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2011 IL App (3d) 100489-U

Order filed August 1, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

| | | |
|--|---|-------------------------------|
| JAMES A. FULLER, JR., by his father and next |) | Appeal from the Circuit Court |
| friend, JAMES A. FULLER, SR., |) | of the 10th Judicial Circuit, |
| |) | Peoria County, Illinois, |
| Plaintiff-Appellant, |) | |
| |) | |
| v. |) | Appeal No. 3-10-0489 |
| |) | Circuit No. 05-L-368 |
| TAMMY S. GOULD, |) | |
| |) | Honorable |
| Defendant-Appellee. |) | Joe R. Vespa, |
| |) | Judge, Presiding. |

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Carter and Justice Wright concurred in the judgment.

ORDER

- ¶1 *Held:* Trial court erred in granting summary judgment in favor of defendant where genuine issues of material fact exist concerning whether defendant driver was negligent in accident where plaintiff pedestrian ran into her car.
- ¶2 Plaintiff James Fuller, Jr. brought this negligence action against defendant Tammy Gould for injuries he sustained when he ran into Gould's car. The trial court granted summary judgment in favor of Gould, finding that there were no disputed issues of fact and that a jury verdict in favor of

James would be based only on speculation. We reverse and remand.

¶ 3

FACTS

¶ 4 In August 2005, at approximately 3 p.m., plaintiff, nine-year-old James Fuller, Jr. was walking home from an afternoon of swimming in the Illinois River with his older brother, Jimmy Havlin, and Jimmy's friend. To reach home, the threesome had to cross Northeast Adams Street in Peoria at a point where it was a four-lane road, with two northbound lanes and two southbound lanes. There was little traffic on Adams. When James and his companions reached Adams, they stopped at the edge of the road before crossing the northbound lanes. They proceeded across the northbound lanes and stopped in the middle of the street. Defendant Tammy Gould was traveling south on Adams on her way to work when James ran into the southbound lanes and struck the driver's side of her vehicle near the front tire well. James fell backward onto the street and was injured.

¶ 5 James, by his father and next friend, James Fuller Sr., brought this negligence action to recover for damages he sustained in the accident. Gould filed an answer and asserted affirmative defenses, including that the accident occurred as a result of James's negligence. She subsequently moved for summary judgment, arguing that the evidence failed to establish that she was negligent in any way or that her alleged negligent acts proximately caused the accident and James's injuries. Attached to Gould's motion were supporting exhibits, including transcripts of depositions of James, his father, his brother Jimmy, eyewitnesses Robert Gonzalez and Robert Wilson, and Peoria police officer David Slater. Gould also submitted the transcript from her own deposition.

¶ 6 Gould's deposition provides that on the date of the accident, as she turned southbound onto Northeast Adams Street, she noticed James and another boy in a field abutting the road. She kept her eye on them and "assessed the traffic situation." James and his companion stopped at the side

of the road, then crossed the northbound lanes and stopped in the middle of the road. She took her foot off the gas and coasted, “seeing what they were going to do.” She assumed that, when the boys were standing in the middle of the road, they were waiting for her to pass. She would have been able to stop for them at that point if they had started to cross the southbound lanes. She estimated she was driving at a speed of 20 to 25 miles per hour (mph). The posted speed limit was 35 mph. She checked traffic in front and behind her but also kept her eye on the boys at the same time, “when all of a sudden I just, out of the corner of my eye, saw this little kid just head down.” She described that “the flash came out from behind them and hit my side of my car.” The flash was James’s head or arms. She hit the brakes with both feet and felt the impact when James hit her vehicle. He was not dragged any distance as she was stopped or “almost completely stopped” when he made contact with her car. James did not become entangled in her tire but landed exactly at the spot where he dented her car when he hit it. Gould admitted that the police report stated she noticed three children step into the street. She explained that one of the children did not cross the street with James and his brother but joined them after the accident occurred. She surmised that the officer who interviewed her at the scene paraphrased what various witnesses observed when writing his report.

¶ 7 In his deposition, James stated as follows. He was in fifth grade at the time of the deposition and had been nine years old when the accident occurred. He had been to the river swimming many times before the day of the accident and always crossed Adams in the same spot. He had crossed Adams about 12 times. The crossing point he used was not at an intersection or a crosswalk. He would cross when there were no cars and would run his “fastest.” He dad taught him to look both ways before crossing the street. He believed that as long as he looked both ways, he could cross the street at any point. His brother and Jimmy’s girlfriend entered the road first and he ran to the middle

