

If this opinion indicates that it is “FOR PUBLICATION,” it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN
COURT OF APPEALS

ESTATE OF MARK BALLENTINE, by
DOROTHY RITTER, Personal Representative,

UNPUBLISHED
September 16, 2021

Plaintiff-Appellant,

v

ROBERT SALVAGGIO, NATIONAL MINI
STORAGE-KL AVE, and U-HAUL COMPANY OF
MICHIGAN,

No. 355106
Kalamazoo Circuit Court
LC No. 2020-000080-NI

Defendants-Appellees.

Before: MURRAY, C.J., and M. J. KELLY and O’BRIEN, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court’s order granting summary disposition in favor of defendants under MCR 2.116(C)(10). We affirm.

I. BACKGROUND

This case arises out of the unfortunate death of Mark Ballentine on the morning of August 5, 2019 in the parking lot of National Mini Storage-KL Avenue. The events leading to Ballentine’s death were captured entirely on National Mini Storage’s surveillance camera and are therefore not in dispute.

At the start of the video, three U-Haul trucks are parked in National Mini Storage’s parking lot, parallel to a gated entrance (behind which are storage units) and the street. During the video, a fourth U-Haul truck pulls in and parks perpendicular to the other trucks, between those trucks and the street. This fourth truck is parked over a grassy patch that separates the parking lot from the street, right next to the entrance of the parking lot.

After some time, the video shows Ballentine slowly emerging from between two of the three trucks parked parallel to the street.¹ Ballentine can be seen staggering and using the trucks to balance. He is holding a plastic black bag. He slowly makes his way to the roadway, walking very unsteadily, and at one point appears to almost fall over.² He then slowly staggers towards the fourth truck parked perpendicular to the roadway and heavily leans on the back of that truck. After a few seconds, he lays down behind the fourth truck. At this point, Ballentine's legs are still visible, and he can be seen still moving, but exactly what he is doing is unclear. At one point, Ballentine sits up, rolls onto his knees and begins slowly crawling under the truck, and is eventually so far under the truck that he is completely obscured from the camera's view.

Later in the video, Robert Salvaggio can be seen arriving at work in his pickup truck and opening the gate that the four trucks were parked near. Salvaggio drives through the gate, and then later walks back to the trucks. He first approaches the truck parked perpendicular to the roadway that Ballentine was under. The driver's side door is facing Salvaggio, so he walks directly up to the door, opens it, and gets in. Salvaggio averred in an affidavit that he was checking the gas tank and mileage. The video shows Salvaggio exit the truck that Ballentine was under without moving it, and then going to the other three trucks and doing the same thing—going inside the truck through the driver's side door and then exiting of the truck without moving it. After doing this with the three other trucks, Salvaggio makes his way back to the truck that Ballentine is under—the only one that was parked perpendicular to the road.

Salvaggio again approaches the truck from the driver's side, opens the driver's door, and gets in. According to Salvaggio, he checked the mirrors to make sure no one was behind him and that there was no traffic on the street, and then put the truck in reverse. In the video, the truck can be seen lurching back in reverse but does not go very far. The tire closest to the camera then starts spinning and kicking up dirt, and the other tire clearly goes over something, which was later revealed to be Ballentine. Salvaggio continues reversing the truck into the street, then moves the truck forward through the parking lot's entrance into the parking lot, where Salvaggio stops the truck. Salvaggio then gets out of the truck and walks quickly towards Ballentine, stays with him for a moment, then runs inside. Salvaggio called 911, and first responders arrived on the scene but were unable to save Ballentine.

Salvaggio initially told police that he saw Ballentine lying "in the grass portion of the parking lot" and then approached Ballentine and asked if he was okay. Salvaggio told police that Ballentine just blinked without saying anything, which led Salvaggio to call 911. In a second interview, Salvaggio told police that he actually got into the truck and was about to move it, but then he saw Ballentine laying in the grass. When asked if he moved the truck at all before seeing the victim, Salvaggio said no. Salvaggio told police that he then got out of the truck, walked over to Ballentine, and asked if he was okay, but Ballentine just blinked and did not say anything, leading Salvaggio to call 911.

¹ Ballentine was renting a storage unit at the National Mini Storage.

² A toxicology report later showed that Ballentine's blood alcohol content was 0.325.

