STATE OF MICHIGAN

COURT OF APPEALS

BRENDA PRICE, Personal Representative of the Estate of ROGER STANLEY PRICE, Plaintiff-Appellant, v PORT HURON HOSPITAL, Defendant-Appellee.	UNPUBLISHED June 10, 2014 No. 311188 St. Clair Circuit Court LC No. 10-000738-NH

Before: HOEKSTRA, P.J., and SAWYER and GLEICHER, JJ.

PER CURIAM.

Plaintiff Brenda Price testified that she and her now-deceased husband, Roger Price, twice visited the emergency department of defendant Port Huron Hospital seeking treatment for Roger's headaches. Brenda supplied dates, times and details of the visits. She recalled telling a hospital employee that Roger was taking a blood thinner and had recently been involved in a rollover accident. After Roger's death due to intracranial bleeding, Brenda brought this medical malpractice case.

The hospital sought summary disposition, asserting that no record existed of Roger's alleged visits. The hospital insisted that a record is created every time a patient seeks care in its emergency department. According to the hospital, the absence of a record proved that Roger never presented for treatment on the dates claimed by Brenda. The circuit court granted summary disposition to the hospital, finding a "stunning lack of evidence that Mr. Price was even present at Port Huron Hospital."

The circuit court failed to adhere to a fundamental tenet of summary disposition jurisprudence: a court must credit competent evidence presented by the nonmoving party and draw all reasonable inferences supported by that evidence. By deciding which side to believe, the circuit court usurped the fact finder's role. Accordingly, we reverse the circuit court's order and remand for further proceedings.

I

We recite the record evidence in the light most favorable to Price because this approach mirrors the method circuit courts must employ to determine the existence of genuine issues of material fact. Where appropriate, we note conflicting facts presented by the hospital.

On October 21, 2007, Roger Price fell asleep at the wheel of his Jeep and it rolled over. Apparently Roger sustained no obvious injury and sought no treatment. On October 31, 2007, Roger visited his cardiologist's office for a routine checkup. The cardiologist noted that Roger had been prescribed Coumadin, an anticoagulant drug, and recommended that Roger continue to take it.

That same day, Roger complained of a headache. After seeing the cardiologist, Brenda and Roger visited the Port Huron Hospital emergency center. According to Brenda, they "went up to the desk" and were told to "just have a seat." When Roger's name was called, they moved to a room where a "lady" sat at a desk. At her deposition, Brenda described as follows the encounter that ensued:

> *Q.* Did you personally have any conversation with her?
>
> *A.* Well, I explained that—they wanted to know what he was in there for. … Yes, I did have a conversation.
>
> * * *
>
> *Q.* What did you say to the lady and what did the lady say to you?
>
> *A.* What I said to the lady, and the reason why I said it because I had explained about the car accident and that he was having headaches. He never had headaches before. That's pretty much what I said.
>
> *Q.* I'm going to ask you some questions about that. Again this is what you remember saying. Did you tell her he had been in a car accident?
>
> *A.* He rolled his Jeep over.
>
> *Q.* Did you tell her when?
>
> *A.* I don't know if I said a date. Truthfully I don't know.
>
> *Q.* And then you said something about headaches?
>
> *A.* Yes.
>
> *Q.* Is that the way you put it, he's had headaches?
>
> *A.* He has a headache.
>
> *Q.* Has a headache?
>
> *A.* And normally he doesn't have headaches.
>
> *Q.* And is there anything else that you said to her?

A. I can't think of anything else. Oh, that he was on Coumadin because he wore a necklace with Coumadin on it.

* * *

Q. Did your husband talk to her, did he say anything to her?

A. That he had a headache.

* * *

Q. And do you remember the lady saying anything to him?

A. I don't remember what the conversation was.

Q. All right. Have you recited for me all of the conversation that you can remember that day?

A. Well, he said maybe it could be my blood pressure. He didn't know.

Q. Are you saying this is something your husband said?

A. Right, could be his blood pressure, he didn't know. I told him my thing about the headaches and the accident and then he says maybe it could have been my blood pressure.

Q. Was he talking to you or to—

A. To the lady at the desk.

Q. That's what I was asking if he had any conversation with her, and I think you are indicating now he did volunteer or say something to the effect it may be my blood pressure.

A. He said it could be. He didn't know. He wanted it checked, he said he wanted it checked.

Q. He wanted his blood pressure?

A. Thinking it could be blood pressure.

Brenda testified that same woman took Roger's blood pressure, "said it looked okay," and instructed him to "take a couple Tylenol and see if that will help."

According to the testimony of several hospital employees, patients presenting at the emergency department first encounter a "customer service technician," otherwise known as a "greeter," who either directed the patient to the triage nurse or, if the triage nurse is occupied, to a waiting area. A triage nurse assessed most ambulatory patients before the patients were assigned a bed in the "back" of the emergency department.

