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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0505**

Sondra M. Pederson, individually and as Trustee for the Heirs
and Next of Kin of Roger M. Pederson, deceased,
Appellant,

vs.

Quality Construction Connection, Inc., et al.,
Respondents.

**Filed June 17, 2008
Affirmed
Toussaint, Chief Judge**

Aitkin County District Court
File No. C9-06-101

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Considered and decided by Lansing, Presiding Judge; Toussaint, Chief Judge; and
Hudson, Judge.

UNPUBLISHED OPINION

TOUSSAINT, Chief Judge

Roger M. Pederson and Richard A. Anderson both died as the result of an accident
with a vehicle owned by respondent Quality Construction Connection, Inc. Appellant

Sondra M. Pederson, individually and as trustee for the heirs and next of kin of Roger M. Pederson, challenges the adverse grant of summary judgment on her wrongful-death claim against Quality Construction and respondent Jean Anderson, special administrator of the estate of Richard A. Anderson. Appellant argues that the district court erred by applying the doctrine of primary assumption of risk, by not finding a comparative-fault issue for the jury, and by finding that appellant failed to make a prima facie case of negligence. Respondents argue that the district court erred in concluding that appellant brought suit within the applicable statute of limitations. Because the facts are sparse and disputed, we cannot conclude that the statute of limitations bars appellant's claim. The lack of information in the record also leads us to conclude, as the district court did, that appellant failed to make a prima facie case of negligence. We therefore affirm the district court's dismissal of appellant's wrongful death claim without reaching appellant's assumption-of-the-risk argument.

D E C I S I O N

Granting summary judgment on a statute of limitations is appropriate if there are no genuine issues of material fact regarding the date or time of the event that triggers the statute of limitations. *City of Willmar v. Short-Elliott-Hendrickson, Inc.*, 475 N.W.2d 73, 77 (Minn. 1991). An appellate court examines the facts in the light favorable to the non-moving party. To preclude summary judgment, the non-moving party must offer more than mere averment and conclusory allegations. *Metge v. Cent. Neighborhood Improvement Ass'n*, 649 N.W.2d 488, 495 (Minn. App. 2002), *review dismissed* (Minn. Oct. 15, 2002).

The elements of a claim for negligence are (1) duty; (2) breach of duty; (3) causation; and (4) damages. *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 729 (Minn. 1990). The district court granted summary judgment against appellant, stating that she had produced no evidence that Anderson was driving negligently or that the negligence caused Pederson's death. The district court was correct.

An injury itself is not enough to establish negligence or causation. *See Lenz v. Johnson*, 265 Minn. 421, 424-25, 122 N.W.2d 96, 99 (Minn. 1963). Proof of negligence and causation must offer "more than a basis for speculation or conjecture." *Sandvik v. Jammes*, 281 Minn. 85, 90, 160 N.W.2d 700, 704 (Minn. 1968). Appellant's brief states that Anderson "ignored the danger," "failed to keep a proper lookout," did not "have his vehicle under control," and "carelessly continued to drive" in a way that negligently caused Peterson's death. But this version is conjecture, not evidence, because the record provides no support for this account of what happened. The record contains no evidence either of negligence or of negligence that caused Pederson's death; it shows only that the two men were last seen on Friday, December 20, 2002, and that the Jeep they had been in was found on the lake bottom beneath the ice on Sunday, December 22, 2002. Their bodies were recovered the following day.

The district court did not find sufficient evidence to support a prima facie case of negligence, and neither do we. Appellant has failed to offer any evidence of negligence or causation. Accordingly, we do not reach appellant's argument that the district court erred by applying the primary-assumption-of-the-risk doctrine.

Respondents filed a notice of review, challenging the district court's ruling that appellant's claim was not barred by the statute of limitations. Minnesota's wrongful death statute requires that a claim be filed within three years of the date of death. Minn. Stat. § 573.02, subd. 1 (2006). The date of Pederson's death is an issue of disputed fact. Respondents argue that Pederson died on either December 20 or December 21, 2002, and support this assertion with a water-accident report listing December 20, 2002, as the date of death. Appellant argues that the death certificate, which lists the date the bodies were found, supports the date of death as December 23, 2002. If this factual dispute is material, the district court properly denied summary judgment on respondents' statute-of-limitations argument. A disputed fact is material if it affects the outcome of the case. *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996).

When calculating a time period, the day of the triggering event is not included in the time period. Minn. R. Civ. P. 6.01. Therefore, if Pederson died on December 23, 2002, the last timely day to file would have been December 26, 2005, and appellant's filing would have been timely. But if Pederson died before December 21, 2002, appellant's claim would have been untimely. Because the disputed fact of Pederson's date of death affects the outcome of the case, it is a material fact. *See O'Malley*, 549 N.W.2d at 892 (stating that fact is material if it affects outcome of case). Therefore, we also affirm the district court's denial of summary judgment on statute-of-limitations grounds.

Affirmed.