STATE OF MICHIGAN

COURT OF APPEALS

DONALD L. WALLS, Personal Representative of the Estate of Steven Frederick Walls,

Plaintiff-Appellant,

v

JACKSON NATIONAL LIFE INSURANCE,

Defendant-Appellee.

UNPUBLISHED

December 6, 1996

No. 179905
LC No. 93-467829-CK

Before: Reilly, P.J., and White, and P.D. Schaefer,* JJ.

PER CURIAM.

Plaintiff appeals as of right a circuit court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) and dismissing plaintiff's claim for accidental death benefits under an insurance policy issued by defendant to the decedent, Steven Walls. We affirm.

The supplementary rider for the accidental death benefit stated that the death must "result directly from accidental injury and independently of all other causes." The rider also contained the following provisions, under the heading "RISKS NOT ASSUMED":

> This benefit will not be paid if the Insured's death results directly from any of the following (nor will it be paid if the Insured's death was caused by any of these conditions):
>
> 1. Intentionally self-inflicted injury while sane or insane.
>
> 2. Any bodily or mental infirmity or disease existing before or which commences after the accidental injury.

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

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10) contending that there was no genuine issue of material fact that Walls committed suicide and therefore his death resulted from an "[i]ntentionally self-inflicted injury while sane or insane."

In presenting a motion for summary disposition under MCR2.116(C)(10), the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross and Peters Co*, 451 Mich 358, 362; ___ NW2d ___ (1996). The moving party may satisfy its burden of production in one of two ways: (1) by submitting "affirmative evidence that negates an essential element of the nonmoving party's claim;" or (2) by demonstrating to the court that "the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim." *Id.* at 361-362.

Defendant's motion in this case was supported by three items of documentary evidence relevant to the circumstances of the death: (1) a police report; (2) a coroner's inquest report; and (3) the certificate of death.

Defendant's motion relies primarily on a portion of a police report in which the authoring detective recounts information he obtained from two witnesses. We recognize that this portion of the report poses the problem of "hearsay within hearsay,"[1] and that this account of the witnesses' observations is a poor substitute for affidavit, or deposition testimony taken under oath.[2] Nevertheless, inasmuch as both parties have used the information from the report in their arguments to the trial court and to this Court, we will examine the contents of the report in our endeavor to determine whether summary disposition was properly granted.

According to the report, the complaining party's account of her observations was as follows:

> Ms. EHRHARDT advised that she was talking on the telephone in her second story apartment, at approximately 19:15 hours, this date, when she observed the victim through the south sliding door of her apartment, walking southbound across the apartment parking lot adjacent to her second story apartment.
>
> Ms. EHRHARDT advised that she continued with her conversation on the telephone when she heard what she believed to be a firecracker or a vehicle backfire.
>
> Ms. EHRHARDT said that when she looked out the south sliding door again, she observed the victim sitting down in a grassy area, located just south of the apartment parking lot. Ms. EHRHARDT further advised that the victim was holding an object, black in color, in his left hand.
>
> Ms. EHRHARDT stated that the victim then fell over, face down, (where he was located upon my arrival). Ms. EHRHARDT then stated that she contacted the police by calling "911" in reference to what she had observed.

According to the report, the information conveyed by the second witness was as follows:

> Mr. SHEN advised that he is a business associate as well as a friend of the victim. Mr. SHEN advised that the victim was involved in a program at work that he was having difficulty in finishing.
>
> Mr. SHEN advised that the victim's boss had been concerned about the completion of the victim's program. Mr. SHEN further advised that the victim was a diabetic and had been having difficulty with his diabetes.
>
> Mr. SHEN stated that he remembers the victim making a statement in the past that he was going to shoot himself. Mr. SHEN believes that this statement was made due to the problems the victim was having at work and also with the diabetes.

In addition to the witness accounts, the report contained additional facts pertinent to the circumstances of the death. The report described the weapon, a .38 Special. The type of injury was described, "It appeared to be a penetrating gunshot wound to the left ear area." The report contains a description of the position of the body (laying face down, with both arms folded underneath)[3]. In Walls' apartment, on a bed, the police discovered an open "ammo box", from which a gun case was protruding. Although, according to the report, photographs were taken at the scene, neither party made any photographs part of the record.