where he stopped because his leg was hurting. He hurt his leg from falling on rocks while swimming so he could not run his “fastest.” When he was stopped in the middle of the road, he did not look for cars. He first saw Gould’s car coming off the ramp from the bridge one-half block away. James estimated Gould’s car was going 45 or 35 mph, that “it went off the ramp pretty fast” and that it “was still going that fast” on Adams. It looked like Gould “was slowing down but she wasn’t; she was going fast.” The car had its turn signal on so he thought it was going to turn into the Hardee’s. If she did not have her turn signal on and did not appear to slow down, he would have waited for her to go by before crossing the road. He thought he could run across the road before the car got to him. He decided to run across the street “but right - right when I was trying to avoid the car, the car just hit [him].” He zigzagged trying to get away from the car. He hit the front of the car, his foot got caught in the tire, and “it swung [him] around and threw [him] up in the air like a dog bag (sic).” His foot was injured in the accident, and he suffered road rash on his back and side, a bump on his head and blood on his brain. Jimmy and his girlfriend had crossed the southbound lanes ahead of him. He did not know why he did not stop when he saw Gould’s car. He had been hit by a car on a different occasion in a different location.

¶ 8 James Fuller, Sr. testified at his deposition that he had explained to his son that when he crosses the street, he needs to look both ways and make sure it is clear. He cautioned James not to try to beat a car because he was not going to win. James takes medication for attention deficit hyperactivity disorder (ADHD).

¶ 9 Jimmy Havlin, James’s brother, stated in his deposition that he was 15 years old when the accident occurred. He and James crossed Adams almost every day; he estimated more than 100 times. They crossed at different spots, depending on where they were going. He had instructed

James to look both ways before crossing a street, “always to check until the last minute to see if the car is actually turning and stuff,” and to hold someone’s hand. He was aware that they should only cross at an intersection or crosswalk but the closest intersection was three or four blocks away. His girlfriend was holding James’s hand when they were at the side of the road, let go when they reached the middle of the road, and she then grabbed James’s hand again. They stopped in the middle of the road to let another car pass. He saw Gould’s car but he thought Gould was going to turn into Hardee’s because the turn signal was on and it was going slow. Because the car kept going without turning, his girlfriend let go of James’s hand so they could hurry up and cross the road. James started running to cross ahead of him and his girlfriend. He yelled at James to stop when he realized Gould was not turning into Hardee’s. He had to “holler” at his brother a lot in the past to get him to listen because of his ADHD. James ran across the street and hit the side of Gould’s car. His brother tried to avoid the impact. He saw James get hit by a car another time when James was on his bike. Jimmy had also been hit by cars on a couple occasions.

¶ 10 Robert Gonzalez was an eyewitness to the accident. He lived on the same block as the Fullers and knew the Fuller children. They played with his children. He had stopped his car on the other side of Adams one block before Hardee’s for James, Jimmy and a girl on a bicycle to cross the northbound lane just prior to the accident. If he not stopped his vehicle, he would have hit the children. He saw the girl on her bike cross first, then Jimmy crossed the southbound lanes, followed by James. James was running when he made contact with Gould’s car. James’s “foot went all the way through the fender wheel, the one foot did, and the other one was underneath the car.” The impact “just slammed the poor guy.” James’s only contact with Gould’s vehicle was with the tire. He did not see that Gould’s turn signal was on. Gonzalez could not estimate Gould’s speed but he

believed she was driving too fast. In his opinion, the accident should not have happened. He believed that Gould could have stopped unless she was not paying attention.

¶ 11 Eyewitness Robert Wilson was also deposed. He stated that he witnessed the accident while in his vehicle at a stop sign on a cross street. He saw the two boys and a girl at the side of the road, noticed James move his head back and forth, and then run across the street. The children did not stop in the middle of the road. He observed James, “in [his] opinion, intentionally run across the street in front of that car.” Wilson stated that “to me, it seemed like [James] was waiting for a special vehicle to come so he could run in front of it.” James ran into the side of Gould’s car and was “hooked” under it and dragged 50 to 60 feet. James tried to run after he collided with Gould’s car but Wilson told him he was in no condition to run. He did not see Gould slow down but did not believe she saw James until the impact when he heard Gould’s tires squeal. He estimated her speed at 30 to 40 mph. He overheard either Jimmy or his friend tell James after the accident, “I told you not to do that.” He heard from neighborhood residents that James “had been disciplined several times for doing the same thing.” Wilson’s daughter, who lived in the neighborhood, told him that James was “playing chicken” with traffic and that he had done so before.

¶ 12 Officer David Slater of the Peoria police department testified at his deposition that he responded to the scene and investigated the incident. James was already in the ambulance when he arrived and he was unable to speak to him. He initially spoke to Gould who told him that two other boys with James had left the scene. Jimmy returned while he was still investigating. He examined Gould’s car and observed that the point of impact was above the driver’s side front wheel well. Both Gould and Jimmy told him that James darted out and hit the side of Gould’s car. Gould told him she was going 30 mph at the time of the collision. James was not crossing the street at a crosswalk or

an intersection. In his report, he indicated that Gould was not at fault but that James failed to yield the right of way pursuant to section 11-1003 of the Illinois Vehicle Code (625 ILCS 5/11-1003 (West 2005)).

