STATE OF MICHIGAN

COURT OF APPEALS

TAHIR ALWATAN,

Plaintiff-Appellant,

v

COX ENTERPRISES, COX AUTOMOTIVE, JOHN DOE, and JOHN DOE,

Defendants.

and

MANHEIM'S METRO DETROIT AUTO AUCTION, INC, also known as MANHEIM REMARKETING, INC,

Defendant-Appellee,

UNPUBLISHED
March 17, 2020

No. 348089
Monroe Circuit Court
LC No. 18-140816-NI

Before: TUKEL, P.J., and MARKEY and SWARTZLE, JJ.

PER CURIAM.

Plaintiff, Tahir Alwatan, brought a negligence action against defendant Manheim's Metro Detroit Auto Auction, Inc., as well as others, after plaintiff was brushed back by a slow-moving vehicle at an automobile auction. The trial court granted summary disposition in favor of all defendants under MCR 2.116(C)(10) (no genuine issue of material fact). We affirm.

I. BACKGROUND

On November 5, 2015, plaintiff attended an automobile auction hosted by Manheim's Metro. He attended as a registered dealer for the purpose of bidding on the purchase of vehicles. Plaintiff had attended vehicle auctions at Manheim's Metro's facility approximately once per week for over two years, and was therefore familiar with the facility and with the auction process.

Typically, vehicles being auctioned would be driven into the arena, stopped in front of the auction block, and then driven back out of the arena. Vehicles followed a driving lane that was

painted blue to contrast it from the remainder of the arena floor, which was painted a yellow or tan color. Pedestrians often stood or walked in the driving lane, despite the routine presence of slow-moving vehicles. Manheim's Metro's written policies governing the drivers who operated vehicles in its facility stated that, as vehicles were being driven in and out of the arena, drivers were required to yield the right-of-way to pedestrians.

On the day in question, while plaintiff was attempting to bid on a vehicle, he stepped backwards into the driving lane, where a vehicle made slight contact with him and bumped or brushed him back out of the driving lane. The parties supplied the trial court with a video of the incident, which lasted only a few seconds. It is undisputed that the video is an accurate depiction of how the accident happened. This Court has reviewed the video supplied by the parties, which shows the following series of events.

As the video begins, a vehicle is stopped in the driving lane with the engine running. Plaintiff is standing just outside the travel lane, facing the vehicle. Plaintiff was so close to the vehicle at this point that he had placed both of his hands on the hood of the vehicle. At his deposition, plaintiff explained that he did so because he wanted to feel how the engine was running. Plaintiff then removed his hands from the hood of the vehicle and turned toward the auctioneer, intending to place a bid. Simultaneously, the vehicle began to inch forward slowly, but another pedestrian walked across the driving lane in front of the vehicle. Plaintiff, who had partially turned away from the vehicle and was standing perpendicular to it, placed his left hand on the hood of the moving vehicle. At his deposition, plaintiff admitted that he knew the vehicle was moving when he touched the hood with his left hand.

The driver of the vehicle paused the vehicle's forward momentum, apparently because the driver saw the pedestrian crossing the driving lane immediately in front of the vehicle. As that pedestrian cleared the front of the vehicle, the driver resumed the vehicle's slow, forward momentum. Plaintiff, now turned away from the vehicle and facing the auctioneer, simultaneously stepped backwards into the driving lane, directly into the path of the vehicle, and was bumped or brushed back slightly by the front-passenger side of the vehicle's hood. From both the video and plaintiff's deposition testimony, it is undisputed that plaintiff stepped backwards into the driving lane without looking toward the vehicle. The vehicle did not appear to strike plaintiff with any appreciable force. Plaintiff did not attempt to grab onto anything to prevent himself from falling, and plaintiff did not fall to the ground. Instead, plaintiff was merely brushed back a few inches by the slow-moving vehicle. The entire incident lasted approximately five seconds.

Plaintiff filed this lawsuit in circuit court, raising claims of negligence. Defendants moved for summary disposition under MCR 2.116(C)(10). The trial court viewed the video provided by the parties. Based on the undisputed contents of that video, which plaintiff conceded was an accurate representation of the accident, the trial court granted defendants' motion. In its ruling, the trial court stated that plaintiff knowingly stepped in front of a moving vehicle, and defendants did nothing to breach their duty of care owed to plaintiff. The trial court further stated that no reasonable jury could find plaintiff less than fifty percent liable for the collision. Therefore, the trial court entered summary disposition in favor of defendants.

