

STATE OF MICHIGAN
COURT OF APPEALS

FOREST JOSEPH KARRAR,

Plaintiff-Appellant,

v

DOUGLAS CARL JOHNSON
and THE BOTTLING GROUP, L.L.C.,
d/b/a PEPSI BOTTLING GROUP,

Defendant-Appellees.

UNPUBLISHED

April 6, 2006

No. 258812

Montcalm Circuit Court

LC No. 03-002146-NI

Before: Smolenski, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's grant of summary disposition in favor of defendants under MCR 2.116(C)(10) and MCL 500.3135(2)(b). We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

This matter arises from an accident wherein Johnson's vehicle, while Johnson was acting in the employment of The Bottling Group LLC, struck plaintiff, who was crossing M-57 outside of a crosswalk. The trial court granted summary disposition in favor of defendants, effectively holding that any reasonable jury would conclude that plaintiff was more than 50 percent negligent.

Plaintiff argued that the trial court erred in granting summary disposition because questions of fact are for a jury to decide, and a reasonable jury could have found plaintiff less than 50 percent negligent. We agree.

We review a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10) de novo and consider the facts in the light most favorable to the nonmoving party. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is appropriate if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Alsbaugh v Law Enforcement Comm*, 246 Mich App 547, 567; 634 NW2d 161 (2001).

This Court has ruled that "[n]egligence and contributory negligence of a pedestrian are questions of fact for the jury. Whether plaintiff exercised reasonable care is a fact question." *Wohlgeleit v Moffatt*, 16 Mich App 319, 320; 167 NW2d 866 (1969). Further, it has been

held that summary disposition is not favored in a negligence action, but is appropriate if the plaintiff fails to establish a prima facie case. *Richardson v Michigan Humane Society*, 221 Mich App 526; 528 NW2d 873 (1997).

The motor vehicle code, section 7.17 [AACS R 28.1716] states that every driver should exercise due care to avoid colliding with any pedestrian and should give warning upon a collision by sounding the horn. In this matter, there is conflicting testimony as to how fast Johnson was driving, if he was negligently speeding, and if he was negligently driving without due care, as Johnson did not see plaintiff standing in the middle of the street on a bright day. These issues should be reviewed by a jury, as to whether Johnson was negligent and, if so, whether he was more than 50 percent negligent.

Additionally, the trial court stated that plaintiff was jaywalking in violation of motor vehicle code, section 7.9 [AACS R 28.1709], which makes the plaintiff more than 50 percent negligent. A violation of a motor vehicle code does not automatically make one party more than 50 percent negligent. It is not for a trial judge to make reasonably disputable negligence determinations. Rather, it is for jurors, who normally travel in the area and know the street and the traffic better than the judge, to make such determinations. *Musat v Harris*, 52 Mich App 442, 448; 217 NW2d 440 (1974). In this case, it is for a jury, not the trial judge, to decide whether plaintiff's jaywalking was negligent and more than 50 percent the cause of the accident, or whether Johnson was negligent and at least 50 percent the cause of the accident for failing to see plaintiff and avoid the accident.

For the foregoing reasons, we reverse the trial court's grant of summary disposition for defendants and remand this case to the trial court for further proceedings. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ Donald S. Owens

/s/ Pat M. Donofrio