Order

Michigan Supreme Court
Lansing, Michigan

October 6, 2023

Elizabeth T. Clement,
Chief Justice

165728

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

TODD BRIGGS, Personal Representative of the ESTATE OF OMARI BELL,
Plaintiff-Appellee,

v

SC: 165728
COA: 358641
Kalamazoo CC: 2020-000143-NI

JEFFREY KNAPP,
Defendant-Appellant,

and

GABRIEL CARMONA and ADRIAN ROJO,
Defendants.

_____/

On order of the Court, the application for leave to appeal the March 9, 2023 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals and REMAND this case to the Kalamazoo Circuit Court for entry of an order granting defendant Jeffrey Knapp's motion for summary disposition. As noted by dissenting Judge K. F. Kelly, "until a hazard is perceived, or until a hazard would have been apparent to 'a reasonable man, considering pertinent surrounding circumstances of traffic and terrain,' a driver has no duty to guard against or anticipate an unknown hazard. See *McGuire [v Rabaut]*, 354 Mich 230[, 236 (1958)]." The plaintiff also failed to present evidence to establish causation, where, as observed by Judge K. F. Kelly, there was no showing that the defendant driver could have altered his conduct to avoid the accident. See *DePriest v Kooiman*, 379 Mich 44, 47 (1967); *McGuire*, 354 Mich at 240; *Gardiner v Studebaker Corp*, 204 Mich 313, 316 (1918).

WELCH, J., (*concurring in the judgment*).

I agree with this Court's decision to reverse the Court of Appeals' judgment. I write separately because I would have based the reversal on plaintiff's failure to establish a genuine dispute of material fact as to whether defendant breached his legal duty of care.

Summary disposition is appropriate where "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). A genuine issue exists " 'when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party.' " *Kandil-Elsayed v F & E Oil, Inc*, 512 Mich ___, ___ (2023) (Docket Nos. 162907 and 163430); slip op at 7, quoting *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425 (2008). The Court resolves all reasonable inferences in the nonmoving party's favor. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 618 (1995). At the same time, "[a] litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10)." *Maiden v Rozwood*, 461 Mich 109, 121 (1999). "A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial." *Id.* Relatedly, a party "may not rest upon the mere allegations or denials . . . but must," through admissible evidence, "set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4).

As a driver, defendant in this case had a legal duty "to exercise ordinary and reasonable care and caution, that is, that degree of care and caution which an ordinarily careful and prudent person would exercise under the same or similar circumstances." *Zarzecki v Hatch*, 347 Mich 138, 141 (1956), citing *Hazen v Rockefeller*, 303 Mich 536 (1942). Defendant also had a duty to exercise care to notice pedestrians, avoid hitting pedestrians on the highway, follow traffic laws, and leave ample space to pass pedestrians on the highway. *Birkhill v Todd*, 20 Mich App 356, 360 (1969).

In this case, defendant furnished evidence suggesting that he exercised reasonable care and caution before the accident. In response to that evidence, plaintiff "may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4). Here, as observed by Judge K. F. KELLY, "[p]laintiff offered no such evidence" regarding defendant's alleged failure to exercise reasonable care. *Briggs v Knapp*, unpublished per curiam opinion of the Court of Appeals, issued March 9, 2023 (Docket No. 358641) (K. F. KELLY, J., dissenting), p 6. Accordingly, defendant was entitled to summary disposition.

The majority order broadly states that a driver has no duty to guard against unknown hazards. See *McGuire v Rabaut*, 354 Mich 230, 236 (1958). I do not think that we need to decide whether defendant established that the presence of the decedent on the highway was an unknown hazard. A fact-intensive inquiry is needed to determine whether and when a driver owes a duty to a pedestrian on an interstate highway. For example, the inquiry would be different from the inquiry in this case if the decedent's vehicle had broken down and he was on the shoulder of the highway rather than in the right lane.

Because the inquiry regarding an "unknown hazard" is so fact-intensive, I would have focused instead on plaintiff's failure to furnish substantive evidence that defendant failed to exercise reasonable care. By focusing on plaintiff's failure to fulfill his evidentiary burdens, we would have avoided the murkier waters as to when a driver owes a pedestrian on an interstate highway a duty of care. With those reservations in mind, I respectfully concur in the judgment.

STATE OF MICHIGAN

COURT OF APPEALS

TODD BRIGGS, Personal Representative of the Estate of OMARI BELL,

Plaintiff-Appellee,

v

JEFFREY KNAPP,

Defendant-Appellant,

and

GABRIEL CARMONA and ADRIAN ROJO,

Defendants.

UNPUBLISHED
March 9, 2023

No. 358641
Kalamazoo Circuit Court
LC No. 2020-000143-NI

Before: GLEICHER, C.J., and K. F. KELLY and LETICA, JJ.

PER CURIAM.

