

STATE OF MICHIGAN
COURT OF APPEALS

SHERITA WHITE and DERRICK WHITE,

Plaintiffs-Appellants,

v

TAYLOR DISTRIBUTING COMPANY, INC.,
PENSKE TRUCK LEASING COMPANY, L.P.,
and JAMES J. BIRKENHEUER,

Defendants-Appellees.

FOR PUBLICATION

May 24, 2007

9:00 a.m.

No. 272114

Oakland Circuit Court

LC No. 2005-064307-NI

Official Reported Version

Before: Markey, P.J., and Murphy and Kelly, JJ.

KELLY, J. (*dissenting*).

I respectfully disagree with the majority's conclusion that summary disposition was "inappropriate" under MCR 2.116(G)(4) "regardless of plaintiffs' failure to submit sufficient documentary evidence to counter Birkenheuer's version of events, which was primarily within his exclusive knowledge." *Ante* at _____. I would affirm because plaintiffs' failure to submit any evidence to create a genuine issue of material fact requires summary disposition pursuant to MCR 2.116(C)(10). The majority, in "concluding that crucial credibility issues" exist when there is no evidence to counter Birkenheuer's version of events, is not leaving credibility issues for the trier of fact, but, rather, making its own finding that Birkenheuer's undisputed testimony lacks credibility. *Ante* at _____. And credibility issues are not for this Court to decide.

I. Facts

Plaintiffs alleged in their complaint that on or about March 15, 2004, at approximately 8:49 p.m., plaintiff Sherita White was driving at or near the intersection of I-96 and Novi Road. Defendant James J. Birkenheuer, who was driving a semi-truck owned by defendant Penske Truck Leasing Company, L.P., in the course of his employment with defendant Taylor Distributing Company, Inc., negligently "fail[ed] to stop within an assured clear distance ahead, violently striking and thereby colliding with [White] and seriously injuring her."

Birkenheuer testified at his deposition that on the day of the accident, he was driving from Cincinnati to Novi. He indicated that while he was on I-275, he stopped at a rest area in the Canton area because he suddenly had to use the restroom "big time." At the rest stop, he experienced severe diarrhea. Birkenheuer stated that after using the restroom, he "hung around a

while, walked around to make sure I was finished and felt fine so I continued on to where I had to go because it wasn't far away." He estimated that he was at the rest area for "maybe 20 minutes." Birkenheuer indicated he had not previously been treated for gastrointestinal issues.

Birkenheuer further testified that he thereafter resumed traveling on westbound I-96 and later took the Novi Road exit. Ten to fifteen seconds after getting on that ramp, he "just broke out into a sweat and got dizzy." The very next thing he did when he felt the sudden sweating and dizziness was to "[h]it the brakes." He did not slam the brakes, but he did "[m]ore than a normal stop. I wanted to get stopped in a hurry." When asked why he hit his brakes, Birkenheuer said, "Because I was dizzy and I told myself—you know, I'm stopping. I don't care if I'm in the middle of this thing and sit here, I'm stopping." He indicated that he did not apply the emergency brake because he had plenty of room to stop and "you don't want to put on an emergency brake because that emergency brake will cause you to jackknife." When he started sweating and became dizzy, he saw White's vehicle "way up there," at least 250 to 300 yards ahead. Birkenheuer testified that he remembered applying the brakes with plenty of room to stop and that he suddenly passed out. He was awoken by the collision. He indicated that he had no recall between the point of applying the brakes and the collision. Birkenheuer described his actions after the collision as follows:

Set the brake and hit the flashers, and I wanted to get out and see if she was all right. I got out of the car, walked to the front of the truck and passed out again in the street. And the next thing I remember is trying to get up again, and some guys that were already there and said just stay where you are, so I never saw her.

Birkenheuer also expressed that after he passed out again on the pavement in front of his truck he involuntarily urinated and defecated. Birkenheuer testified that he had never before felt dizzy while driving.