This appeal followed. On appeal, plaintiff challenges only the trial court's ruling regarding defendant Manheim's Metro.

II. ANALYSIS

A. STANDARD OF REVIEW

We review de novo a trial court's decision to grant or deny a motion for summary disposition to determine whether the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When evaluating a motion under MCR 2.116(C)(10), a trial court considers the evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id*. at 120. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.*

"Whether a defendant owes an actionable legal duty to a plaintiff is a question of law." *Spikes v Banks*, 231 Mich App 341, 355; 586 NW2d 106 (1998). This Court reviews de novo questions of law. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004). "[W]hether a defendant has breached a duty of care is ordinarily a question of fact for the jury and not appropriate for summary disposition. However, when the moving party can show either that an essential element of the nonmoving party's case is missing, or that the nonmoving party's evidence is insufficient to establish an element of its claim, summary disposition is properly granted." *Latham v Nat'l Car Rental Systems, Inc*, 239 Mich App 330, 340; 608 NW2d 66 (2000) (citation omitted). "If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless" and the moving party is entitled to summary disposition as a matter of law. *Id*. (cleaned up).

B. PRIMA-FACIE CLAIM OF NEGLIGENCE

"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).

"The threshold question in a negligence action is whether the defendant[s] owed a duty to the plaintiff. It is axiomatic that there can be no tort liability unless defendants owed a duty to plaintiff." *Fultz*, 470 Mich at 463 (cleaned up). "[A] negligence action may be maintained only if a legal duty exists that requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." *Graves v Warner Bros*, 253 Mich App 486, 492; 656 NW2d 195 (2002). A driver of a motor vehicle generally owes a duty to pedestrians. The duty is "to exercise ordinary and reasonable care and caution" in the operation of his motor vehicle. *Zarzecki v Hatch*, 347 Mich 138, 141; 79 NW2d 605 (1956); see also *Poe v Detroit*, 179 Mich App 564, 571; 446 NW2d 523 (1989).

Once a legal duty has been established, a plaintiff must then demonstrate that the duty has been breached. On appeal, plaintiff argues that there is a genuine issue of material fact on whether defendant breached a duty of care owed to him. We conclude that there is no genuine issue of material fact because defendant breached no duty to plaintiff, who stepped in front of a vehicle he knew was moving.

As explained above, plaintiff knew that the vehicle was running when he stood just inches from the vehicle and placed both his hands on its hood. Plaintiff turned away from the vehicle, and as it began slowly moving forward, he again touched the hood of the vehicle, this time with his left hand. Plaintiff admitted that he knew the vehicle was moving when he touched the hood the second time. The vehicle paused in its forward momentum to avoid striking a pedestrian crossing the driving lane immediately in front of the vehicle. As soon as that pedestrian cleared the vehicle and the driving lane, the driver resumed the vehicle's slow, forward momentum. Simultaneously, plaintiff stepped backwards into the driving lane, into the path of the moving vehicle. As he did so, plaintiff was looking away from the vehicle, and he did not look back or touch the vehicle again, even though he knew that it had been moving just one second earlier.

Under these circumstances, defendant breached no duty to plaintiff. The Michigan Supreme Court has explained that it is proper for a trial court to hold, as a matter of law, that a defendant did not breach his duty when a pedestrian "suddenly darted into the side of defendant's car." *Houck v Carigan*, 359 Mich 224, 227; 102 NW2d 191 (1960). "Negligence is not presumed but must be proved. The mere happening of an accident raises no presumption of negligence." *Michigan Aero Club v Shelley*, 283 Mich 401, 410; 278 NW 121 (1938) (citations omitted). "[T]he fact of an accident does not establish liability or raise a presumption that the driver is negligent." *Barger v Bissell*, 188 Mich 366, 375; 154 NW 107 (1915). A pedestrian has a duty to make a proper observation as to potentially approaching traffic and "exercise that duty of degree of care and caution which an ordinary careful and prudent person would exercise under like circumstances." *Malone v Vining*, 313 Mich 315, 321; 21 NW 144 (1946). Furthermore, it is obvious a pedestrian "should look both ways before crossing the driving lane to ensure that he or she is not about to be struck by a vehicle." *Richardson v Rockwood Ctr, LLC*, 275 Mich App 244, 249; 737 NW2d 801 (2007).