Defendant, Jeffrey Knapp, appeals by leave granted[1] the order denying defendant's motion for summary disposition in favor of plaintiff, Todd Briggs, the personal representative of the Estate of Omari Bell (the decedent). We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Defendant was driving on the freeway when his vehicle collided with the decedent, a pedestrian. The decedent was tossed over the roof of defendant's vehicle and landed on the freeway where he was run over by a vehicle driven by defendant Gabriel Carmona and registered

[1] *Estate of Omari Bell v Knapp*, unpublished order of the Court of Appeals, entered February 7, 2022 (Docket No. 358641).

to defendant Adrian Rojo.[2] Plaintiff filed an action against defendant alleging ordinary negligence citing common-law breach of duties by the driver and statutory motor vehicle violations.

Defendant denied responsibility for the accident. After it occurred, he pulled over to the side of the road. He was given sobriety tests, and the police concluded he was sober at the time of the accident.[3] Defendant testified that he was driving in the right lane with his cruise control set at approximately 70 miles per hour (mph) in accordance with his practice. He never saw the decedent until the impact occurred. Defendant testified that he was looking ahead at the roadway and was not distracted. He had his cellphone attached to the car's heater vent and denied making calls or texts at the time of the collision. Defendant denied seeing the decedent before the impact. He opined that he was driving in the center of the right lane, and the decedent entered the right lane of travel as evidenced by the damage to his vehicle at the passenger side. Defendant denied that he could have avoided the accident. He cited to the dark conditions, the all dark clothing worn by the decedent, and the lack of ambient lighting because of a nearby wall. The police interviewed defendant and found him to be forthcoming. The accident reconstructionist and the investigating officer concluded that the decedent was at fault for the accident, analogizing the vehicle/pedestrian accident to a vehicle/deer accident. Defendant was not ticketed for the accident.

Defendant moved for summary disposition under MCR 2.116(C)(10), relying on his deposition testimony and the results of the police investigation. It was also asserted that the decedent tested positive for controlled substances and may have been more than 50% at fault for the accident under the circumstances. Additionally, defendant questioned the foundation for the opinion expressed by Timothy Robbins, plaintiff's expert, and that defendant could not be held negligent in light of the sudden emergency doctrine.

Plaintiff opposed the dispositive motion. Plaintiff noted that, before the accident, two motorists called 911 to report that a pedestrian was on the freeway or near the freeway off of westbound I-94. Although the decedent was wearing all dark clothing, he was visible to these individuals. Plaintiff cited to the duty owed by a driver to pedestrians at common-law and by statute and noted that the issue of breach of duty and causation generally presented an issue for the trier of fact. Additionally, it was noted that summary disposition was inappropriate when credibility issues were presented. Plaintiff also relied on the affidavit filed by Robbins which cited to the ability of other drivers to see the decedent on the roadway as well as vehicle and lighting factors, such as cleaning dim headlights or using bright headlights, that defendant could have taken. The trial court denied defendant's motion for summary disposition, concluding that there

[2] The trial court granted summary disposition in favor of Carmona and Rojo, and that decision is not at issue in this appeal.

[3] Defendant reported that he was driving home from a night class and did not consume alcohol or controlled substances.

were genuine issues of material fact particularly when two other drivers were able to observe the decedent.[4] We granted defendant's application for leave to appeal.

II. STANDARD OF REVIEW

A trial court's ruling on a motion for summary disposition is reviewed de novo. *Houston v Mint Group, LLC*, 335 Mich App 545, 557; 968 NW2d 9 (2021). Summary disposition is appropriate pursuant to MCR 2.116(C)(10) where there is "no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). When reviewing a motion for summary disposition challenged under MCR 2.116(C)(10), the court considers the affidavits, pleadings, depositions, admissions, and other admissible documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(4), (G)(5); *Buhl v City of Oak Park*, 507 Mich 236, 242; 968 NW2d 348 (2021).

III. ANALYSIS

Defendant asserts that the trial court erred in concluding that there were genuine issues of material fact when the decedent was dressed in dark clothing, there was a lack of lighting in the area, and defendant could not have avoided the accident. We disagree.

A. LEGAL PRINCIPLES

To establish a prima facie case of negligence, a plaintiff must generally demonstrate: "(1) a duty owed by the defendant to the plaintiff, (2) breach of that duty by the defendant, (3) damages suffered by the plaintiff, and (4) that the damages were caused by the defendant's breach of duty." *Composto v Albrecht*, 328 Mich App 496, 499; 938 NW2d 755 (2019). Generally, whether a defendant owes a duty of care to a plaintiff presents a question of law for the court to determine. *Hill v Sears, Roebuck & Co*, 492 Mich 651, 659; 822 NW2d 190 (2012); *Sabbagh v Hamilton Psychological Servs, PLC*, 329 Mich App 324, 348-349; 941 NW2d 685 (2019). "Duty is the legal obligation to conform one's conduct to a particular standard to avoid subjecting others to an unreasonable risk of harm." *Composto*, 328 Mich App at 499 (citation omitted). This duty, typically described as an ordinary negligence standard of care, requires that a defendant exercise ordinary care to a plaintiff in light of the circumstances. *Id*. at 499-500.

