

STATE OF MICHIGAN
COURT OF APPEALS

CINDY BETH CLARDY,

Plaintiff-Appellant,

v

THOMAS TANNAR RESTRICK, JR. and MARK
DAVID FRIEDLAND,

Defendants-Appellees,

and

JOCELYN ANN WALTERS and CITIZENS
INSURANCE COMPANY,

Defendants.

UNPUBLISHED

June 12, 2012

No. 303899

Jackson Circuit Court

LC No. 09-001802-NI

Before: BORRELLO, P.J., and O'CONNELL and TALBOT, JJ.

PER CURIAM.

Plaintiff appeals by right from the summary disposition entered in favor of defendant Restrict and from the judgment entered in favor of defendant Friedland. We affirm.

This lawsuit arose from highway collisions among three cars on a summer night in 2006. First, defendant Friedland's car hit a barricade and became disabled, stopping partially on the shoulder and partially in the left traffic lane. Defendant Restrict was driving in that lane, and his car hit Friedland's car. Restrict's car stopped in a ditch on the right side of the highway; Friedland's car spun in the left traffic lane. Jocelyn Walters then collided with Friedland's car in the left traffic lane. Plaintiff, a passenger in Walters' car, was injured in the collision. Plaintiff sued Friedland, Restrict, Walters, and Walters' insurance company.¹

I. SUMMARY DISPOSITION IN FAVOR OF DEFENDANT RESTRICK

¹ Plaintiff's claims against Walters and the insurance company are not at issue in this appeal.

Restrict moved for summary disposition and submitted deposition testimony from individuals involved in the accident and other documentary evidence that described the collisions. Plaintiff responded with deposition testimony from individuals involved and other documentary evidence. The trial court granted Restrict's motion under MCR 2.116(C)(10), upon finding that Restrict breached no duty to plaintiff and that Restrict was not a proximate cause of plaintiff's injuries.

We review de novo the trial court's ruling on the summary disposition motion. *Dancey v Travelers Prop Cas Co*, 288 Mich App 1, 7; 792 NW2d 372 (2010). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). We consider the pleadings and other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. *Dancey*, 288 Mich App at 7.

To support his summary disposition motion, Restrict had the initial burden of presenting documentary evidence to negate at least one element of plaintiff's negligence claim. *Coblentz v Novi*, 475 Mich 558, 568-569; 719 NW2d 73 (2006). The burden then shifted to plaintiff to present evidence supporting the challenged elements of her claim. *Id.* The four elements of the negligence claim were: (1) Restrict owed a duty to plaintiff; (2) Restrict breached that duty; (3) Restrict's breach proximately caused plaintiff's injuries; and (4) plaintiff sustained damages. See *Romain v Frankenmuth Mut Ins Co*, 483 Mich 18, 21-22; 762 NW2d 911 (2009).

To withstand summary disposition on the causation element of her claim, plaintiff was required to present evidence of both cause in fact and proximate cause. *Id.* at 21. To prove cause in fact, plaintiff had to present evidence that her injuries would not have occurred but for Restrict's conduct. See *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). As for proximate cause, plaintiff was required to present evidence that her damages were foreseeable and that Restrict was a proximate cause of her damages. *Id.* Generally, the assessment of proximate cause is a matter for a jury. *Lockridge v Oakwood Hosp*, 285 Mich App 678, 684; 777 NW2d 511 (2009). However, if there is no material factual issue regarding causation, summary disposition may be appropriate. See *Reeves v Kmart Corp*, 229 Mich App 466, 480; 582 NW2d 841 (1998); see generally *Latham v Nat'l Car Rental Sys, Inc*, 239 Mich App 330, 340; 608 NW2d 66 (2000).

The summary disposition record lacks any evidence that Restrict's conduct proximately caused plaintiff's injuries. The undisputed testimony established that on the night of the accident, Friedland's unlit car was partially blocking the left traffic lane even before Restrict hit the car. Restrict was traveling in the left lane when he hit Friedland's car. Restrict's car angled off the highway to the right, but Friedland's car stayed in the left lane, spinning from the impact with Restrict's car. Friedland's car was still blocking the left traffic lane, and Walters' car collided with it in that lane. Viewed in the light most favorable to plaintiff to assume that Restrict could have avoided Friedland's car, there was no testimony or other evidence to indicate that Restrict's conduct increased the likelihood that Walters would collide with Friedland's car. Because there was no material factual issue regarding causation, the trial court properly granted summary disposition in favor of Restrict.

Plaintiff argues that the evidence established Restrict was driving 73 miles an hour in a 70 mile an hour zone, and Restrict was negligent per se by driving too fast for the conditions. A plaintiff may establish negligence per se by proving that a defendant violated a statutory duty. *McKinney v Anderson*, 373 Mich 414, 419; 129 NW2d 851 (1964). Plaintiff acknowledges, however, that even if Restrict was negligent, plaintiff could not prevail unless she could establish that his negligence was a proximate cause of her injuries. See *Klanseck v Anderson Sales & Serv, Inc*, 426 Mich 78, 87; 393 NW2d 356 (1986). Plaintiff did not present facts sufficient to create a question of fact on the proximate cause issue. The trial court was thus correct in deciding the lack of proximate cause as a matter of law.