Eventually, after being confronted with the video, Salvaggio acknowledged that he indeed ran over Ballentine. After reviewing the video and the police investigation report of this incident, a prosecutor determined that Ballentine's death was an accident and that "there is nothing to suggest that Mr. Salvaggio's actions were criminal in any way."

During discovery, Salvaggio testified that he had a checklist from U-Haul that he used to inspect trucks, but did not perform the checklist before using the truck on the day in question. According to Salvaggio, there was no requirement that the checklist be performed before moving the truck, and the checklist was generally done after the truck was moved to "a safe location."

Plaintiff filed her complaint on February 18, 2020. As relevant to this appeal, plaintiff alleged that Salvaggio was negligent both in the way he drove the truck and by failing to "inspect the exterior of the" truck before driving. Plaintiff further alleged that U-Haul and National Mini Storage were vicariously liable for Salvaggio's negligence.

Before the close of discovery, defendants moved for summary disposition under MCR 2.116(C)(10). Defendants recognized that dispositive motions before the close of discovery were generally premature, but argued that further discovery was unnecessary because the factual basis underlying plaintiff's claim was fully captured by surveillance video, leaving only questions about how the law applied to this situation.

Defendants first argued that Ballentine was a trespasser around the truck at the time of the accident because, even if he was permitted to be on the land, he did not have permission to use any of the trucks or to crawl underneath one of the trucks. As such, Salvaggio's duty to Ballentine was to refrain from willful and wanton misconduct. According to defendants, there was no question of fact that Salvaggio's conduct did not rise to the level of willful and wanton misconduct.

Alternatively, defendants argued that Salvaggio could not be deemed liable for Ballentine's injuries because plaintiff could not establish that Salvaggio breached a duty. According to defendants, Salvaggio's duty was to move the truck as a reasonably careful person would under the circumstances, and there was no question of fact that Salvaggio did that—he checked his mirrors before reversing and made sure that the area was clear, he drove at a reasonable speed, and he was in control of the vehicle at all times. Defendants further argued that, based on both Michigan law and law from other jurisdictions, there was no duty for Salvaggio to inspect around the truck before moving it. Lastly, defendants pointed out that if plaintiff's claims against Salvaggio failed, then its vicarious liability claims against U-Haul and National Mini Storage must also fail.

In response to defendants' motion, plaintiff first emphasized that this dispositive motion was premature because discovery was ongoing and she "presumed" or "expected" experts to provide evidence that would support her position. Plaintiff next argued that, regardless, as the record now stood it was clear that Salvaggio breached a duty. Namely, the duty to inspect the truck before moving it. Plaintiff then walked through an analysis of why she believed such a duty existed. In so doing, plaintiff pointed to, among other things, the fact that Salvaggio was provided a checklist that he was "to perform prior to operating any U-Haul vehicle"—which included walking around the vehicle before operating it—and that Salvaggio admitted that he did not perform the checklist before using the vehicle in this instance.

At a hearing on defendants' motion, the trial court listened to the parties' arguments and then issued its ruling from the bench. The court acknowledged that summary disposition was generally premature before discovery closed, but was "satisfied that [t]here is no further information that can be gleaned through the discovery process" such that "a (C)(10) determination [was] appropriate." On the legal arguments, the court determined that Salvaggio satisfied the ordinary standard of care for operating a motor vehicle, but "[d]id not go the extra mile and anticipate that there was any unusual circumstance that would require extraordinary measures" such as inspecting around the vehicle before using it. Accordingly, the court determined that Salvaggio did not violate any duty. Following the hearing, the trial court entered an order granting defendants' motion for summary disposition "[f]or the reasons stated on the record."

Plaintiff now appeals as of right.

II. STANDARD OF REVIEW

Appellate courts review de novo a trial court's grant of summary disposition. *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 506; 885 NW2d 861 (2016). Defendants moved for summary disposition under MCR 2.116(C)(10). In *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999), our Supreme Court explained the process for reviewing a motion filed under MCR 2.116(C)(10) as follows:

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. 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. [*Maiden*, 461 Mich at 120.]