[4] Defendant also moved for reconsideration and presented documentary evidence, specifically, an affidavit, not previously filed with the trial court. The trial court denied reconsideration and there was no indication that it considered this newly filed evidence. The order denying reconsideration is not the order appealed from in this appeal. The decision to deny reconsideration was within the trial court's discretion as well as the failure to consider newly filed evidence. See *Pioneer State Mut Ins Co v Michalek*, 330 Mich App 138, 150; 946 NW2d 812 (2019); see also *Charbeneau v Wayne Co Gen Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987) ("We find no abuse of discretion in denying a motion [for rehearing or reconsideration] resting on a legal theory and facts which could have been pled or argued prior to the trial court's original order.").

"Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person." *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007). To determine whether a duty exists, the court may consider factors such as the foreseeability of the harm, the degree of certainty of injury, the close connection between the conduct and the injury, any moral blame correlated to the conduct, the policy of preventing future harm, and the burdens and consequences of imposing a duty and liability for a breach. *Id*. at 553 (citation omitted).

In *Malone v Vining*, 313 Mich 315, 321; 21 NW2d 144 (1946), our Supreme Court delineated the following obligations or duty owed by a pedestrian:

> Under present-day traffic conditions a pedestrian, before crossing a street or highway, must (1) make proper observation as to approaching traffic, (2) observe approaching traffic and form a judgment as to its distance away and its speed, (3) continue his observations while crossing the street or highway, and (4) exercise that degree of care and caution which an ordinarily careful and prudent person would exercise under like circumstances. In *Pearce v Rodell*, 283 Mich 19, 37[; 276 NW 883 (1937)], we approved the following charge by the trial court:
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> "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."
>
> "We have repeatedly held that one must look before entering a place of possible danger, such as crossing an intersection, and maintain observation while crossing." *Carey v De Rose*, 286 Mich 321, 323[; 282 NW 165 (1938)].
>
> "If one is to make a proper observation of an oncoming car, * * * the observation must include not only the distance the approaching car is from the point of possible collision but also some observation and judgment of its approximate speed." *Ayers v Andary*, 301 Mich 418, 425[; 3 NW2d 328 (1942)].

A driver also owes duties to pedestrians. Specifically, "automobile drivers must notice persons in the street, must use reasonable and ordinary care not to run down pedestrians on the highway, [and] must obey statutes governing the use of automobiles[.]" *Birkhill v Todd*, 20 Mich App 356, 360; 174 NW2d 56 (1969). Additionally, it is negligence for the driver with ample space to pass a pedestrian on a highway to guide his vehicle and strike the pedestrian in passing. *Id*.

Once the duty element of a negligence action is established, the breach of duty requirement must be examined. The trier of fact then decides, whether, in light of the particular facts of the case, a breach of the duty occurred. *Meyers v Rieck*, ___ Mich ___, ___; ___ NW2d ___ (2022) (Docket No. 162094), slip op at 9. Thus, the fact-finder renders a determination regarding what constitutes reasonable care under the circumstances. *Id*.; see also *Riddle v McLouth Steel Products*

Corp, 440 Mich 85, 96; 485 NW2d 676 (1992) ("Once a defendant's legal duty is established, the reasonableness of the defendant's conduct under that standard is generally a question for the jury. The jury must decide whether the defendant breached the legal duty owed to the plaintiff, that the defendant's breach was the proximate cause of the plaintiff's injuries, and thus, that the defendant is negligent." (Citation omitted.)).

Comparative negligence is the standard adopted in Michigan to promulgate a fair system of apportionment of damages. *Id*. at 98. "Under this doctrine, a defendant may present evidence of a plaintiff's negligence in order to reduce liability." *Id*. Comparative negligence is an affirmative defense. *Id*. Questions regarding the reasonableness of a decedent's actions are relevant to comparative negligence, not duty. *In re Skidmore Estate*, 500 Mich 967; 892 NW2d 376 (2017).[5]

The moving party has the initial burden to support its claim for summary disposition with affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). "When a moving party properly supports its motion, the burden shifts to the nonmoving party to establish that a genuine issue of disputed material fact exists." *Sabbagh*, 329 Mich App at 346. The nonmoving party may not simply rely on allegations or denials in the pleadings. *McCoig Materials, LLC*, 295 Mich App at 693. "Affidavits, depositions, and documentary evidence offered in support of, and in opposition to, the motion are considered only to the extent that the content or substance would be admissible as evidence." *Id*.

"A trial court may not assess credibility, weigh the evidence, or resolve factual disputes, and when material evidence conflicts, it is not appropriate for the court to grant the motion for summary disposition." *Cetera v Mileto*, ___ Mich App ___, ___; ___ NW2d ___ (2022) (Docket No. 356868), slip op at 3. Like the trial court, the appellate court's review of a summary disposition decision makes all legitimate inferences in favor of the nonmoving party. *Id*.