Medical records demonstrate that Birkenheuer was taken from the scene to Providence Hospital where he was examined by Ruby Sooch, M.D. Dr. Sooch's report indicates that Birkenheuer reported that he believed he passed out and that he could not recall what occurred between the time he felt dizzy and the impact. The report also indicates that while emergency medical service (EMS) was assisting Birkenheuer at the scene, he "became diaphoretic [sweaty] and dizzy with decreased level of consciousness." In her deposition, Dr. Sooch testified that cardiac monitor strips demonstrated that while EMS attended to Birkenheuer at the scene, he experienced a low heart rate, which was consistent with the decreased level of consciousness. Dr. Sooch called what Birkenheuer experienced "a true syncopal episode." In layman's terms, that means he "passed out." Dr. Sooch also testified that given the history provided for the purposes of care and treatment, she would say that Birkenheuer's episode happened over "several seconds, a couple minutes. That's pretty sudden."

Defendants moved for summary disposition under MCR 2.116(C)(10) on the grounds that Birkenheuer was not negligent with regard to the accident under the sudden-emergency doctrine or, alternatively, that White did not suffer a serious impairment of body function as a result of the accident. Defendants also argued that they were entitled to summary disposition under MCR

2.116(C)(7) on the basis of a release that White had signed in connection with her claim for first-party no-fault benefits with a non-party insurer.

The trial court granted summary disposition in defendants' favor on the basis of the sudden-emergency doctrine without addressing the issues of serious impairment of body function and release. The trial court provided the following explanation for its decision:

The evidence establishes that Mr. Birkenheuer passed out while driving his semi truck. He had no prior similar episodes, had no pain or any other symptom just before the accident. He attempted to stop as soon as he began feeling dizzy and lightheaded. The court finds the collision occurred as the result of a sudden emergency not of the defendants' own making.

Plaintiffs appeal this ruling.

II. Analysis

Plaintiffs contend that the trial court erred by granting defendants summary disposition on the basis of a determination that there was no genuine issue of material fact concerning whether Birkenheuer was not negligent as a matter of law under the sudden emergency doctrine. I believe the trial court did not err.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence submitted by the parties, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002). "If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Quinto v Cross & Peters Co*, 451 Mich 358, 363; 547 NW2d 314 (1996). Recently, this Court recognized that

the purpose of summary disposition is not to deny parties with apparently weak cases the chance to have their day in court and their right to present their case; rather, the purpose is to avoid pointlessly wasting resources by sending a matter to trial when there is no actual dispute to resolve. . . .

* * *

In effect, summary disposition is intended to facilitate two important Michigan public policies: resolution of disputes on their merits, and avoidance of unnecessary expenditures where there is no actual dispute or where the only material dispute is over a point of law. [*Minter v Grand Rapids*, 275 Mich App 230; ___ NW2d ___ (2007).]

In regard to automobile accidents, MCL 257.402(a) provides a rebuttable presumption of negligence under specified circumstances. It states:

In any action, in any court in this state when it is shown by competent evidence, that a vehicle traveling in a certain direction, overtook and struck the rearend of another vehicle proceeding in the same direction, or lawfully standing upon any highway within this state, the driver or operator shall be deemed prima facie guilty of negligence. This section shall apply, in appropriate cases, to the owner of such first mentioned vehicle and to the employer of its driver or operator.

Accordingly, because the truck Birkenheuer was driving indisputably struck the rear of White's vehicle, there is a rebuttable presumption that Birkenheuer was negligent with regard to the collision. *Hill v Wilson*, 209 Mich App 356, 359; 531 NW2d 744 (1995).

However, the statutory presumption of negligence attending a rear-end collision may be overcome by evidence of a "sudden emergency." *Szymborski v Slatina*, 386 Mich 339, 340-341; 192 NW2d 213 (1971). The sudden-emergency doctrine provides as follows:

"One who suddenly finds himself in a place of danger, and is required to act without time to consider the best means that may be adopted to avoid the impending danger is not guilty of negligence if he fails to adopt what subsequently and upon reflection may appear to have been a better method, unless the emergency in which he finds himself is brought about by his own negligence." [*Vsetula v Whitmyer*, 187 Mich App 675, 681; 468 NW2d 53 (1991), quoting *Socony Vacuum Oil Co v Marvin*, 313 Mich 528, 546; 21 NW2d 841 (1946), quoting Huddy on Automobiles (8th ed), p 359.]