II. JUDGMENT ON VERDICT IN FAVOR OF DEFENDANT FRIEDLAND

Plaintiff first argues that Friedland's defense counsel engaged in misconduct, which, according to plaintiff, denied her a fair trial. Plaintiff describes two types of alleged misconduct: first, defense counsel referred to other named defendants and noted that "accidents become opportunities;" and second, that defense counsel asked Friedland about the student loans that Friedland would incur to pay for medical school.

This Court applies a multi-step review of issues involving alleged improper conduct by an attorney. *Badalamenti v William Beaumont Hosp*, 237 Mich App 278, 290; 602 NW2d 854 (1999), citing *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982). The Court first determines whether the attorney's conduct was error. *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996). Conduct is error if the conduct was deliberate and was aimed at preventing a fair trial. *Id.* If the attorney's conduct constitutes error, this Court then must consider whether the error was harmless. *Badalamenti*, 237 Mich App at 290. If the error was not harmless, the Court determines whether the opposing party properly objected to the error at trial. *Id.* If the opposing party failed to object to the error, this Court must determine whether the error nonetheless deprived the opposing party of a fair trial. *Id.*

A new trial may be warranted when a party's attorney engages in "persistent and deliberate efforts to incite passion and prejudice" among the jurors. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 776; 685 NW2d 391 (2004). No new trial is required, however, if an attorney's prejudicial remarks were "fleeting and unintentional." *Id.* Moreover, potential prejudice arising from an attorney's comments can be cured by appropriate jury instructions. See *Hammack v Lutheran Social Servs*, 211 Mich App 1, 9; 535 NW2d 215 (1995).

We find no misconduct requiring reversal in this case. Defense counsel's reference to other defendants was not inappropriate. As defense counsel pointed out to the trial court, those defendants were named in plaintiff's complaint. The complaint itself would have been admissible as a statement of a party opponent under MRE 801(d)(2). *Hunt v CHAD Enterprises, Inc*, 183 Mich App 59, 63; 454 NW2d 188 (1990). Given that defense counsel could have entered the complaint into evidence, the reference to the named defendants cannot be deemed error. Although counsel's comment about accidents becoming opportunities was not within the facts to be established at trial, the comment was a response to plaintiff's counsel's opening statement regarding the other defendants' lack of responsibility for the accident. Accordingly, the comment was harmless error.

Similarly, defense counsel's question concerning student loans cannot, in context, be characterized as an effort to prejudice the jury. The question was a fleeting reference to the cost of medical school, not to defendant's ability or inability to pay a judgment. Given the passing reference to student loans, and given defendant's equivocal response regarding whether he would have any loans, the question cannot be deemed error. See *Gilbert*, 470 Mich at 776.

Even if this Court were to assume that defense counsel's conduct was inappropriate, the trial court cured any potential prejudice through its instructions to the jury. The trial court instructed the jurors that sympathy must not influence their decision. In addition, the court instructed the jurors that the arguments, statements, and remarks of attorneys are not evidence, and that they should disregard anything said by an attorney that was not supported by the evidence. These instructions correctly informed the jury of the respective roles of attorneys and witnesses and cured any error arising from defense counsel's conduct. See *Hammack*, 211 Mich App at 9.

Plaintiff next argues that the trial court erred by instructing the jury on the sudden emergency doctrine. We review for abuse of discretion the trial court's determination that the evidence supported the instruction. *Freed v Salas*, 286 Mich App 300, 327; 780 NW2d 844 (2009). To warrant an instruction on the sudden emergency doctrine, the record must contain evidence that the circumstances surrounding the accident were unusual or unsuspected. *Vander Laan v Miedema*, 385 Mich 226, 231-232; 188 NW2d 564 (1971). Specifically, the evidence must indicate that the situation differed from routine traffic conditions, or that the danger "had not been in clear view for any significant length of time." *Id.* In addition, the evidence must support a finding that the emergency was not of the defendant's own making. *White v Taylor Distrib Co, Inc*, 482 Mich 136, 139-140; 753 NW2d 591 (2008).

Plaintiff contends that two factors negate the application of the sudden emergency doctrine in this case: first, that defendant's car breakdown resulted from his failure to maintain the car properly; and second, that defendant exacerbated the situation by exiting the car and attempting to flag down oncoming drivers. We disagree with plaintiff's contention. The only evidence submitted at trial concerning the pre-accident status of Friedland's car came from Friedland himself. His testimony was sufficient to allow the jury to conclude that Friedland had no knowledge of possible mechanical or electrical problems in his car and that the post-impact failure of the car's electrical system was sudden and unexpected. Regarding Friedland's decision to exit his car after it became disabled, the testimony was sufficient to allow the jury to assess the reasonableness of that decision and to determine whether the decision contributed to the emergency. Accordingly, the trial court was within its discretion by instructing the jury on sudden emergency doctrine in this case.

Affirmed.

/s/ Stephen L. Borrello
/s/ Peter D. O'Connell
/s/ Michael J. Talbot