B. APPLICATION OF LAW TO THE FACTS

The trial court did not err in denying defendant's motion for summary disposition in light of the documentary evidence submitted by the parties.

To establish a prima facie case of negligence, a plaintiff must generally demonstrate: "(1) a duty owed by the defendant to the plaintiff, (2) breach of that duty by the defendant, (3) damages suffered by the plaintiff, and (4) that the damages were caused by the defendant's breach of duty." *Composto*, 328 Mich App at 499. Whether a defendant owes a duty of care to a plaintiff presents a question of law for the court to determine. *Hill*, 492 Mich at 659. "Duty is the legal obligation

[5] Although the citation is to an order from our Supreme Court, it nonetheless constitutes binding precedent. *Dykes v William Beaumont Hosp*, 246 Mich App 471, 483; 633 NW2d 440 (2001). ("An order that is a final Supreme Court disposition of an application and that contains a concise statement of the applicable facts and reasons for the decision is binding precedent."). See also *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 196; 650 NW2d 364 (2002) (An order from our Supreme Court constitutes binding precedent when its rationale can be understood).

to conform one's conduct to a particular standard to avoid subjecting others to an unreasonable risk of harm." *Composto*, 328 Mich App at 499 (citation omitted).

With regard to the question of duty, defendant as the driver owed a duty "to notice persons in the street, must use reasonable and ordinary care not to run down pedestrians on the highway, [and] must obey statutes governing the use of automobiles[.]" *Birkhill*, 20 Mich App at 360. Additionally, defendant was negligent as a driver if he had ample space to pass the decedent on the highway and avoid striking the decedent when passing. *Id*.

In the present case, defendant seemingly asserted that he satisfied his duty and did not commit any breach. Defendant alleged that he was not using his phone to call or text when the collision occurred. Rather, his cellular phone was in a magnetic dock station that was clipped to the heater vent. His phone was turned on and Google maps was "up for the route home." Defendant did not consume any drugs or alcohol before the crash. He could not remember the lighting, any parked vehicles, or any cars immediately in front of him before the accident. When asked where his eyes were looking before the crash, defendant answered, "I don't remember exactly, but as a matter of general driving I'm looking down the roadway and scanning for cars and hazards." Defendant could not recall his speed, but testified that he generally set his cruise control near the speed limit of 70 mph. When asked to describe what happened, defendant answered, "I mean there's not a whole lot there. I was driving on the highway and all of a sudden there was an impact to the vehicle and I tried to pull over on the side of the road." Immediately before the impact, defendant asserted that he was traveling within his lane. When asked when defendant first realized a crash was going to occur, he answered, "I never realized it was going to occur. It occurred." Defendant was asked if he observed the decedent before the crash. He responded, "Yeah, I didn't see anything before the crash that was moving around there, no." There was an inquiry if the decedent made any effort to avoid the collision. Defendant answered, "No, I couldn't – I wouldn't have seen him, I didn't see anything, so no, couldn't." And, defendant did not know what type of clothing the decedent was wearing. When asked about his ability to discern what direction the decedent was traveling on the roadway immediately before the crash, defendant testified, "I never saw the man, so no."

Defendant contends that this evidence is "undisputed," and therefore, summary disposition in his favor was proper. However, once the duty element of a negligence action is established, the breach of duty requirement must be examined. The trier of fact then decides, whether, in light of the particular facts of the case, a breach of the duty occurred. *Meyers*, ___ Mich at ___. Thus, the fact-finder renders a determination regarding what constitutes reasonable care under the circumstances. *Id*.; see also *Riddle*, 440 Mich at 96. And, "[a] trial court may not assess credibility, weigh the evidence, or resolve factual disputes, and when material evidence conflicts, it is not appropriate for the court to grant the motion for summary disposition." *Cetera v Mileto*, ___ Mich App at ___.

In the present case, at common-law, defendant had a duty to look out for pedestrians such as the decedent. Because this duty was established, the trier of fact was required to determine if defendant breached the duty of reasonable care owed under the circumstances. Although the decedent had passed and could not dispute defendant's testimony, the testimony offered by defendant was still subject to a credibility determination. It was certainly curious that two other individuals described a person in all black clothing walking on or near the shoulder of the freeway

and called 911 to express their concerns. The decedent was visible to these two individuals. Yet, defendant testified that he never saw the decedent, and the first sight of the decedent was when the contact occurred. Whether defendant was looking at the roadway, as he testified, or was distracted by his phone, tiredness, or some other factor presented a credibility determination for the trier of fact.

Nonetheless, defendant submits that the decedent as a pedestrian also was subject to duties and cited to the fact that the decedent was walking on the freeway, wearing dark clothing, was in a dark area, and was intoxicated. Indeed, a pedestrian "must (1) make proper observation as to approaching traffic, (2) observe approaching traffic and form a judgment as to its distance away and its speed, (3) continue his observations while crossing the street or highway, and (4) exercise that degree of care and caution which an ordinarily careful and prudent person would exercise under like circumstances." *Malone*, 313 Mich at 321.