On November 2, 2007, the Prices returned to the emergency department because Roger continued to experience headaches. Brenda recalled that the lobby was full and the department appeared "really busy." A woman told them to take a seat. When Roger proposed that they return another time, a female nurse obtained a blood pressure machine, took Roger's blood pressure, and pronounced it "fine." She again advised that he take Tylenol.

On November 15, 2007, the Prices made a third trip to the emergency department. A record of that visit exists. The triage nurse noted Roger's chief complaint as a "migraine headache. . . [that] started five days ago," accompanied by nausea and vomiting. The emergency department physician similarly recorded Roger's complaint as a "migraine headache with vomiting [beginning] three days ago [and] gradual onset." According to the physician, Roger advised that he had rolled his Jeep "[t]wo weeks ago," despite that the accident had occurred 25 days earlier.

A CAT scan revealed bilateral subdural hematomas. Roger's condition deteriorated and he was airlifted to the University of Michigan Hospital. Dr. Oren Sagher, a University of Michigan neurosurgeon, opened Roger's skull in an attempt to relieve the pressure caused by the bleeding. He found blood with "essentially the color and consistency of crank-case motor oil." Dr. Sagher explained that the blood's appearance meant that Roger's initial brain bleeding occurred between two weeks and a month or more earlier. Roger succumbed to the brain bleed a few days after the surgery.

Brenda filed this lawsuit, alleging that acts and omissions of the hospital's nursing staff on October 31, 2007 and November 2, 2007 proximately caused Roger's death. Counsel for the Prices learned before commencing suit that the hospital claimed it possessed no record of emergency department visits on October 31, 2007 or November 2, 2007. Accordingly, many depositions addressed the hospital's record-keeping practices. The deposed hospital personnel unanimously and vigorously insisted that the hospital's "comprehensive systems of records" would have contained some information regarding Roger's visits if he had, in fact, presented in the emergency department. The witnesses described that every patient visit was memorialized by several people in several different ways, and adamantly asserted that even absent treatment, a patient encounter would leave a footprint in the record system.

Several hospital witnesses conceded that its registration system was "transitioning" at the time of the Prices' alleged visits. Before the fall of 2007, registration occurred when the patient spoke to the triage nurse. At some point in 2007 (the testimony differed as to exactly when), patients were registered only after having been assigned an emergency department bed. The testimony of Julie Lewandowski, R.N., the hospital's director of emergency services, substantiated that if a registration clerk failed to register a patient while the patient remained in the triage area, the task would fall to a registration agent "in the back." But according to Brenda's testimony, Roger never made it to the "back" on either October 31, 2007 or November 2, 2007. Lewandowski nevertheless testified that if Roger had been seen in the triage room, the nurse would have created a paper record of his visit.

At the close of discovery, the hospital moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), arguing that Brenda failed to create a genuine issue of fact regarding whether Roger visited its emergency department on the dates in question. The hospital urged

that evidence describing the hospital's record-keeping system and the absence of any records of Roger's visits on either October 31, 2007 or November 2, 2007, established as irrefutable fact that Roger did not visit its emergency department on those dates. Brenda responded by filing her own deposition testimony and excerpts of other depositions. The circuit court granted the hospital's motion under MCR 2.116(C)(10), reasoning:

> The Court is or has been struck by the stunning lack of evidence that Mr. Price was even present at Port Huron Hospital. One can argue that he was not necessarily a good historian under the circumstances, but he did give two consistent statements indicating that he . . . began experiencing migraine headaches anywhere from three to five days prior to the date that he did, in fact, report to Port Huron Hospital. Or the date we know he reported to Port Huron Hospital.
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> . . . [T]he Court finds that Plaintiff's theories are based upon, primarily again based on the evidence or lack of evidence presented are based primarily on speculation and conjecture. As a result, the Court finds the evidence presented to it fails to create a genuine issue of material fact and, therefore, grants summary disposition in Defendant's favor …

II

This Court reviews de novo the circuit court's summary disposition ruling. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may grant summary disposition under subrule C(10) if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.* "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). When the record leaves open an issue on which reasonable minds could differ, a genuine issue of material fact exists that precludes summary disposition. *West*, 469 Mich at 183. A court may not make findings of fact when deciding a summary disposition motion. *Jackhill Oil Co v Powell Production, Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995).

III

The circuit court's characterization of Brenda's deposition testimony as "based primarily on speculation and conjecture" embodies a finding that Brenda's version of events was not credible. However, in the summary disposition context credibility determinations belong to the finder of fact. Only when a court finds no grounds for a difference of opinion concerning the facts or the reasonable inferences that flow from the evidence is summary disposition appropriate. *West*, 469 Mich at 183. This is not such a case.