The second item of documentary evidence relevant to the circumstances of the death was the coroner's inquest report, dated October 22, 1991. It stated as follows:

> I, Phillip E. Shaughnessy, D.D.S., M.S.D., Coroner of Allen County, in the State of Indiana, after having heard the evidence and examined the body, do find that the deceased came to his death by reason of gunshot wound to the head, self-inflicted on October 11, 1991 at an unknown time.
>
> Steven F. Walls was at a residence . . . at which time he walked outside and placed a .38 cal. handgun to his right temple and caused the weapon to discharge.
>
> Steven F. Walls had a history of diabetes, was presently under the care of a physician, and had previously verbally indicated his intention to take his own life.
>
> Steven F. Walls expired at an unknown time and was DAS at 6:00 p.m., October 11, 1991.
>
> * * *
>
> VERDICT: Suicide

The last piece of documentary evidence pertinent to the circumstances of Walls' death was the certificate of death. It states that the immediate cause of death was "Gunshot wound to the head", that

the injury was "self-inflicted" and that the manner of death was "Suicide." The certificate also states that no autopsy was performed.

Undoubtedly, there are factual issues unresolved by the evidence submitted. The most glaring inconsistency in the documents concerns the location of the fatal wound ("right temple", according to the coroner's inquest report or "a penetrating gunshot wound to the left ear area" according to the police report.) Defense counsel at oral argument before this Court stated that there was an entrance and exit wound. Although that would explain the appearance of a wound at the right temple and the left ear area, that observation is not made in any of the documents that are a part of the record. The evidence presented also does not provide the facts upon which the coroner concluded that Walls placed the gun to his temple. There is no evidence about the trajectory of the bullet or the distance from Walls' head that the gun was fired. Because neither party deposed Ms. Ehrhardt, there is no evidence about the length of time between when she heard the noise and when she observed Walls sitting on the ground.[4]

Despite the questions raised and the factual information missing from the record presented, we conclude that defendant satisfied its burden of production by submitting "affirmative evidence that negates an essential element of the nonmoving party's claim." *Quinto*, at 361-362. The evidence submitted, including the conclusion that the death was suicide, was vulnerable to an attack by plaintiff. Nonetheless, the evidence was adequate to meet the burden of production that the death was not covered by the language of the policy, specifically, because the death "result[ed] directly" or "was caused by" "[i]ntentionally self-inflicted injury while sane or insane."

In response to defendant's motion, plaintiff filed a brief with two attachments: (1) a copy of what plaintiff contends are handwritten notes of the coroner[5]; and (2) an affidavit of Oakland County Chief Medical Examiner Ljubisa Dragovic. Plaintiff argued that the injury was unintentionally self-inflicted. At oral argument before this Court, plaintiff's counsel stated that the injury was unintentional for one of two reasons: (1) Walls inadvertently discharged the gun while cleaning or otherwise handling it; or (2) Walls' ability to form an intent was impaired by the combination of prescribed medicine and his diabetes.

Plaintiff failed to provide any factual support for his contention that the discharge of the gun was inadvertent. This theory was suggested by plaintiff's response to an interrogatory by defendant:

> Please identify all facts in support of Plaintiff's claim that Steven Frederick Walls' death was the result of an accident.
>
> ANSWER: Deponent's brother was in good spirits and had talked to deponent's mother the evening before his death. Deponent was excited about the prospects of a new job, and deponent believes his brother was playing with or carelessly handling a firearm which accidentally discharged, causing his death.

However, plaintiff did not come forward with any evidence to support the theory that the wound to Walls' head was consistent with an inadvertent discharge of the gun. Where the burden of proof at trial

on a dispositive issue rests on a nonmoving party, the nonmoving party may not rest on mere allegations or denials in the pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *Quinto*, at 362. With respect to the theory that Walls inadvertently discharged the gun while cleaning or carelessly handling the gun, plaintiff has failed to set forth facts establishing that there is a genuine issue of material fact.

The primary issue in this appeal concerns plaintiff's second theory for its assertion that the injury was unintentional. This theory relies upon Dragovic's affidavit. Dragovic did not examine the body, but examined the death certificate, "the Certificate of Analysis . . . that includes the toxicological analysis", the reports of the police investigation and unspecified "other documents." In addition to noting the discrepancies in the police report and coroner's report about which side of the head the wound was on, Dragovic criticized the coroner's examination and the police investigation. He referred to "serious medical information confirming that [Walls] had a history of diabetes and was taking anti-depressants." According to the affidavit, "the critical assessment of the levels of glucose in the eye fluid" were not ordered by the coroner or the police department, the coroner and the police department failed to look for levels of insulin or C-peptide, and the coroner failed to check on the levels of antidepressants. Dragovic stated his conclusion as follows:

> 17. I would have classified this manner of death as undetermined with a preponderance toward accidental death because of a history of taking insulin for diabetes mellitus and taking medically prescribed antidepressants. In taking insulin, due to sudden onset of hypoglycemia, psychotic behavior can result and such behavior is unintentional. The individual is unable to control or direct his activities. That is, the individual's actions and behavior are accidental rather than a result of a consciously informed intent.
>
> 18. It is well established in medicine that insulin can precipitate hypoglycemia which can result in psychotic behavior and can affect the central nervous system in combination with other drugs, such as antidepressants. Resulting abnormal behavior is enhanced and extremely bizarre circumstances can prevail. Individuals who are thus afflicted may have paranoid ideas believing they are being chased by someone and may exert aggressive behavior in their immediate environment and/or directed to themselves.