Defendant submitted that the decedent chose to go to the area at night to work on his car. However, the documentary evidence indicated that the decedent was experiencing mental health issues and had police contacts.[6] It is entirely possible that he sought to fix his vehicle to leave the area in light of the police contacts and family drama that had transpired. In any event, the decedent's chosen time to attend to his vehicle and his attire did not alleviate the duty owed by defendant. Rather, the decedent's actions pertain to comparative negligence. As noted, comparative negligence is the standard adopted in Michigan to promulgate a fair system of apportionment of damages. *Riddle*, 440 Mich at 98. "Under this doctrine, a defendant may present evidence of a plaintiff's negligence in order to reduce liability." *Id*. Comparative negligence is an affirmative defense. *Id*. Questions regarding the reasonableness of a decedent's actions are relevant to comparative negligence, not duty. *In re Skidmore Estate*, 500 Mich at 967. Additionally, defendant's proffer that the decedent is more than 50% at fault for the accident because of his intoxication was not established by the toxicology report. The medical examiner did not opine that the decedent was impaired at the time of the accident, and the toxicology report did not positively detect any compounds, contrary to Officer Lena Wileczek's testimony. Thus, MCL 600.2955a(1)[7] did not serve as a basis to dismiss plaintiff's complaint.

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[6] Although it was alleged that the decedent was arrested and released from jail, the police deposition testimony did not disclose the charges. The investigator for the medical examiner indicated that police contacts were because of the decedent's mental health issues. The decedent's sister, Jamila Bell, also indicated that the decedent suffered from post-traumatic stress disorder, had a conflict with family, and was prohibited from staying with relatives in Kalamazoo. She indicated that the decedent was at the freeway to find his vehicle that had stalled there.

[7] MCL 600.2955a(1) provides: "It is an absolute defense in an action for the death of an individual or for injury to a person or property that the individual upon whose death or injury the action is based had an impaired ability to function due to the influence of intoxicating liquor or a controlled substance, and as a result of that impaired ability, the individual was 50% or more the cause of the accident or event that resulted in the death or injury. If the individual described in this subsection was less than 50% the cause of the accident or event, an award of damages shall be reduced by that percentage."

Lastly, defendant's reliance on the sudden emergency doctrine is misplaced. The sudden emergency doctrine applies when "a collision is shown to have occurred as the result of a sudden emergency not of the defendants' own making." *Taylor v White Distrib Co*, 482 Mich 136, 139-140; 753 NW2d 591 (2008) (citation omitted). The sudden emergency doctrine is utilized to rebut a statutory presumption of negligence, but to do so, it must be totally unexpected. *Id*. "The sudden emergency doctrine provides a basis for a defendant to be excused of a statutory violation in regards to the events that occur after the defendant discovers the emergency." *Freed v Salas*, 286 Mich App 300, 333; 780 NW2d 844 (2009).

In the present case, plaintiff raised both common-law and statutory violations. Further, defendant testified that he never saw the decedent, and he became aware of the decedent when the accident occurred. He did not take evasive action before or after the accident but was forced to pull over because of the condition of his vehicle. Moreover, the application of the doctrine is contingent on a sudden emergency that occurs not as a result of defendant's "own making." If defendant was distracted and not paying attention to the roadway, an issue that presents a credibility determination, then a sudden emergency not of the defendant's own making failed to transpire. Under the circumstances, defendant failed to demonstrate entitlement to summary disposition in light of this doctrine.

Finally, defendant seemingly submits that all of the police officers testified that the decedent caused the accident, and indeed, no hazard was issued to defendant or Carmona. However, there was no documentary evidence to support the driving conditions that evening.[8] That is, both vehicles that struck the decedent did not have data collection boxes to track their speed and any braking. Neither vehicle had a dashcam. Although defendant asserts that the area of the collision was dark and lacked ambient lighting, he did not present video evidence of the lighting in the area of the collision as opposed to the two locations where the pedestrian, presumed to be the decedent, was viewed on the highway. The investigating police officers accepted that defendant was driving 70 mph and paying attention to the roadway.[9] They did not have an independent basis to verify his assertions but nonetheless found him to be credible. They similarly

[8] Although defendant contends that plaintiff did not meet his burden to oppose summary disposition, the moving party must first make and support his motion to shift the burden. The two witnesses who called 911 were not deposed, and the police officers testified to their conversations with them after the accident. There is no indication that plaintiff's expert interviewed those witnesses, ascertained the location where they saw the decedent, and compared the lighting in those areas to the lighting where the accident occurred. Therefore, the exact disparity in the lighting cannot be ascertained on this record.