"To come within the purview of this rule the circumstances attending the accident must present a situation that is 'unusual or unsuspected'." *Vander Laan v Miedema*, 385 Mich 226, 232; 188 NW2d 564 (1971), quoting *Barringer v Arnold*, 358 Mich 594, 599; 101 NW2d 365 (1960). "The term 'unusual' is employed here in the sense that the factual background of the case varies from the everyday traffic routine confronting the motorist." *Id.* "'Unsuspected' on the other hand connotes a potential peril within the everyday movement of traffic." *Id.* "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." *Id.*

In the context of a sudden emergency, the "test to be applied is what that hypothetical, reasonably prudent person would have done under all the circumstances of the accident, whatever they were." *Szymborski, supra* at 341, quoting *Baker v Alt*, 374 Mich 492, 496; 132 NW2d 614 (1965). This accords with the principle that a violation of a statutory duty of care establishes a prima facie case of negligence, but that such a presumption "may be rebutted with a showing of an adequate excuse or justification under the circumstances." *Dep't of Transportation v Christensen*, 229 Mich App 417, 420; 581 NW2d 807 (1998).¹ Even though it

¹ Accordingly, that plaintiffs rely on the "assured, clear distance" requirement of MCL 257.627(1) in addition to the plain statutory presumption of negligence attending a rear-end collision under MCL 257.402(a) does not affect the potential applicability of the sudden-
(continued...)

may serve to rebut a statutory presumption of negligence, however, the sudden-emergency doctrine is not an affirmative defense because it is an extension of the "reasonably prudent person" rule. *Szymborski, supra* at 341. As such, a defendant asserting the existence of a sudden emergency is not required to establish the existence of the emergency by a preponderance of the evidence. *Id.*

The question on appeal is whether there is any *genuine* issue of material fact regarding whether there was a sudden emergency and whether Birkenheuer acted reasonably under the circumstances. In my opinion, plaintiffs failed to demonstrate any genuine issue of material fact in this regard. Birkenheuer testified that immediately after becoming dizzy and lightheaded, he began to downshift, hit his brakes firmly, and then suddenly lost consciousness. The state police automobile accident report made at the scene corroborates this testimony, indicating that Birkenheuer reported to the police at the scene that he "blacked out" possibly from being ill and remembered slowing for traffic at the intersection. Medical records demonstrate that Birkenheuer was taken from the scene to Providence Hospital where he was examined by Ruby Sooch, M.D. Dr. Sooch's report indicates that Birkenheuer reported that he believed he passed out. The report also indicates that while EMS was assisting Birkenheuer at the scene, he "became diaphoretic and dizzy with decreased level of consciousness." In her deposition, Dr. Sooch testified that cardiac monitor strips demonstrated that while EMS attended to Birkenheuer at the scene, he experienced a low heart rate, which was consistent with the decreased level of consciousness. Dr. Sooch called what Birkenheuer experienced "a true syncopal episode." In layman's terms, that means he "passed out." She also indicated that when EMS found Birkenheuer, he was "alert, but a little drowsy and diaphoretic." He was sweating and incontinent of urine and stool. Dr. Sooch also testified that, given the history provided for the purposes of care and treatment, she would say that Birkenheuer's episode happened over "several seconds, a couple minutes. That's pretty sudden."

Thus, the evidence presented at the time of plaintiffs' motion corroborates Birkenheuer's deposition testimony that he passed out just before he struck White's vehicle. It further demonstrates that this episode was sudden, unusual, and not caused by Birkenheuer. Even though Birkenheuer waited at the rest stop to make sure he was "finished," i.e., that he would not experience additional diarrhea, there is no evidence that he felt dizzy or passed out before he resumed driving. And even if the circumstantial evidence indicates that he was aware or should have been aware that he may experience diarrhea again, there is no evidence that his condition before he resumed driving alerted him or should have alerted him that he would soon become dizzy and lose consciousness. There is also no evidence that Birkenheuer had ever experienced episodes of dizziness or loss of consciousness before this incident. Therefore, I would conclude that there is nothing in the evidence that creates a genuine issue of material fact regarding whether the incident falls within the purview of the sudden-emergency doctrine.