A genuine issue of material fact exists when, after viewing the evidence in a light most favorable to the nonmoving party, reasonable minds could differ on the issue. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

III. COMPLETION OF DISCOVERY

Plaintiff first argues that the trial court erred by granting defendants' motion for summary disposition before the close of discovery. Summary disposition is generally premature if discovery is incomplete on a disputed material issue. *Townsend v Chase Manhattan Mtg Corp*, 254 Mich App 133, 140; 657 NW2d 741 (2002). However, that discovery remains open does not necessarily mean that summary disposition is inappropriate—"[t]he question is whether further discovery stands a fair chance of uncovering factual support for the opposing party's position." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009). A party may not rely on mere assertions or speculation, but must identify "a disputed issue and support[] that issue with independent evidence." *Id.*

The parties do not dispute that all of the fact witnesses in this case had been deposed and that the video-recording of the accident fully depicted what happened. Nonetheless, plaintiff contends that summary disposition was premature because she had yet to obtain "expert analysis

of what Salvaggio could see, whether Ballentine’s body was visible, and other key facts in the negligence analysis.”³ Plaintiff offers no independent evidence to suggest that these were disputed material issues. She instead relies on mere assertions that these issues were in dispute, and bases that assertion on apparent speculation that unspecified experts would testify to that. Accordingly, nothing suggests that further discovery would stand a fair chance of uncovering factual support for plaintiff’s position, and plaintiff’s argument that discovery was premature is meritless. See *id.*

IV. WHETHER SALVAGGIO EXERCISED ORDINARY CARE

Plaintiff next argues that there is a question of fact whether Salvaggio failed to exercise ordinary care in his operation of the truck.⁴ We disagree.

Initially, we acknowledge that defendants argue that Ballentine was a trespasser “around” the truck at the time of his death, so Salvaggio’s duty to Ballentine was only to refrain from gross negligence or willful and wanton misconduct. See, e.g., *Langford v Rogers*, 278 Mich 310, 315; 270 NW 692 (1936) (“The owner of a motor vehicle owes no special duty to one who is being transported by stealth, or who is a mere trespasser, except to restrain from gross negligence or willful or wanton misconduct.”) (Citations omitted.) We decline, however, to offer any opinion on defendants’ argument because we conclude that there is no question of fact that Salvaggio satisfied the ordinary standard of care for drivers of motor vehicles.

To sustain a claim of negligence, a plaintiff must show: (1) a duty existed from the defendant; (2) the defendant breached that duty; (3) the breach was the proximate cause of the injury; and (4) damages. *Latham v Nat’l Car Rental Sys, Inc*, 239 Mich App 330, 340; 608 NW2d 66 (2000). In general, a driver owes a duty to other motorists and pedestrians 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). This includes checking to make sure the area behind a vehicle is clear before reversing. *Jenkins v Bentley*, 277 Mich 81, 84; 268 NW 819 (1936). But a driver is not required “to guard against every conceivable result, to take extravagant precautions, [or] to exercise undue care.” *Hale v Cooper*, 271 Mich 348, 354; 261 NW 54 (1935).

In their motion for summary disposition, defendants presented sufficient evidence to establish that Salvaggio exercised ordinary and reasonable care and caution in his operation of the truck. The video shows that, while Ballentine was sleeping underneath the back-passenger tires

³ Plaintiff does not specify what those “other key facts” are.

⁴ In her complaint, plaintiff alleged that Salvaggio had a duty to inspect under the truck before moving it, and in her response to defendant’s motion for summary disposition, she limited her argument to contending that Salvaggio had a duty to inspect under the truck before using it. On appeal, however, plaintiff has abandoned her argument that such a duty exists by failing to brief it, see *Mitcham v City of Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959), and now only argues that there is a question of fact whether Salvaggio breached the well-established duty to exercise ordinary care in the operation of a motor vehicle. In their brief, defendants persuasively argue that a driver does not have a duty to inspect under a vehicle before using it, but it is unnecessary to address that argument to resolve this appeal.

of the truck, Salvaggio came out to the truck and got in the driver's side. Salvaggio averred that he checked the mirrors and the traffic on the nearby street behind him, but did not see Ballentine at any time. Salvaggio then put the truck into reverse, and the video shows the truck reversing, seemingly running over Ballentine who was asleep under the back-passenger tires, then pulling forward. Ballentine's body becomes visible in the video as the truck moves forward into the parking lot. The video then shows the truck stop, and Salvaggio gets out and goes to Ballentine. After a brief moment, Salvaggio runs into the store, and 911 received a call from Salvaggio shortly thereafter. This evidence clearly established that Salvaggio was not negligent in his operation of the truck. In response, plaintiff did not produce any evidence tending to suggest that Salvaggio failed to exercise ordinary and reasonable care and caution in his operation of the truck. Accordingly, there was no question of material fact that Salvaggio was not negligent in his operation of the motor vehicle, and the trial court properly granted summary disposition to defendants.