[9] Additionally, Michigan State Police Sergeant Brandon Davis testified that police officers were sent to look for the decedent after the 911 calls and could not locate him. However, Officer Kevin Burleson testified that he received the report about the pedestrian and went to look for him but then engaged in a traffic stop. Officer Burleson was about to look for the pedestrian in the opposite direction when he learned of the accident. The number of officers and the degree of the search was not delineated, and Davis's characterization of a thorough police search is questionable.

likened the decedent's actions to a deer jumping in front of a vehicle. The officers' determination that defendant was credible did not remove the issue from the jury.[10]

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Anica Letica

[10] In the trial court, defendant challenged the Robbins's opinion for a lack of foundation. For the first time on appeal, he contends that the Robbins's affidavit does not satisfy MRE 702, MRE 703, and MCL 600.2955. Because this issue was not raised below and not delineated in the statement of questions presented, we decline to address it. MCR 7.212(C)(5); *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 146; 807 NW2d 866 (2011); *Cheron, Inc v Don Jones, Inc*, 244 Mich App 212, 218 n 3; 625 NW2d 93 (2000).

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Before: GLEICHER, C.J., and K. F. KELLY and LETICA, JJ.

K. F. KELLY, J. (*dissenting*).

I respectfully dissent and would conclude the trial court erred when it denied defendant's motion for summary disposition. The evidence demonstrated that the decedent was dressed in dark clothing and walking in the dark along a highway that did not permit pedestrian access when the accident occurred. Although there was no evidence that defendant was distracted, the trial court held—on the basis of conjecture and speculation—that questions of fact existed for the jury regarding whether defendant properly exercised his standard of care. However, because defendant was not required to disprove plaintiff's hypothetical scenarios in which he may have been distracted, and because plaintiff failed to produce evidence creating a genuine issue of material fact for trial, I respectfully dissent.

I. FACTUAL BACKGROUND

On November 6, 2019, at approximately 9:30 p.m., the decedent, Omari Bell, was killed in an accident after he was struck by two vehicles: the first driven by defendant, Jeffrey Knapp, and the second vehicle driven by defendant, Gabriel Carmona. Knapp testified that he was driving alone, heading home from a night class. He had not been drinking or using drugs on the day of

the crash. He described the traffic conditions as "pretty light," was using cruise control, and did not recall any cars immediately in front of him at the time of the crash. It was dark outside, but the weather was fine. Knapp had his standard headlights on and stated the lights were working. Knapp had his phone in the car on the "docking station with maps up." The docking station was clipped to the heater vent, and Knapp stated he was not using his phone to text or make calls while driving.

Knapp stated that while driving, "all of a sudden there was an impact to the vehicle." After the impact, he pulled over to the shoulder of the road. He stated he had no warning that the crash was going to occur and had no time to brake or swerve. Knapp testified he never saw Bell and did not know in what direction Bell was walking. According to Knapp, he did not think that he could have done anything to avoid the crash.

Carmona testified that it was dark outside at the time of the accident. He also stated the accident happened "very quickly." Carmona stated that there was a car in front of him, which seemed to be driving in a "normal" way, and it had its lights on. There was also a trailer in the left lane. He was in the right lane when something seemed to fall in front of him. He had no time to swerve or apply his brakes and hit Bell before he "knew it." Carmona initially thought it was a deer. Like Knapp, Carmona stated that he could not have done anything differently to avoid the crash. The vehicle in front of Carmona did not seem to do "any quick maneuvering" before the crash, and Carmona did not see any vehicle, including Knapp's vehicle, strike Bell.

Sergeant Brandon Davis also testified that it was dark outside, and there were no lights in the area, not even ambient lighting from the city spilling onto the freeway. Sergeant Davis also noted that Bell was dressed in "dark-colored black clothing," including a black coat, black jeans, and dark navy blue athletic shoes. Sergeant Davis saw nothing to indicate that either driver drove outside the right lane of travel, and the roadway showed no tire marks on the roadway, which "would be indicative that [the drivers] didn't see the pedestrian before impact" or that at least there was no roadway evidence that they saw him. According to Sergeant Davis, Knapp and Carmona were not in violation of any provision of the Motor Vehicle Code. Ultimately, according to Sergeant Davis, the circumstances of the crash were "straightforward" in terms of what happened. That is, in Sergeant Davis's view, the pedestrian seen walking westbound shortly before the accident had crossed the highway and been hit on the eastbound side of the highway. The drivers would not have expected to see a pedestrian, at night, all in dark clothing.

In the trial court, in response to Knapp's motion for summary disposition, plaintiff argued that Knapp was comparatively negligent because Knapp set his cruise control and surmised he was not paying attention to the road because he did not see Bell before the accident even though two other witnesses reported seeing him. For its part, the trial court denied Knapp's motion because "there was an argument being made with regard to [Knapp's] GPS being on and some implication that that might have distracted him," and "there is the implication that at least at some point he may have been visible, and that's certainly something that a trier of fact could latch on[]to . . . ." This appeal followed.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Sutariya Props, LLC v Allen & I-75, LLC*, 331 Mich App 521, 528; 953 NW2d 434 (2020). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.* "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019) (quotation marks and citation omitted).