This case is similar to many other negligence cases in which a pedestrian suddenly darted into the path of a moving vehicle, making a collision effectively unavoidable. The video of the incident clearly shows that plaintiff knew he was standing just inches from a vehicle that was running, knew that the vehicle had begun to move, and nonetheless stepped backwards into the driving lane without looking to see whether the vehicle was continuing to move. Given how quickly the sequence of events unfolded, the driver of the vehicle had no opportunity to avoid bumping plaintiff as he stepped backwards into the driving lane.

> Pedestrians upon the public highway have a right to assume in the first instance the driver of an automobile will use ordinary care and caution for the protection of pedestrians, nevertheless the pedestrian must not rest content on such assumption, if there comes a time where he knows, or ought to know by the exercise of reasonable care, he is being placed in danger. He must take such care for his own safety as a reasonable, careful, prudent person would do under similar circumstances. [*Malone*, 313 Mich at 321 (cleaned up).]

Plaintiff cites *Spikes*, 231 Mich App at 355, for the proposition that whether a defendant breached a duty to the plaintiff is *always* a question of fact for the jury. In *Spikes*, this Court held that the defendant owed a duty to plaintiff, as a matter of law, but whether the plaintiff breached her duty to the plaintiff was "a question of fact for the jury and is not an appropriate consideration for summary disposition." *Id*. at 355.

But, contrary to plaintiff's argument, whether a defendant breached a duty of care to the plaintiff is not always a question of fact for the jury, if the moving party can show that an essential element of the nonmoving party's case is missing or the nonmoving party's evidence is insufficient to establish an element of his claim. *Latham*, 239 Mich App at 340. Here, the video of the incident clearly establishes that plaintiff stepped backwards into the driving lane, without looking, when he knew that the vehicle in that lane was only inches away from him and knew that the vehicle had been moving a split second earlier. The trial court correctly concluded that defendant breached no duty owed to plaintiff.

C. PLAINTIFF'S PERCENTAGE OF FAULT

Plaintiff next argues that the trial court erred when it ruled that that no jury could find plaintiff less than fifty percent liable for the collision. The Legislature has provided that damages in a negligence case "must be assessed on the basis of comparative fault, except that damages must not be assessed in favor of a party who is more than 50% at fault." MCL 500.3135(2)(b). A plaintiff is considered to be at fault if a defendant proves that "the plaintiff's conduct was both a cause in fact and a legal, or proximate, cause of his own damages." *Lamp v Reynolds*, 249 Mich App 591, 599; 645 NW2d 311 (2002).

Plaintiff argues that determining comparative negligence of a plaintiff is always a question of fact for the jury, unless all reasonable minds could not differ, citing *Rodriguez v Solar of Mich, Inc*, 191 Mich App 483, 488; 478 NW2d 914 (1991). The trial court, however, concluded that reasonable jurors could not differ on this question, and that no reasonable juror could find that plaintiff was less then fifty percent liable for the accident. Based on the undisputed video evidence in this case, we agree with the trial court that no reasonable juror could find that plaintiff was less then fifty percent liable for the accident.

Lastly, plaintiff argues that the trial court erroneously granted summary disposition because the driver of the vehicle had the "last clear chance" to avoid the collision. Although "the last clear chance doctrine has been abolished with the adoption of a pure comparative negligence system in Michigan," a party may still "properly argue to the jury that the other party had the greater percentage of negligence because he or she had the last clear chance to avoid injury." *Callesen v Grand Trunk Western R Co*, 175 Mich App 252, 261-262; 437 NW2d 372 (1989). In any event, a jury may not award damages in favor of a party who is more than fifty percent at fault. MCL 500.3135(2)(b). Because no reasonable juror could find that plaintiff was less then fifty percent liable for the accident, the trial court properly granted defendants' motion for summary disposition.

Affirmed. Defendant, having prevailed in full, may tax costs under MCR 7.219(F).

/s/ Jonathan Tukel
/s/ Jane E. Markey
/s/ Brock A. Swartzle