¶ 13 The trial court granted summary judgment in favor of Gould on the allegations in Fuller's complaint, including that Gould failed to brake to avoid striking James, to decrease speed, to keep her vehicle under control, to use her horn to warn James, and to exercise proper precaution. The trial court also granted James leave to file an amended complaint. He filed an amended complaint setting forth substantially the same allegations and adding a claim that Gould was negligent for failing to turn off her turn signal. The trial court thereafter granted Gould's motion to strike the new allegation regarding her turn signal, finding that the allegation was legally insufficient.

¶ 14 Gould filed a renewed motion for summary judgment as to James's amended complaint, again arguing that the allegations were the same or substantially similar to those in James's first complaint on which the trial court granted summary judgment in her favor. In response, James requested and was granted leave to file a second amended complaint in which he alleged that Gould:

“a. Drove her automobile at a speed that was greater than reasonable and proper, having regard for the traffic conditions and the use of the highway so as to avoid striking the Plaintiff in violation of Section 5/11-601 of the Illinois Vehicle Code;

b. Failed to keep a proper lookout ahead of her automobile, so as to be able to stop it before striking Plaintiff;

c. Failed to change the course of the direction of her automobile so as to avoid striking the Plaintiff;

d. Failed to sufficient [*sic*] decrease the speed of her automobile once she observed the Plaintiff standing in the middle of N.E. Adams Street so as to either allow him to cross or to avoid striking Plaintiff;

e. Failed to exercise the proper precaution upon first observing Plaintiff at the side of N.E. Adams Street and/or then again when she observed him in the middle of N.E. Adams Street;

f. Failed to give warning to the Plaintiff by the sounding of her horn[.]”

¶ 15 Gould filed affirmative defenses, including that James was negligent and his negligence cause or contributed to his injuries. She asserted as James’s negligent acts that he:

“(a) Failed to yield the right-of-way to all vehicles upon the roadway when crossing a roadway at a point other than within a crosswalk at an intersection, in violation of 625 ILCS 5/11-1003;

(b) Stepped away from the curb or other place of safety or otherwise walked or ran into the path of a moving vehicle which was so close as to constitute an immediate hazard to himself, in violation of 625 ILCS 5/11-1002;

© Improperly walked or ran on a roadway when a sidewalk was available, in violation of 625 ILCS 5/11-1007;

(d) Failed to keep a safe and proper lookout for vehicles upon the roadway; and

(e) Stepped into the travel lane of a roadway with moving traffic, before determining if this action could be performed safely.”

¶ 16 Gould filed a renewed motion for summary judgment on the second amended complaint, arguing that the allegations were identical to those raised in James’s original complaint for which the trial court granted her summary judgment. In response, James acknowledged that the same allegations were set forth in his second amended complaint but submitted that he failed earlier to present applicable case and statutory law providing that a driver owes a duty to a pedestrian. See *Wallace v. Weinrich*, 87 Ill App 3d 868 (1980); 625 ILCS 5/11-1003.1 (West 2005) (“drivers to exercise due care”). Following a hearing, the trial court granted summary judgment in favor of Gould. The trial court concluded that with the facts presented, there was not a disputed issue material to the case that would allow the jury to find in James’s favor, noting “[i]t would be the purest of speculation.” James appealed.

¶ 17

ANALYSIS

¶ 18 The issue on appeal is whether the trial court erred when it granted summary judgment in favor of Gould. Fuller argues that the trial court’s grant of summary judgment in favor of Gould was in error. He contends that genuine issues of material fact concerning whether Gould was traveling too fast and whether her attention was diverted at the time of the accident preclude summary judgment. He argues that discrepancies in the deposition testimony of the parties and witnesses raise genuine issues of material fact to be resolved by the jury. We agree.

¶ 19 Summary judgment is proper where the pleadings, affidavits, depositions, admissions and exhibits on file, viewed in a light most favorable to the nonmovant, establish that there is no issue of material fact and that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(

c) (West 2006); *Abrams v. City of Chicago*, 211 Ill. 2d 251, 257 (2004). Summary judgment is appropriate only where the right of the moving party is clear and free from doubt. *Mann v. Producer's Chemical Co.*, 356 Ill. App. 3d 967, 971-72 (2005) (quoting *Kennedy v. Joseph T. Ryerson & Sons, Inc.*, 182 Ill. App. 3d 914, 918 (1989)). Factual disputes may not be determined as a matter of law. *Mann*, 356 Ill. App. 3d at 972. Where there are disputes as to a material fact or where reasonable persons could draw divergent inferences from undisputed facts, summary judgment should not be granted. *Mann*, 356 Ill. App. 3d at 972. This court reviews a trial court's grant of summary judgment *de novo*. *Abrams*, 211 Ill. 2d at 258.