We conclude that plaintiff has failed to establish a genuine issue of material fact with respect to his theory that Walls was unable to form an intent because of his medication. Dragovic's affidavit indicates that hypoglycemia, especially in combination with drugs such as anti-depressants, "can result" in psychotic behavior. However, Dragovic has not suggested that there are facts proving that Walls was in a hypoglycemic state at the time of his death, much less that he was psychotic. In other words, Dragovic's affidavit suggests a theory of causation, but without further proof, the theory is no more than a conjecture.

In *Skinner v Square D Co*, 445 Mich 153, 164, 174-175; 516 NW2d 475 (1994), the Court discussed causation in the context of a products liability action. The Court's observations with respect to the plaintiff's burden on the issue and the level of proof necessary to avoid summary disposition are

also applicable in this case, in which plaintiff must show that the death was caused unintentionally to recover benefits under the policy.

> As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to anyone of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.
>
> * * *
>
> We recognize that motions for summary judgment implicate considerations of the jury's role to decide questions of material fact. At the same time, however, litigants do not have any right to submit an evidentiary record to the jury that would allow the jury to do nothing more than guess.
>
> We are also aware that courts should exercise restraint when deciding to dismiss a suit for lack of evidence. Nonetheless, in this case, we are confident that the plaintiffs were unable to establish an essential element of proof. The decedent's tragic death remains a matter of speculation. [Citations omitted.]

We need not decide whether plaintiff's argument about Walls' inability to form an intent is distinguishable from the "irresistible impulse" argument that was rejected in *Mirza v Maccabees Life and Annuity Co*, 187 Mich App 76; 466 NW2d 340 (1991). We also need not decide whether the nature of Walls' alleged condition would provide a basis for distinguishing the rule of *Auto-Owners v Churchman*, 440 Mich 560, 569-570; 489 NW2d 431 (1992), (e.g. "an insane or mentally ill person can intend or expect the results of his actions within the meaning of an insurance policy's exclusion clause,") or *Group Ins Co v Czopek*, 440 Mich 590, 595; 489 NW2d 444 (1992) ("an intoxicated person can intend the results of his actions." Because plaintiff failed to provide adequate factual support for his theory, we need not reach the legal issues that his theory, if supported, would have raised.

The trial court's order granting defendant's motion for summary disposition is affirmed.

Affirmed.

/s/ Maureen Pulte Reilly
/s/ Philip D. Schaefer

Judge White concurs in the result only.

[1] Although plaintiff's counsel did not specifically address the double level hearsay issue with respect to the witness statements at oral argument on defendant's motion, he argued to the court, "The reports attached are all hearsay upon hearsay."

[2] Although plaintiff suggested at oral argument before this Court that depositions of certain witnesses had been scheduled, but he did not have an opportunity to complete discovery, the record indicates that the hearing on defendant's motion occurred on September 13, 1994, four days before the (extended) discovery deadline, and nearly nine months after the complaint was filed.

[3] The report also indicates that other officers had "roll[ed the victim] up temporarily to check his condition when they arrived." Therefore, we question whether any conclusions can be drawn from the position of the body.

[4] The length of the interval can not be approximated by reference to the time when the police responded. At least one of the times stated in the police report is inaccurate. According to the account of Ehrhardt's statement in the report, she was talking on the phone at "approximately 19:15" when she heard the noise. After she heard the noise and observed Walls, she called 911. The police report states that the police were summoned at "approximately "18:00 hours" and that the investigating officer arrived at the scene "at approximately 18:20."

[5] These notes state that the cause of death was "GSW to right temple", that the victim was "found at 5:52 PM" and that the "ruling" was suicide. In the comments, the coroner wrote, "Hist of Diabetes - taking anti-depressant went out in yard and shot himself -other people heard the shot - gun still in hand." The facts contained in these notes, with the exception of 5:52 p.m. as the time found, are also in the documents supplied by defendant in support of its motion, and further discussion is unnecessary.