STATE OF MICHIGAN

COURT OF APPEALS

DESTINY MACON,

Plaintiff-Appellee,

v

MICHAEL JOSEPH SCHMITT and MR. PIZZA YPSILANTI, INC., operating under the assumed name of MR. PIZZA,

Defendants-Appellants.

UNPUBLISHED
September 17, 2020

No. 349780
Washtenaw Co. Circuit Court
LC No. 18-872-NI

Before: RIORDAN, P.J., and O'BRIEN and SWARTZLE, JJ.

PER CURIAM.

Defendants, Michael Joseph Schmitt and his employer Mr. Pizza Ypsilanti, Inc. ("Mr. Pizza"), appeal by leave granted[1] the trial court's order denying defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) (no genuine issue of material fact). We reverse the trial court's order and remand this case for the trial court to enter an order granting summary disposition in defendants' favor.

I. FACTS & PROCEDURAL HISTORY

This case arises from a motor vehicle collision that occurred around 8:30 p.m. on February 24, 2017, on Washtenaw Avenue near the entrance to Fountain Plaza in Ypsilanti. Washtenaw Avenue is a five-lane road with two eastbound lanes, two westbound lanes, and a center turn lane. Schmitt, a pizza delivery driver for Mr. Pizza, was returning from a delivering a pizza and was driving eastbound on Washtenaw Avenue when he drove through the intersection where plaintiff, a Wendy's employee wearing a red shirt, black hat, and black pants, was crossing the street to return to work from her break. The front, passenger-side bumper of Schmitt's vehicle hit plaintiff and injured her leg.

[1] *Macon v Schmitt*, unpublished opinion of the Court of Appeals, issued November 6, 2019 (Docket No. 349780).

Plaintiff testified in her deposition that that she started crossing the street and was in the "curb lane" when she suddenly saw Schmitt's car driving towards her. She testified that she turned and tried to run back to the side of the road, but was struck by Schmitt's car. Plaintiff conceded that she did not see what color the light was when she began to cross the intersection, but she thought Schmitt was going fast in order to avoid being stopped at the light.

Schmitt testified in his deposition that he was driving in the "travel lane" and the light was green when he proceeded through the intersection. Schmitt stated that he saw plaintiff at the very last second before the impact. Several witnesses were at the scene, but no one saw the collision occur. The police report from the collision indicates that one witness, Darius Scott, stated that he was driving in the travel lane and Schmitt was driving in the curb lane when the collision occurred. However, when Scott was deposed over two years after the collision occurred, he could not recall some of the details of the event, including in which lane Schmitt was driving.

A vehicle traveling westbound on Washtenaw Avenue recorded video of the collision on a dash camera, but the footage does not conclusively support either Schmitt's or plaintiff's version of events and the parties disagree about what the footage depicts. Defendants contend that it shows Schmitt's vehicle proceeding through a green light in the travel lane when plaintiff darted out in front of his vehicle. Plaintiff asserts that it depicts Schmitt driving in the curb lane through a yellow light and hitting plaintiff. The dash camera footage is less than two minutes long and is dark, grainy, and shot at a distance from a clear angle. It does not show what actually occurred.

Defendants moved for summary disposition under MCR 2.116 (C)(10) (no genuine issue of material fact), and argued that no reasonable jury could find that plaintiff was less than 50% at fault because, at the time of the collision, Schmitt was legally traveling in the eastbound travel lane when plaintiff, clad in dark clothes, darted out in front of his car at an intersection which was poorly lit and without a cross walk. In response, plaintiff argued that there existed genuine issues of material fact regarding the lighting in the area, Schmitt's speed, the lane of the collision, the color of the light when plaintiff stepped off the curb and when Schmitt proceeded through the intersection, and what role, if any, Schmitt's medical condition (multiple sclerosis) played in his reaction time.

Following a hearing on the motion, the trial court denied the motion stating "at its core this is a classic car versus pedestrian accident…You have a pedestrian in a roadway where he or she isn't supposed to be there, and a car that doesn't see the pedestrian . . . . I can see a jury finding that the Plaintiff was 2 percent at fault or finding that she was 98 percent or 100 percent at fault. That's why we have juries is to make that determination. And seeing many issues of material fact[,] I'm denying the motion for summary disposition." This appeal followed.