Plaintiff argues that Salvaggio breached his duty to exercise ordinary care in his operation of the motor vehicle because the reason he did not see Ballentine was "the result of his failure to look at the area he was planning to drive over in reverse."⁵ Plaintiff asserts that this was contrary to *Jenkins*, in which our Supreme Court explained that a driver who operates a motor vehicle in reverse "must exercise ordinary care in backing his machine, so as not to injure others by the operation, and this duty requires that he adopt sufficient means to ascertain whether others are in the vicinity who may be injured." *Jenkins*, 277 Mich at 84 (quotation marks and citation omitted). According to plaintiff, Salvaggio's "failure to look at the area he was planning to drive over in reverse" was a failure to "adopt sufficient means to ascertain whether others are in the vicinity who may be injured." Yet plaintiff ignores the second part of that quote from *Jenkins*, which gives context to the sentence on which plaintiff relies: "And he must not only look backward when he commences his operation, but he must continue to look backward in order that he may not collide with or injure those lawfully using such street or highway." *Id.* (quotation marks and citation omitted). Clearly, the portion of *Jenkins* on which plaintiff relies stands for the unremarkable proposition that a driver reversing a motor vehicle must make sure he has a clear view of the area where he is reversing to. The second sentence then clarifies that the driver must actually look at the area to make ensure that it is clear, and continue looking while reversing to ensure that the area stays clear. Here, the evidence is undisputed that Salvaggio had a clear view of the area behind him before reversing and in fact looked behind him before reversing. No one was visible to Salvaggio, however, because Ballentine was underneath, not behind, the truck. Nothing in *Jenkins* supports plaintiff's assertion that a driver must check "the area he was planning to drive over."

⁵ Before making this argument, plaintiff contends that Salvaggio gave "two different stories"—in one, he said that he did not see Ballentine before he moved the truck, and in the other (according to plaintiff) he said that he saw Ballentine before moving the truck. This is not wholly accurate. Salvaggio did give conflicting statements, and in one statement Salvaggio did say that he did not see Ballentine before moving the truck. In his other statement, however, Salvaggio said that when he went outside to move the truck, he saw Ballentine and called 911 without moving the truck. Contrary to plaintiff's assertions, Salvaggio never said that he saw Ballentine *and then* moved the truck.

Plaintiff also argues that Salvaggio failed to exercise ordinary care when he “failed to use the horn to audibly warn that he was starting the engine in preparation for moving the previously stationary truck.” Plaintiff cites no authority to support her assertion that using a “horn to audibly warn that [a driver] was starting the engine in preparation for moving [a] previously stationary” motor vehicle is part of the duty to exercise ordinary and reasonable care in the operation of a motor vehicle, thereby abandoning that claim. See *Mitcham v City of Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) (“It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.”).

Plaintiff also briefly seems to argue that Salvaggio breached his duty to operate the motor vehicle with ordinary care because he failed to “walk around the vehicle and complete a checklist” like U-Haul required, which included inspecting the truck’s tires. It is well established, however, that “an institution’s internal rules and regulations do not add to its obligations to the public or establish a standard of care” *Gallagher v Detroit-Macomb Hosp Ass’n*, 171 Mich App 761, 764-765; 431 NW2d 90 (1988). This has been the law in Michigan for well over a century. See *McKernan v Detroit Citizens’ St Ry Co*, 138 Mich 519, 530; 101 NW 812 (1904) (explaining that “a person cannot, by the adoption of private rules, fix the standard of his duty to others” because that duty “is fixed by law, either statutory or common”). Accordingly, that Salvaggio did not complete the checklist provided by U-Haul has no bearing on whether Salvaggio breached a duty owed Ballentine.

Affirmed.

/s/ Christopher M. Murray

/s/ Michael J. Kelly

/s/ Colleen A. O’Brien