III. ANALYSIS

To establish a prima facie case of negligence, a plaintiff must introduce evidence sufficient to establish: "(1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages." *Powell-Murphy v Revitalizing Auto Communities Environmental Response Trust*, 333 Mich App 234, 243; 964 NW2d 50 (2020) (quotation marks and citation omitted). " 'Duty' is a legally recognized obligation to conform one's conduct toward another to what a reasonable man would do under similar circumstances." *Finazzo v Fire Equip Co*, 323 Mich App 620, 625; 918 NW2d 200 (2018). Generally, the question of whether a duty exists is a question of law for the court. *Id.* "Once the question of duty has been determined, the question whether a defendant was negligent, i.e., whether the defendant breached its duty, is generally a question of fact." *Boumelhem v Bic Corp*, 211 Mich App 175, 181; 535 NW2d 574 (1995). However, if reasonable minds could not differ, a court may determine whether a defendant's conduct fell below the applicable standard of care. See *Case v Consumers Power Co*, 463 Mich 1, 7; 615 NW2d 17 (2000).

Typically, under the doctrine of comparative negligence, a plaintiff's damages are reduced by the proportion by which a plaintiff's own conduct contributed to his or her injuries. See MCL 600.2959; *Laier v Kitchen*, 266 Mich App 482, 496; 702 NW2d 199 (2005). However, a plaintiff may not recover noneconomic damages when a plaintiff's fault is greater than the aggregate fault of the others involved. MCL 600.2959; see also MCL 500.3135(2)(b) ("Damages 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.").

In the case of an accident between a motor vehicle and a pedestrian, in the absence of more specific statutory requirements, "it is the motorist's duty in the use and operation of his automobile to exercise ordinary and reasonable care and caution, that is, that degree of care and caution which an ordinarily careful and prudent person would exercise under the same or similar circumstances." *Zarzecki v Hatch*, 347 Mich 138, 141; 79 NW2d 605 (1956). "[T]he happening of the accident alone is not evidence of negligence of the defendant sufficient to take that question to the jury." *Gardiner v Studebaker Corp*, 204 Mich 313, 316; 169 NW 828 (1918). And "[o]ne is not negligent merely because he fails to make provision against an accident which he could not reasonably be expected to foresee." *Hale v Cooper*, 271 Mich 348, 354; 261 NW 54 (1935).

> It was not incumbent upon the defendants to guard against every conceivable result, to take extravagant precautions, to exercise undue care: but defendants were entitled to assume that others using the highway in question would under the

> circumstances at the time use reasonable care themselves and take proper steps to avoid the risk of injury. [*Id.*]

Moreover, a driver's standard of care must take into account the "unique function" of a particular roadway, such as a highway designed "to move great volumes of traffic at relatively high speeds." *McGuire v Rabaut*, 354 Mich 230, 238; 92 NW2d 299 (1958).

Pedestrians generally enjoy "equal rights with automobiles in the use of public highways," but they are required to "exercise that care which, reasonably prudent persons would use for their own protection and preservation." *Buchel v Williams*, 273 Mich 132, 137; 262 NW 759 (1935). However, pedestrians typically are not permitted on "a limited access highway." MCL 257.679a(1). Moreover, a driver unaware of a pedestrian's presence is not bound to anticipate that a pedestrian "will come loping into his lane of traffic." *Gamet v Jenks*, 38 Mich App 719, 724; 197 NW2d 160 (1972). Of course, that is not to say that a driver may be "permitted to lower his head, close his eyes, and charge blindly . . . ." *McGuire*, 354 Mich at 235. At all times, a driver remains obligated to "exercise reasonable care under the circumstances." *Id.* Nevertheless, until a hazard is perceived, or until a hazard would have been apparent to "a reasonable man, considering pertinent surrounding circumstances of traffic and terrain," a driver has no duty to guard against or anticipate an unknown hazard. See *McGuire*, 354 Mich at 230 (examining driver's rights and duty when approaching an intersection with the right-of-way and when confronted with a subordinate driver, who fails to properly yield, at the intersection).

An emergency involves a situation that is "unusual or unsuspected." *Vander Laan v Miedema*, 385 Mich 226, 232; 188 NW2d 564 (1971) (quotation marks and citation omitted). An unusual event typically involves something that "varies from the everyday traffic routine," such as a phenomenon of nature like a blizzard. *Id.* The Michigan Supreme Court explained:

> 'Unsuspected' on the other hand connotes a potential peril within the everyday movement of traffic. To come within the narrow confines of the emergency doctrine as 'unsuspected' it is essential that the potential peril had not been in clear view for any significant length of time, and was totally unexpected. A good example of this can be seen in *McKinney v Anderson*, [373 Mich 414; 129 NW2d 851 (1964),] supra, where defendant rear-ended a plaintiff's car which had stopped while pushing a disabled vehicle on the highway. Coming over the crest of a hill, defendant first saw plaintiff's taillights when he was 400 feet away. However, defendant did not clearly see the peril of plaintiff's stopping until he was about 100-200 feet away, at which point it was too late to avoid a collision under the circumstances. Furthermore, the failure of the plaintiff to signal that he was stopping, coupled with the surrounding darkness, made the subsequent peril totally unexpected to the defendant. [*Id.*]

Notably, the question of proximate cause must also be examined in light of the emergency presented. *DePriest v Kooiman*, 379 Mich 44, 47; 149 NW2d 449 (1967); see also *McGuire*, 354 Mich at 240 ("Even had he looked, diligently, there was nothing he could have done, after discovery of the danger, upon these facts, to avoid collision. The deficiency in plaintiff's case lies in the area of proximate cause.").