Plaintiffs contend, and the majority agrees, that there is a genuine issue of material fact because Birkenheuer's motive and intent are at issue and his credibility is crucial. Plaintiffs rely on *Foreman v Foreman*, 266 Mich App 132, 135-136; 701 NW2d 167 (2005), in which this

(...continued)
emergency doctrine.

Court noted that "[s]ummary disposition is suspect where motive and intent are at issue or where the credibility of a witness is crucial," and "where the truth of a material factual assertion of a moving party is contingent upon credibility, summary disposition should not be granted."

In this case, however, there is no evidence calling into question Birkenheuer's motive or intent in stating that he passed out. While it may be convenient for a person in Birkenheuer's situation to falsely assert that he passed out, plaintiffs have failed to bring forth any evidence whatsoever to demonstrate that Birkenheuer made false assertions. On the contrary, *all* the evidence corroborates his assertion, as discussed earlier. By concluding that Birkenheuer may have made false assertions about what happened just before the collision, the majority is recognizing an explanation that, while consistent with known facts and conditions, is not deducible from them as a reasonable inference, which, as a matter of law, is an insufficient basis for denying a motion for summary disposition when there is no genuine issue of material fact. *Minter, supra* at ____.

Further, by concluding that there is a credibility issue on this record, the majority is essentially adjudging Birkenheuer's testimony as possibly suspect rather than determining, when his testimony is not refuted, that there is simply no genuine issue of material fact. And this Court "may not resolve factual disputes or determine credibility in ruling on a summary disposition motion." *Burkhardt v Bailey*, 260 Mich App 636, 646-647; 680 NW2d 453 (2004).

I also disagree with the majority's assertion that Birkenheuer's "claims are virtually impossible to contradict with any documentary evidence" On the contrary, Birkenheuer might have stated one thing to police at the scene and another to his doctor, skid marks on the road might have been inconsistent with Birkenheuer's story, cardiac monitor strips might have been inconsistent with Birkenheuer's story, or EMS employees might have testified that Birkenheuer's physical condition was inconsistent with his story. If these facts or similar facts were in the record, there would be evidence to contradict Birkenheuer's testimony and there would be a genuine issue of material fact. But such facts are not in the record. On this record, I would conclude that the trial court was correct in applying the sudden-emergency doctrine.

If the sudden-emergency doctrine were applied, the next question would be whether there was any genuine issue of material fact regarding whether Birkenheuer acted as a reasonably prudent person under the circumstances of the sudden emergency. I would conclude that there is no genuine issue of material fact in this regard. The evidence demonstrates that when Birkenheuer began to sweat and feel dizzy, he began to brake to bring the vehicle to an orderly stop. He did not slam on the brakes or use the emergency brake because White's vehicle was "way up there" and he had "plenty of room to stop." However, as Birkenheuer began to brake, he suddenly and unforeseeably passed out, at which point he was unable to complete the stop. Plaintiffs assert that their accident reconstructionist opined that Birkenheuer could have avoided the collision if he had, "when the medical problem became evident," "aggressively applied the brakes," "pull[ed] to the side of the ramp," or "applied the emergency brakes in combination with the service brakes." However, this opinion presumes that Birkenheuer had foreknowledge *when he began to brake* that he was going to pass out and would be unable to complete the stop he had initiated. But there is no evidence whatsoever that Birkenheuer had such foreknowledge when he decided to stop as he did. Furthermore, in negligence claims, the relevant inquiry is whether the "defendant exercised reasonable care, not whether the procedures used by [the] defendant

could have been made safer." *Boyt v Grand Trunk W R*, 233 Mich App 179, 186; 592 NW2d 426 (1998). Accordingly, the question is not whether Birkenheuer could have stopped more safely, but whether he exercised reasonable care in what he did when he became dizzy. Certainly once Birkenheuer lost consciousness, he could do nothing more to avoid the collision. I would conclude that plaintiffs failed to establish a genuine issue of material fact regarding whether Birkenheuer acted as a reasonably prudent person under the circumstances.

For these reasons, I would affirm.

/s/ Kirsten Frank Kelly