STATE OF MICHIGAN

COURT OF APPEALS

KAREN KEREZI, Personal Representative of the Estate of VALLEY J. BECKER,

Plaintiff-Appellant,

v

D & A CORPORATION, d/b/a DEARBORN FARM MARKET,

Defendant-Appellee,

and

SHIRLEY R. WICKMAN,

Defendant.

UNPUBLISHED
February 1, 2005

No. 247932
Wayne Circuit Court
LC No. 00-041235-NI

Before: Schuette, P.J., and Bandstra and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition under MCR 2.116(C)(10) to defendant D & A Corporation, doing business as Dearborn Farm Market (hereafter "defendant"). We affirm.

This action arises from an accident in defendant's parking lot involving a pedestrian and an automobile. Plaintiff's decedent, Valley Becker, was killed when she was struck by an automobile driven by Shirley Wickman, who was backing out of a parking space. Wickman was criminally charged and pleaded nolo contendere to negligent homicide in connection with the incident.

Plaintiff sued both Wickman and defendant and ultimately settled with Wickman. Plaintiff made claims of negligence and nuisance against defendant. The negligence claim was based on allegations that defendant (1) had a dangerous parking lot, (2) failed to provide a pedestrian walkway to access the parking lot, (3) created a hazardous and distracting display area near the parking lot, (4) failed to provide a safe traffic pattern or employees to direct traffic, (5) failed to train properly or supervise its employees to protect pedestrians, and (6) failed to provide adequate warnings for pedestrians and operators of vehicles. The nuisance claim was based on allegations that the parking lot was dangerous and constituted a nuisance because of (1) the

installation and maintenance of a pumpkin display that extended into the parking area, (2) a confusing parking arrangement, and (3) the diversion of customers and vehicles into the same congested area without adequate signs, directions, or control.

Defendant moved for summary disposition under MCR 2.116(C)(8) and (10), arguing, among other things, that the evidence established that the condition of defendant's parking lot did not cause the accident. The trial court granted defendant's motion. It subsequently denied plaintiff's motion for reconsideration.

This Court reviews de novo a circuit court's decision with regard to a motion for summary disposition. *Trost v Buckstop Lure Co*, 249 Mich App 580, 583; 644 NW2d 54 (2002). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Lewis v LeGrow,* 258 Mich App 175, 192; 670 NW2d 675 (2003). In reviewing a motion under MCR 2.116(C)(10), this Court "'must consider the available pleadings, affidavits, depositions, and other documentary evidence in a light most favorable to the nonmoving party and determine whether the moving party was entitled to judgment as a matter of law.'" *Michigan Ed Employees Mut Ins Co v Turow*, 242 Mich App 112, 114-115; 617 NW2d 725 (2000), quoting *Unisys Corp v Comm'r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999).

Plaintiff first argues that the trial court erred in taking judicial notice, based on photographs of the scene, that a significant amount of acceleration had been used in order for Wickman's vehicle to come to rest where it did, on top of a pumpkin stand. MRE 201(b) permits a court to take judicial notice of a fact that is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." In this case, photographs of the scene depicted Wickman's vehicle resting on a pumpkin stand, several feet off the ground. It is readily apparent from the photos that the vehicle, which was traveling backward, could not have come to rest at this elevated location without a significant amount of acceleration. Plaintiff does not question the accuracy of the photos. Accordingly, we find no error with the court's finding that a significant amount of acceleration occurred before the vehicle came to rest.[1]

Plaintiff further complains that the trial court erroneously denied her request for a judicial notice hearing. MRE 201(d) provides that "[a] party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed." The record discloses that plaintiff was permitted an opportunity to be heard on the

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[1] Plaintiff additionally contends that the trial court improperly used the fact that significant acceleration occurred *at some point* to extrapolate that Wickman must have been speeding *at the time she hit Becker* and that Wickman's negligence in speeding caused Becker's injuries. Plaintiff contends that the trial court's analysis was erroneous because Wickman might have hit Becker and *then* stepped on the accelerator of her vehicle. To the extent that the trial court erred in this regard, its error was harmless, because, as discussed *infra*, the court ultimately reached the correct result in this case. Also, in denying plaintiff's motion for reconsideration, the court clarified its earlier opinion; the court mentioned the speed of the vehicle but also emphasized that "the driver specifically stated that nothing about the parking lot contributed to the accident."

question of judicial notice at the hearing on defendant's motion for summary disposition. Therefore, we reject this claim of error.

Plaintiff next argues that the trial court erroneously considered the evidence and erroneously granted summary disposition to defendant. We disagree.

"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." *O'Donnell v Garasic*, 259 Mich App 569, 573; 676 NW2d 213 (2003).