¶ 20 To survive a summary judgment motion in a negligence action, the plaintiff must present some factual basis in support of each element of the cause of action. *Gyllin v. College Craft Enterprises, Ltd.*, 260 Ill. App. 3d 707, 710-11 (1994). To establish negligence, a plaintiff must prove facts that show the existence of a duty, breach of the duty, and an injury proximately caused by the breach. *Gyllin*, 260 Ill. App. 3d at 710. A plaintiff is not entitled to recover based on the mere happening of an accident. *Payne v. Mroz*, 259 Ill. App. 3d 399, 403 (1994). To survive a summary judgment motion, the plaintiff must offer evidence of the defendant's negligence and that the negligence proximately caused his injury. *Payne*, 259 Ill. App. 3d at 403. The existence of proximate cause cannot be established by speculation, surmise or conjecture. *Gyllin*, 260 Ill. App. 3d at 711.

¶ 21 The evidence offered by James establishes that genuine issues of material fact exist as to whether Gould proximately caused his injury. He alleges in his complaint that Gould was negligent in that she failed to use reasonable speed, keep a proper lookout, and change directions in order to avoid hitting him, and that she failed to use her car's horn to warn him. As set forth in the pleadings and depositions, there is conflicting evidence as to whether Gould was speeding at the time of the

accident. She estimated that she was traveling at 20 to 25 miles per hour at the time of impact. James said that she was traveling between 35 and 45 miles per hour. Eyewitness Wilson estimated her speed to be 30 to 40 mph. The responding officer testified Gould said she was moving at a speed of 30 miles per hour. Eyewitness Gonzalez opined she was going too fast but stated he could not estimate her speed.

¶ 22 Also in dispute is whether Gould maintained a lookout. She stated that she was aware of the location of the children, saw them stop in the middle of the road, and anticipated that they were waiting for her to drive by before they continued across the street. Gould said she kept her foot off the accelerator and was coasting because the children were in the area. In her view, she would have been able to stop if the children had continued proceeding across the street rather than stopping in the middle. Gonzalez believed that the accident would not have occurred if Gould had been paying attention. However, in Wilson's view, James intentionally ran into Gould's car. Although it is undisputed that James darted or ran into the southbound lanes and struck the side of Gould's vehicle, Gonzalez testified she should have been able to avoid the impact while Wilson believed she could not. Gould stated that she was nearly at a stop just prior to impact and immediately braked with both feet when she saw a flash, which was James. James and Jimmy both indicated that James attempted to avoid the impact. Based on the differing accounts, we cannot conclude that the facts are not in conflict as to Gould's level of attention to the children.

¶ 23 Similarly, while James's attorney conceded at the summary judgment hearing that James, as well as Jimmy, admitted that they saw Gould's car prior to the accident, we cannot state with certainty that there was no reason for her to beep her horn to warn them of her presence. 625 ILCS 5/11-1003.1 (West 2006) (driver shall exercise due care to avoid colliding with pedestrian and "shall

give warning by sounding the horn when necessary and shall exercise proper precaution upon observing any child”). Both James and Jimmy testified Gould’s turn indicator was on while she and Gonzalez testified it was not. On these facts, it is not clear that the accident would have occurred if she had sounded her horn and warned James that she was proceeding forward and not turning into Hardee’s.

¶ 24 These inconsistencies in the accounts of the accident preclude summary judgment. We cannot state with certainty that the evidence failed to establish that James’s injury was not proximately caused by Gould’s negligence. We acknowledge that in her affirmative defenses, Gould submits that the evidence indicates that James was negligent in failing to cross the street at a crosswalk or intersection and by failing to yield the right of way to her vehicle. 625 ILCS 5/11-1003(a) (West 2006) (pedestrians crossing other than within crosswalk or at an intersection shall yield the right-of-way to all vehicles upon the roadway). The accounts of James’s conduct, the fact that he and Jimmy had both been previously involved in collisions with cars, as well Wilson’s testimony that James acted intentionally playing chicken, add support to Gould’s defenses. However, in light of the factual disputes, we believe that the issues must be determined by a fact finder. We disagree with the trial court’s assessment that any verdict in favor of James would be based on pure speculation. Accordingly, we find that trial court erred when it granted summary judgment in Gould’s favor.

¶ 25 For the foregoing reasons, the judgment of the circuit court of Peoria County is reversed and the cause remanded.

¶ 26 Reversed and remanded.