> It may well be that there has been negligence on the part of the arterial driver but that his permissible speed, and the traffic conditions, were then such that, even had he been alert, looked, discovered the danger, and responded instantaneously and properly, no action on his part could have averted collision once the subordinate driver came into his path. If this were the case his negligence in not properly observing or acting could not be a proximate cause of the accident. [*DePriest*, 379 Mich at 47.]

Turning to the facts of this case, the undisputed evidence demonstrated that Bell—a pedestrian dressed entirely in dark clothing—was walking on a limited access highway at night in an unlit area of the roadway. As a pedestrian, he had no right to be on a limited access highway. See MCL 257.679a. In contrast, according to Knapp's uncontradicted deposition testimony, Knapp was traveling in a designated lane of travel, and he was not exceeding the speed limit. As a motorist, Knapp was not required to guard against "every conceivable result" or to "take extravagant precautions"; rather, he was entitled to assume that others would use reasonable care themselves. See *Hale*, 271 Mich at 354. And as a motorist, Knapp could not be expected to anticipate that a pedestrian would enter his lane of traffic, a rule that holds particularly true given that Knapp was traveling on a limited access highway and that pedestrians do not have the right to be on a limited access highway. See *Gamet*, 38 Mich App at 724. Coming upon a pedestrian—clad entirely in dark clothing—in his lane of travel on a limited access highway, Knapp was, in other words, confronted with a sudden emergency—an unexpected peril—not of his own making. And the question of whether Knapp's conduct constituted a proximate cause of the crash must be judged in light of this emergency. See *McGuire*, 354 Mich at 230, 239-240; *DePriest*, 379 Mich at 47. In this regard, the testimony from Knapp and Carmona demonstrated that Bell was not visible on the roadway and that nothing could have been done to avoid the accident.

Under the trial court's reasoning, a fact-finder could conclude that Knapp was not being truthful when he denied being distracted because Knapp's testimony, while uncontradicted, was subject to a credibility determination. But this is not the standard when deciding a motion for summary disposition. When the nonmoving party produces evidence in support of the party's position, the "adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4). Similarly, conjecture and speculation are never sufficient to create a genuine issue of fact for trial. *Meisner Law Group PC v Weston Downs Condo Assoc*, 321 Mich App 702, 723; 909 NW2d 890 (2017). Yet mere conjecture and speculation is all that the trial court relied on when denying defendant's motion.

And even assuming there was evidence from which a jury could conclude that Knapp failed to keep a proper lookout, plaintiff failed to present any evidence that Knapp could have done anything to avoid the accident. See *DePriest*, 379 Mich at 4; *McGuire*, 354 Mich at 240; *Gardiner*, 204 Mich at 316. In other words, missing from plaintiff's proofs is any evidence that Knapp should have seen Bell in time to take evasive action, stop his vehicle, or otherwise avoid the accident. Even viewed in a light most favorable to plaintiff, the evidence offered by the parties places a pedestrian dressed entirely in dark clothing, in Knapp's lane on an unlit, limited access highway where he would not be expected and where Knapp was driving at a lawful speed in an otherwise lawful manner on a highway with a speed limit of 70 miles per hour. On these facts, showing that Knapp's purported failure to keep a proper lookout was a proximate cause of the accident requires

some evidence of when Bell should have been visible to Knapp and whether Knapp had time to avoid the accident. See *McGuire*, 354 Mich at 239-240 (considering stopping distances and whether the accident was avoidable).

Plaintiff offered no such evidence. *None.* At most, plaintiff offered statements by two witnesses who saw a pedestrian walking westbound on the highway to assert that Bell would have been visible on the highway. Neither individual who called the police gave any indication that they had to stop when they saw the pedestrian or that they would have had time to stop, or otherwise avoid him, had he been in their lane of travel. Robbins's affidavit—which also suggests that Knapp could have seen Bell—similarly fails to provide any indication of when Knapp should have seen Bell or whether Knapp should have seen him in time to avoid the accident. Plaintiff's failure to present such evidence leaves Knapp's testimony uncontradicted that the accident could not have been avoided. See *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (noting nonmoving party's burden to respond to documentary evidence to establish that a genuine issue of disputed fact exists).

The trial court erred when it denied defendant's motion for summary disposition. I would reverse the order of the trial court and remand for entry of an order granting defendant's motion.

/s/ Kirsten Frank Kelly