We conclude that plaintiff did not submit sufficient proof that defendant's negligence caused the injuries in question. As noted in *Skinner v Square D Co,* 445 Mich 153, 164-165; 516 NW2d 475 (1994),

> a causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred.

Here, *Wickman herself* testified that, at the time of the accident, (1) no pedestrians were confusing her, (2) no other cars were confusing her, and (3) nothing about the parking lot itself contributed to her actions that day. These statements – which directly pertained to the issue of causation – were *uncontradicted* and therefore could be relied on by the court as it considered the motion for summary disposition.

Plaintiff suggests that the trial court could not properly rely on Wickman's testimony because she also testified that she did not know why she "did what [she] did" and she made unclear statements during her deposition. However, the additional testimony by Wickman did not contradict her clear statement that, whatever may have caused the accident, the parking lot did not.

Plaintiff also cites an excerpt from a police report in which an unidentified individual states that he spoke with Wickman after the accident and that "[Wickman] . . . said that the parking lot is very dangerous and it is difficult to back out of a parking space. She saw that it was clear to back out and so she did so quickly and she forgot to take her foot off of the accelerator." Plaintiff contends that this information contradicted Wickman's deposition testimony as cited above and precluded the trial court from relying on that testimony. However, plaintiff does not indicate in her appellate brief how the statement given to the police officer would be admissible at trial under the rules of hearsay. See *Maiden v Rozwood,* 461 Mich 109, 121; 597 NW2d 817 (1999) (a court must consider the *admissible* evidence in ruling on a motion for summary disposition under MCR 2.116[C][10]). Even if the statement *were* admissible, it does not contradict Wickman's statement that the conditions of the parking lot did not cause the accident. Indeed, while Wickman allegedly noted to the police officer that the parking lot was "dangerous," she also stated that she backed out "quickly" and "forgot to take her foot off of the accelerator." This information suggests that Wickman caused the accident by acting negligently.

The police report excerpt cited by plaintiff on appeal simply did not preclude the court from relying on the portion of Wickman's deposition testimony emphasized above.

Plaintiff also notes that she presented evidence that patrons felt that the parking lot was confusing and dangerous. She also emphasizes that she submitted an affidavit of a human factors expert who opined that overcrowded, congested, and confusing conditions in defendant's parking lot caused information overload and most likely caused Wickman's failure to back out of her parking space in a safe manner. This evidence merely provided a conjecture regarding the cause of the accident and again did not contradict Wickman's clear testimony that the parking lot conditions did not cause the accident.

Wickman's testimony, as well as the photograph demonstrating that excessive acceleration did occur at some point while Wickman was driving her vehicle in reverse, clearly supported defendant's motion for summary disposition. In response to defendant's motion, plaintiff simply did not present sufficient evidence of causation, even viewing the evidence in the light most favorable to plaintiff.[2] Plaintiff did not "present substantial evidence from which a jury [could] conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Skinner, supra* at 164-165. The trial court did not err in granting summary disposition to defendant.[3]

Plaintiff next argues that negligence per se or a nuisance per se existed because of parking-lot ordinance violations by defendant. She contends that the trial court, under MCR 2.116(I)(2), should have granted her partial summary disposition with respect to this issue. We find no basis for appellate relief. First, plaintiff has not borne her appellate burden of establishing, from the existing record, that ordinance violations actually occurred. Second, plaintiff has not set forth sufficient evidence for a reasonable jury to conclude that the ordinance violations caused the injuries to Becker.[4] See *Zeni v Anderson,* 397 Mich 117, 138-139; 243 NW2d 270 (1976), and *Klanseck v Anderson Sales & Service, Inc,* 426 Mich 78, 90; 393 NW2d 356 (1986) (discussing causation in the context of statutory violations). The trial court did not err in failing to grant partial summary disposition to plaintiff.

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[2] To the extent the trial court may have erred in failing to view the evidence in the light most favorable to plaintiff, any error was harmless. The court reached the correct result in this case.

[3] Although plaintiff's appellate brief focuses on her negligence claim as opposed to her common-law nuisance claim, she mentions common-law nuisance in her brief. We note that our causation analysis applies equally to plaintiff's nuisance claim. The claim is untenable because plaintiff has not sufficiently established causation. See *Jackson v Thompson-McCully Co,* 239 Mich App 482, 490; 608 NW2d 531 (2000) ("[t]o prevail in nuisance, a plaintiff must prove significant harm resulting from the defendant's unreasonable interference with the use or enjoyment of property").

[4] Indeed, the causation analysis provided earlier in this opinion also applies to the allegations of statutory violations.

Affirmed.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Patrick M. Meter