

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of the Estate of FRANKLYN S.
REAUME, Deceased,

FRANKLIN H. REAUME, Personal Representative,

Plaintiff-Appellant,

UNPUBLISHED
August 13, 1996

v

No. 181577
LC No. 93-477-NI

WASHTENAW COUNTRY CLUB,

Defendant /Third-Party Appellee,

and

HOBBS & BLACK ASSOCIATES, INC.,

Defendant/Third-Party
Cross-Plaintiff-Appellee,

and

FRANK REAUME CONSTRUCTION, INC.,

Third-Party Defendant,
Cross-Defendant-Appellee,

and

ANN ARBOR ROOFING, INC.,

Third-Party Defendant.

* Circuit judge, sitting on the Court of Appeals by assignment.

Before: Murphy, P.J., and O'Connell and M.J. Matuzak,* JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition to defendants in this wrongful death action. We affirm the reasoning of the trial court, but vacate the order appealed and remand for reconsideration in light of the intervening adoption of the residual or "catch-all" exception to the hearsay rule, MRE 803(24).

Plaintiff alleged that decedent slipped on ice and fell in front of defendant Washtenaw Country Club's entrance, struck his head, and died two days later from the injuries. There were no witnesses to the alleged fall; however, decedent told his wife and wife's nurse that he fell at the country club on the ice. The trial court granted defendants' motion in limine to have the statements excluded as hearsay. Subsequent to that ruling, defendants brought a renewed motion for summary disposition. Plaintiff conceded that given the court's ruling excluding decedent's statements, he was not in a position to present issues of fact to the jury. Accordingly, the court granted summary disposition to defendants.

Plaintiff first argues that the court erred in ruling that decedent's statements were inadmissible hearsay. Plaintiff contends that the statements were admissible under MRE 803(1), present sense impression; MRE 803(2), excited utterance; MRE 803(3), statement of intent or plan; and MRE 803(4), statements made for purposes of medical treatment. We disagree with plaintiff's contentions.

Plaintiff contends that decedent's statement that he lost his glasses in the country club parking lot and wondered why he did not run over them was admissible as a present sense impression under MRE 803(1). The trial court correctly ruled that the present sense impression exception requires that the statement describing or explaining an event or condition be made while the declarant was perceiving the event or immediately thereafter. *People v Burns*, 118 Mich App 242; 324 NW2d 589 (1982). In this case the record indicates there was a two-hour time frame between decedent's leaving and returning home during which the fall could have happened. The court correctly noted that this time period was too lengthy to pinpoint what event decedent was perceiving and did not meet the immediacy requirement of MRE 803(1).

Next, plaintiff contends that decedent's statements that he fell on the ice at the country club are admissible under MRE 803(2) as excited utterances because decedent was dazed, confused, and still under the stress and excitement of the fall when he made the statements. To be admissible under MRE 803(2), the statement must arise out of an occasion sufficiently startling to produce nervous excitement and render the statement spontaneous and unreflecting; it must be made while the declarant is still under the influence of the nervous excitement, before there is any time to contrive or misrepresent; and it must relate to the circumstances of the startling occasion that the declarant appears to have had an opportunity to observe. *Berryman v K Mart Corp*, 193 Mich App 88, 100-101; 483 NW2d 642 (1992). In this case, the court correctly ruled that decedent's statements were not spontaneous because the time lapse from the alleged fall to his making the statements could have been lengthy, and

there is not sufficient evidence on the record that decedent was excited or under the stress of the fall when he made these statements.

Next, plaintiff contends that decedent's statement that he lost his glasses at the country club and planned to go back there to get them was admissible under MRE 803(3), state of mind exception. A statement of the declarant's then-existing mental, emotional, or physical condition may be admissible pursuant to an exception to the hearsay rule only when the state of mind of the declarant is at issue. *McCallum v Dep't of Corrections*, 197 Mich App 589; 496 NW2d 361 (1992). Decedent's state of mind was not at issue.

Next, plaintiff contends that decedent's statements were admissible under MRE 803(4) because they were made in connection with medical treatment. Generally, statements as to fault do not qualify as necessary for medical treatment for purposes of application of the medical treatment exception to the hearsay rule. *Bradbury v Ford Motor Co*, 123 Mich App 179, 187; 333 NW2d 214 (1983), modified on other grounds 419 Mich 550; 358 NW2d 550 (1984). The court correctly ruled that the portion of decedent's statement regarding the location or fault of his injury did not fall within the hearsay exception. The fact that he fell would have been admissible, but the location of the fall would not.

Plaintiff also contends that the court erred in granting summary disposition because even without these statements, sufficient circumstantial evidence existed to create a question of fact. A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court. *Living Alternatives v Dep't of Mental Health*, 207 Mich App 482, 484; 525 NW2d 466 (1994). Plaintiff conceded below that without decedent's statements, he had nothing to present to the jury. The court's grant of summary disposition was based on plaintiff's concession, and plaintiff cannot now obtain relief on a position contrary to that concession.

However, despite the fact that we find no flaw in the reasoning of the trial court, we remand for reconsideration in light of the Michigan Supreme Court's adoption of MRE 803(24), the "catch-all" exception to the hearsay rule. "An intervening or supervening change in law, such as a change in state law, may cause an appellate court to remand the case to the lower court to consider the change." 5 Am Jur 2d, *Appellate Review*, § 820, pp 480-481 (footnotes omitted). On appeal, plaintiff contends that the decedent's statements would be admissible pursuant to MRE 803(24), which was adopted after the decision of the court below. Because this intervening change in the applicable law may affect the disposition of this case, we remand to allow plaintiff to raise this issue before the court. On remand, plaintiff is limited to raising only the issue of MRE 803(24). We express no opinion on the merit of plaintiff's position.

Vacated and remanded. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Michael J. Matuzak