We begin by reviewing the familiar rules. MCR 2.116(C)(10) requires a circuit court to grant summary disposition if "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact . . . ." The party seeking summary disposition under this subrule must

specifically identify the issues it considers uncontested and support its motion with affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b) and (4). The hospital fulfilled these requirements. The burden then shifted to Brenda "to establish that a genuine issue of disputed fact exists." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Brenda responded by filing her deposition testimony and the depositions of hospital employees, which when viewed in the light most favorable to Brenda, supported that Roger could have visited the emergency department without a record having been created. This evidentiary record formed the basis for the circuit court's evaluation.

Among the well-established principles governing summary disposition analysis, none is more pertinent than the axiom that when entertaining a summary disposition motion under subrule (C)(10), the court must view the evidence in the light most favoring the nonmoving party, draw all reasonable inferences in favor of the nonmoving party, and refrain from making credibility determinations or weighing the evidence. *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013). Adherence to this rule requires that once the contested issue has been identified and supported with proof, a court must focus on the *nonmovant's* evidence and discount evidence to the contrary. In *Reeves v Sanderson Plumbing Prod, Inc*, 530 US 133, 150-151; 120 S Ct 2097; 147 L Ed 2d 105 (2000), the United States Supreme Court succinctly described as follows the process a court must use when ruling on a motion for summary disposition or summary judgment on the basis of an alleged absence of relevant factual issues[1]:

> Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses. [Internal quotation and citation omitted.]

Our Supreme Court articulated this principle in *Locke v Pachtman*, 446 Mich 216, 226 n 8; 521 NW2d 786 (1994):

> In passing upon a motion for directed verdict, a trial judge must consider the evidence in plaintiff's favor *unqualified* by any conflicting evidence. The trial judge is not prohibited from considering evidence presented by a defense witness per se; rather, the judge may not consider evidence from *any* witness to the extent that it conflicts with evidence in plaintiff's favor." [Emphasis in original.][2]

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[1] Although the discussion occurred in the context of a motion for summary judgment under Fed Rule Civ Proc 50(a), the same logic applies to a court's review of a motion for summary disposition under MCR 2.116(C)(10).

[2] The inquiries made on motions for summary disposition and a directed verdict ask the same question in the same way: "[T]he test regarding the sufficiency of causal proof is essentially the same in the contexts of summary judgments and directed verdicts, namely, whether reasonable

Here, a reasonable jury may ultimately believe that hospital personnel infallibly create a record for each patient presenting to the emergency department, even those who are sent home after only a brief blood pressure check. Or, the jury may deem accurate Brenda's account and conclude that the hospital's record system is not infallible or that a nurse elected against creating a record for a normal blood pressure check.[3] Instead of disregarding evidence contrary to the hospital's claim, the circuit court improperly rejected Brenda's testimony as unworthy of belief.

The hospital seizes on several inconsistencies in the record tending to cast doubt on the accuracy of Brenda's recollections. And given the systems in place at the hospital to record and bill for every patient encounter, Brenda's account of two unrecorded visits may seem implausible. Nevertheless, Brenda's testimony constitutes direct evidence of the events in question, and at the summary disposition stage of the proceedings, a court may not simply ignore or cast aside as incredible competent evidence.

Moreover, we note that the hospital's evidence regarding the absence of any record of Roger's visits is in the nature of negative evidence. Understandably, the hospital has no positive evidence negating Roger's presence, such as a videotape of the emergency department on the dates in question. The testimony describing the hospital's record-keeping practices instead serves as the foundation for an inferential showing made pursuant to MRE 803(7), which provides that "[t]he following are not excluded by the hearsay rule":

> Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of [MRE 803(6)], to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a business memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate a lack of trustworthiness.

MRE 803(7) is identical to FRE 803(7). The United States Court of Appeals for the Second Circuit has noted that "[t]he absence of a record of an event which would ordinarily be recorded gives rise to a legitimate negative *inference* that the event did not occur." *United States v Robinson*, 544 F2d 110, 114 (CA 2, 1976) (emphasis added).

While a reasonable inference arising from the absence of an entry in a business record may support a motion for summary disposition, the inference was challenged by Brenda's direct testimony. In contrast with the negative inference relied on by the hospital, Price offered direct, positive, eyewitness evidence of the emergency department visits. Brenda neither speculated nor conjectured about what occurred during the two visits in question; she described them in considerable detail. Consequently a jury must decide which version of the facts it finds more persuasive.

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minds, taking the evidence in a light most favorable to the nonmovant, could reach different conclusions regarding a material fact." *Skinner v Square D Co*, 445 Mich 153, 165 n 9; 516 NW2d 475 (1994).

[3] Brenda testified that Roger was a retired Port Huron police officer, had visited the hospital emergency room from time to time while on duty, and knew people who worked there.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Elizabeth L. Gleicher