in light of existing conditions. A driver must not drive at a speed greater than that "which will permit a stop within the assured, clear distance ahead." MCL 257.627(1). 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). Violation of this statute constitutes negligence per se, except where the driver is presented with a sudden emergency not of his own making. *McKinney v Anderson*, 373 Mich 414, 419; 129 NW2d 851 (1964). A sudden emergency sufficient to remove the statutory presumption must be "totally unexpected." *Vander Laan v Miedema*, 385 Mich 226, 232; 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 reasonable allowances for traffic, weather, and road conditions. *DePriest v Kooiman*, 379 Mich 44, 46; 149 NW2d 449 (1967), quoting *Churukian v LaGest*, 357 Mich 173, 182; 97 NW2d 832 (1959). However, a driver is not required "to guard against every conceivable result, to take extravagant precautions, [or] to exercise undue care," and he 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). For a pedestrian, that means, at the very least, walking on sidewalks if provided, MCL 257.655, and crossing within a marked or unmarked crosswalk at an intersection. MCL 257.613. Thus, a driver who is driving in a lane he 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 path. *Houck v Carigan*, 359 Mich 224, 227; 102 NW2d 191 (1960); *Gamet v Jenks*, 38 Mich App 719, 724-725; 197 NW2d 160 (1972). If a motorist fails to observe a pedestrian who can be seen coming into his path and fails to stop when he is capable of doing so, a question of fact exists regarding whether the driver was negligent. *Johnson v Hughes*, 362 Mich 74, 77-78; 106 NW2d 223 (1960).

Ruffin testified that when she observed Huey coming into her path, she slowed and then stopped. When Huey did not continue attempting to cross the street, Ruffin began moving again. Huey resumed her attempt to cross the street after Ruffin again began moving her car. When Ruffin observed Huey coming into her path, she again stopped. When Huey, again, did not continue her attempt to cross the street, Ruffin resumed driving and moved into the center lane, thus allowing sufficient clearance should Huey again resume her attempt to cross the street. As Ruffin began to pass by, Huey suddenly struck her windshield.

Ruffin's testimony, if believed, shows that she acted with reasonable care and caution until she was presented with a sudden emergency in the form of Huey approaching from the side

and leaping onto her car. Although summary disposition is usually improper where the truth of a material factual assertion depends on a witness's credibility, *Vanguard Ins Co v Bolt*, 204 Mich App 271, 276; 514 NW2d 525 (1994), plaintiff presents no evidence from which a reasonable jury could find that Ruffin was negligent even if the jury disbelieved her testimony. There were no witnesses to the accident apart from Huey and Ruffin. Huey, who had no memory of the accident at the time of her deposition, has since died. The only evidence plaintiff presented to establish an issue of fact regarding whether Ruffin was negligent was the affidavit of Sammie Hall, a retired police officer. This affidavit contains conclusory opinions on matters for which Hall has no apparent expertise. Hall essentially concluded that Ruffin was not presented with a sudden emergency and could have prevented the accident by exercising ordinary care, but an expert's opinion must be supported by facts in evidence, *Skinner v Square D Co*, 445 Mich 153, 173; 516 NW2d 475 (1994), and Hall did not offer any facts to support his conclusions. Further, Hall's other opinions, namely, that Huey's injuries were consistent with being struck by a car while standing upright and that Huey's intoxication was not a contributing factor, relate to matters beyond his area of expertise: there is nothing in the affidavit to show that Hall has any special medical or toxicological knowledge or training that would permit him to render an expert opinion in these areas. See MRE 702. Therefore, the trial court did not err in granting defendants' motion.

Affirmed.

/s/ Brian K. Zahra
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood