STATE OF MICHIGAN

COURT OF APPEALS

RENAY GRANT,

Plaintiff-Appellant,

v

JOHN GRANT,

Defendant-Appellee.

UNPUBLISHED
May 20, 2021

No. 352109
Roscommon Circuit Court
LC No. 18-724227-NO

Before: CAMERON, P.J., and BORRELLO and REDFORD, JJ.

PER CURIAM.

In this negligence lawsuit, plaintiff appeals the trial court's order granting summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact) in favor of defendant on plaintiff's negligence claim. We affirm.

I. BACKGROUND

This case arises out of an accident involving an all-terrain vehicle (ATV). Plaintiff and defendant are married and have two children. On the day of the accident, defendant was driving an ATV and plaintiff was in the passenger seat behind him. Their children were riding dirt bikes. As the family was traveling down a seasonal road, the children drove ahead of the ATV and turned off the road and onto a trail. Defendant "missed" the trail, so he turned the ATV around. After defendant completed the turn and was driving forward, he accelerated to about 30 miles per hour and lost control of the ATV. Plaintiff and defendant were both thrown to the ground, and plaintiff was injured.

Plaintiff filed a complaint in the trial court, asserting that defendant was negligent in operating the ATV. Defendant answered the complaint and generally denied liability. Discovery commenced, and the parties were deposed. Plaintiff testified that she could not recall the accident and that the children were not able to see the accident because of their location. Defendant testified that the accident happened very quickly and that he was not entirely sure what caused it. According to defendant, the road surface was "kind of uneven" and was "like gravel." Defendant testified that the front of the ATV "did start kind of bouncing around" and became "very unstable" after he accelerated. While defendant admitted that "maybe [his] acceleration might have been a little too

quick," defendant was adamant that he was driving responsibly and that it was appropriate to accelerate. Defendant testified that it was possible that the ATV's oversized tires could have caused the accident and that the accident may not have happened if the ATV had been outfitted with "stock tires."

Defendant filed a motion for summary disposition under MCR 2.116(C)(10), arguing that MCL 324.81133(3) barred plaintiff's claim because she had assumed the risks of riding the on the ATV and because there was no genuine issue of material fact regarding whether defendant was negligent. Defendant argued that it was appropriate for him to accelerate when he did and that he was not driving too fast. Plaintiff opposed the motion, arguing that genuine issues of material fact existed for trial given defendant's deposition testimony. After hearing oral argument, the trial court granted summary disposition in favor of defendant. This appeal followed.

II. SUMMARY DISPOSITION

Plaintiff argues that the trial court erred by granting summary disposition in favor of defendant because there was sufficient evidence to create an issue of fact concerning defendant's carelessness or negligence in operating the ATV. Plaintiff further argues that the trial court erred by weighing the evidence and using information outside the record. We disagree.

A. STANDARDS OF REVIEW

This Court reviews de novo questions of law, such as the interpretation of statutes. *City of Grand Rapids v Brookstone Capital, LLC*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 350746); slip op at 2. This Court also "review[s] de novo a trial court's decision on a motion for summary disposition." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019).

> A motion under MCR 2.116(C)(10) . . . tests the factual sufficiency of a claim. When considering such a motion, a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion. A motion under MCR 2.116(C)(10) may only be granted when there is no genuine issue of material fact. A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ. [*Id.* at 160 (quotation marks, citations, and emphasis omitted).]

"Courts are liberal in finding a factual dispute sufficient to withstand summary disposition." *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009) (citation omitted).

B. RELEVANT AUTHORITY

"To establish a prima facie case of negligence, a plaintiff must prove that (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages." *Hill v Sears, Roebuck and Co*, 492 Mich 651, 660; 822 NW2d 190 (2012) (quotation marks and citation

omitted). Defendant asserts that plaintiff's negligence action is limited by MCL 324.81133(3), which provides as follows:

> [e]ach person who participates in the sport of [off-road recreational vehicle (ORV)][1] riding accepts the risks associated with that sport insofar as the dangers are inherent. Those risks include, but are not limited to, injuries to persons or property that can result from variations in terrain; defects in traffic lanes; surface or subsurface snow or ice conditions; bare spots; rocks, trees, and other forms of natural growth or debris; and collisions with fill material, decks, bridges, signs, fences, trail maintenance equipment, or other ORVs. Those risks do not include injuries to persons or property that result from the use of an ORV by another person in a careless or negligent manner likely to endanger person or property . . . .

Thus, "[e]ach person who participates in the sport of ORV riding accepts the risks associated with that sport insofar as the dangers are inherent." Despite this general assumption of risk provision, the statute also provides that inherent risks "do not include injuries to persons or property that result from the use of an ORV by another person in a careless or negligent manner likely to endanger person or property." Thus, unless plaintiff's injuries arose from defendant's use of the ATV in a "careless or negligent manner" that was "likely to endanger" plaintiff, her claim is barred as a matter of law.

The statute does not define "careless" or "negligent." Because these terms are not defined by the statute, it is appropriate to use dictionary definitions. *Guardian Environmental Servs, Inc v Bureau of Constr Codes and Fire Safety*, 279 Mich App 1, 6-7; 755 NW2d 556 (2008). "Careless" is defined as "free from care: UNTROUBLED," and "negligent" is defined as "failing to exercise the care expected of a reasonably prudent person in like circumstances." *Merriam-Webster's Collegiate Dictionary* (11th ed).

C. ANALYSIS

Plaintiff first argues that the trial court erred by holding that a genuine issue of material fact did not exist given that defendant admitted that, in an effort to catch up to the children, defendant "accelerated rapidly," which caused him to lose control of the ATV. We disagree with plaintiff's characterization of the record evidence.

As already stated, defendant testified about the events leading up to the accident. Defendant testified that he was driving the ATV, with plaintiff as his passenger, and that their children were driving dirt bikes. At some point, the parties' children drove their dirt bikes ahead of the ATV against defendant's wishes. The children turned off the seasonal road and onto a trail. However, because of the dust created by the dirt bikes, defendant was unable to see the trail until he had already passed the entrance. This forced defendant to turn around. Once defendant had completed the turn and was traveling straight on an uneven section of the road, he accelerated. Defendant believed that he accelerated to about 30 miles per hour, which was reasonable in his

[1] "An ATV is an ORV." MCL 324.81101(u).

estimation. Defendant lost control of the ATV, which became "very unstable" and possibly "hooked sideways a bit[.]" Thereafter, plaintiff and defendant were thrown off the ATV.

Even when viewing the evidence in a light most favorable to plaintiff, we conclude that reasonable minds could not differ regarding whether defendant operated the ATV in a "careless or negligent manner" that was "likely to endanger" plaintiff. Defendant's testimony establishes that he was concerned with plaintiff's safety, as she was his passenger. Defendant, who had experience with riding ATVs and dirt bikes, described the accident as a "freak accident." Although defendant admitted that he may have accelerated "a little too quick," there is no evidence that the acceleration was careless or negligent and likely to endanger a person or property. Indeed, defendant repeatedly testified that he believed that he drove the ATV responsibly and that he was driving about 30 miles per hour at the time of the accident. This was the case despite the fact that, according to defendant, the ATV was capable of traveling "close to 50 miles an hour." Defendant also testified that he believed that he was in control of the ATV at the time he accelerated and that it was appropriate to accelerate the ATV at that time because he "was on the straightaway[.]" While plaintiff repeatedly points out that defendant acknowledged that he caused the accident, review of defendant's deposition testimony reveals that defendant took responsibility for the accident because he was the driver of the ATV—not because defendant believed that he was driving in an improper manner.

Additionally, when defendant was asked if he agreed that the accident would not have occurred had he been "going slower," defendant indicated that he could not "say no to that" and indicated that "maybe [his] acceleration might have been a little too quick." However, "[s]imply alleging that an actor could have done more is insufficient under Michigan law, because, with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result." *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). "[S]aying that a defendant could have taken additional precautions is insufficient to find ordinary negligence[.]" *Id*. Indeed, "the negligence standard, does not require one to exhaust every conceivable precaution to be considered not negligent." *Id*. Moreover, defendant repeatedly speculated about the cause of the accident, and speculation and conjecture are insufficient to create a genuine issue of material fact for trial. See *Innovative Adult Foster Care, Inc*, 285 Mich App at 479.

Next, plaintiff argues that a genuine issue of material fact existed because defendant's testimony supports that he knew that the ATV's tires were inappropriate for the conditions and that he nonetheless operated the ATV. Defendant testified that, three years before the accident, he had purchased the ATV from someone who had put oversized tires on the ATV. These tires were big and soft and had deep treads to aid in traveling in muddy conditions. Defendant admitted that the tires were "a little tricky to drive with" and that "[o]versized tires do get the vehicle to want to dart [and swerve] around a little more[.]" Although defendant agreed that the oversized tires made it "harder to operate" the ATV and to keep it "stable," this does not support that defendant's decision to drive the ATV with those tires constituted carelessness or negligence. As noted by the trial court, there is no evidence to support that the tires were not designed for the ATV. Indeed, defendant testified that "[m]ost people put [oversized tires] on [] when they buy the 4 X 4 four-

wheelers, ATVs, 4 X 4 ATVs."[2] Additionally, there is no evidence that defendant was operating the ATV in a manner that was careless or negligent in light of the type of tires that were on the ATV. As already discussed, the record simply does not support that defendant's acceleration of the ATV when he was driving the vehicle forward constituted carelessness or negligence that was likely to cause injury. Consequently, we conclude that the trial court did not err by granting summary disposition in favor of defendant.

In reaching this conclusion, we disagree with plaintiff that the trial court improperly weighed the evidence when granting summary disposition in favor of defendant. "[I]t is well settled that the [trial] court may not weigh the evidence or make determinations of credibility when deciding a motion for summary disposition." *Innovative Adult Foster Care, Inc*, 285 Mich App at 480. In granting defendant's motion, the trial court stated, in relevant part, as follows:

> There's been no proof shown by the plaintiff that the defendant did anything wrong ah, in his acceleration or the use of these tires which there's no evidence from an expert um, that the tires are improper or should never have been put on this ATV to begin with, they're not proper for an ATV ah, or that the tires somehow were defective. Ah, these are the tires that were ah, on the ATV when they bought the ATV, and these are the tires they use. Again, that's part of the risk of using this device.
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> [W]ithout question . . . defendant accelerated the ATV but there's no evidence that he did so . . . in a careless or reckless manner or negligent manner that would cause . . . a likelihood of someone getting injured.

Plaintiff's argument that the trial court improperly weighed the evidence rests on the assumption that defendant's acceleration was negligent because defendant testified that the acceleration likely caused the accident. However, the fact that the acceleration may have caused the accident does not mean that the rate of acceleration, or the acceleration in and of itself, was careless or negligent. The trial court found, and we agree, that acceleration is part and parcel of the inherently dangerous activity of riding an ATV. The fact that defendant may have accelerated "a little too quick" does not mean that defendant was careless or negligent. Instead, the evidence shows that defendant acted reasonably during an inherently dangerous activity. Accordingly, we conclude that the trial court did not improperly weigh the evidence.

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[2] The fact that defendant had the tires removed after the accident would be inadmissible at trial under the Michigan Rules of Evidence. See MRE 407. Hence, plaintiff could not rely on the evidence to contest defendant's motion for summary disposition, and we cannot consider it when reviewing the trial court's decision to grant defendant's motion for summary disposition. See *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999) (stating that "[t]he reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion").

Finally, plaintiff argues that the trial court improperly used its own knowledge of ATVs to decide the motion for summary disposition. Plaintiff highlights the trial court's following statement:

> And ah, living in this community where there are extensive ORV uses, I can till [sic] from prior experience in this courtroom on cases um, that in ORV's off the trail on an improved roadway are inherently dangerous because they're squirrely.

Although the trial court's statement reflects the court's personal experience with ATVs, there is no indication that the court's own experience had an effect on the ultimate disposition in this case. Instead, review of the record establishes that the trial court focused on the record evidence and that the court did not make a determination on the motion until the court heard oral argument. Accordingly, plaintiff's argument fails.

Affirmed.

/s/ Thomas C. Cameron
/s/ Stephen L. Borrello
/s/ James Robert Redford