II. STANDARD OF REVIEW

We review a trial court's decision regarding a motion for summary disposition de novo. *City of Fraser v Almeda Univ,* 314 Mich App 79, 85; 886 NW2d 730 (2016). In deciding a motion pursuant to MCR 2.116(C)(10), the trial court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of any material fact exists to warrant a trial. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019); *Maiden v Rozwood*, 461

Mich 109, 120; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) should be granted if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law after a review of all the pleadings, admissions, and other evidence submitted by the parties, viewed in the light most favorable to the nonmoving party. *BC Tile & Marble Co, Inc v Multi Bldg Co, Inc*, 288 Mich App 576, 582-583; 794 NW2d 76 (2010). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Id.* "The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence." *McCoig Materials, LLC v Galui Construction Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). The burden is then shifted to the nonmoving party to demonstrate that a genuine issue of material fact exists. *Id.*

III. ANALYSIS

Defendants argue that the trial court committed error requiring reversal when it denied their motion for summary disposition because the evidence demonstrates that plaintiff was at least 50% negligent for the collision and no reasonable juror could conclude otherwise. We agree.

To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). A driver of a motor vehicle generally owes a duty to pedestrians to exercise ordinary and reasonable care in the operation of his or her motor vehicle. *Zarzecki v Hatch*, 347 Mich 138, 141; 79 NW2d 605 (1956).

In the vehicle collision context, plaintiff's comparative fault does not bar the recovery of damages unless he is determined to have been "more than 50% at fault." MCL 500.3135(2)(b). Additionally, plaintiff may not recover if her negligence is the sole proximate cause of her injuries. *DeGrave v Engle*, 328 Mich 565, 569–570; 44 NW2d 181 (1950). The standards for determining plaintiff's comparative negligence are indistinguishable from those applicable to the negligence of a defendant, and the determination of a plaintiff's negligence is for the jury "unless all reasonable minds could not differ." *Rodriguez v Solar of Mich, Inc*, 191 Mich App 483, 488; 478 NW2d 914 (1991).

Plaintiff testified that she thought Schmitt tried to beat a changing light and his vehicle struck her in the curb lane. Schmitt testified that the light was green and he was driving in the travel lane when the collision occurred. No witnesses saw the collision and the dash camera footage is does not clearly depict the events. Defendants submitted a collision reconstruction report prepared by an expert opining that Schmitt was not at fault, but the report is based on the same deposition testimony submitted to the trial court and the expert's inspection of a vehicle similar to the one Schmitt drove when the collision occurred. Therefore, it conceivably could assist a factfinder in assigning liability, but does not conclusively resolve the issue and this case is reduced to a credibility contest, in many ways a speculative one.

During plaintiff's deposition, she conceded that she did not see the color of the traffic light when she stepped off the curb into oncoming traffic, but that she believed the light was red because other vehicles were stopped at the intersection. Plaintiff further testified that she did not know how fast Schmitt was driving when the collision occurred, or what the speed limit was in the area.

Plaintiff admitted that she had some memory issues, and remembered "a little bit" of what happened. Her initial account of the incidence is recorded in the police report which states that plaintiff told the police that she began crossing the street after the light turned red, and was struck by Schmitt's vehicle in the curb lane after Schmitt, who was "driving really fast," ran the red light. The police report further states that Scott told police that he was driving in the travel lane and Schmitt was driving in the curb lane when the collision occurred. However, in light of plaintiff's deposition testimony that she did not see the traffic light and did not know Schmitt's speed, plaintiff's contradicting statements to the police are merely speculation, and as such they are insufficient to create a genuine issue of material fact. *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993) (parties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact).

The only remaining factual issue is whether Schmitt was traveling in the curb lane when the collision occurred. Viewing the evidence in the light most favorable to plaintiff and assuming that Schmitt was traveling in the curb lane, plaintiff has not submitted evidence that Schmitt was negligent in doing so. Accordingly, the trial court committed error requiring reversal when it denied defendants' motion for summary disposition.

IV. CONCLUSION

The trial court improperly denied defendants' motion for summary disposition because there exists no genuine issue of material fact as to whether plaintiff was more than 50% liable for the collision. Accordingly, we reverse the trial court's order denying defendant's motion and remand this case for the trial court to enter an order granting summary disposition in favor of defendants. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Colleen A. O'Brien
/s/ Brock A. Swartzle