

No. 1-13-0257

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JUAN SANDATE-HERNANDEZ,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 11 L 9915
)	
JOSEPH DEGRANGE, as Special Representative)	
of REGINA DEGRANGE, Deceased,)	Honorable
)	James E. Snyder,
Defendant-Appellee.)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Hyman and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 **Held:** Circuit court's judgment granting defendant summary judgment affirmed over plaintiff's contention that the police report at issue should have been admitted under the past recollection recorded exception to the hearsay rule.

¶ 2 Plaintiff Juan Sandate-Hernandez appeals from an order of the trial court granting summary judgment to defendant, Joseph DeGrange (DeGrange), as special representative of Regina DeGrange (decedent), in his negligence action for injuries and property damage sustained in a motor vehicle accident. On appeal, Hernandez claims that the trial court erred in granting summary judgment where a police report regarding the incident should have been admitted as a

past recollection recorded because it was more likely than not that the report contained an admission by the decedent, creating a question of fact about her negligence. We affirm.

¶ 3 This case arises from a two-vehicle automobile accident involving Hernandez and the decedent in Berwyn, Illinois on November 10, 2009. Hernandez was traveling northbound on Oak Park Avenue and decedent was heading eastbound on 21st Street. Traffic heading east- or westbound on 21st Street is controlled by stop signs. There are no traffic controls at that intersection for traffic on Oak Park Avenue.

¶ 4 A police report, prepared by Officer Casey Stefano, indicated that decedent failed to wait until the intersection was clear to cross, and that she had a stop sign whereas Hernandez did not. Decedent died on February 26, 2010, prior to the filing of Hernandez' lawsuit, leaving Hernandez the only surviving witness to the accident.

¶ 5 Hernandez filed a complaint in negligence against decedent seeking in excess of \$50,000 for personal injuries and damage to his vehicle. He specifically alleged that decedent failed to stop at a stop sign, drove her vehicle at an excessive speed, and failed to keep her vehicle under control. As a result, Hernandez claimed decedent's vehicle collided with his vehicle, causing him serious injuries and property damage. Hernandez subsequently filed an amended complaint, acknowledging that DeGrange had been appointed to represent decedent's estate, and demanding judgment in the same amount against the estate.

¶ 6 On March 7, 2012, DeGrange filed an answer to Hernandez' complaint denying any negligence on decedent's part. DeGrange also raised affirmative defenses. He specifically alleged that Hernandez caused or contributed to the accident by carelessly and negligently failing to properly look out for his own safety and control his vehicle. DeGrange asserted that the contributory fault of Hernandez exceeded 50% of the total proximate cause of his injuries or damages and, thus, Hernandez should be barred from recovering damages. DeGrange requested

that Hernandez' recovery in this cause be barred or, in the alternative, that any damages awarded be reduced by that percentage of fault attributable Hernandez. Hernandez denied these affirmative defenses in his reply.

¶ 7 In a deposition, Officer Stefano testified he did not observe the accident in question, he arrived on the scene after the accident occurred, and could not recall if he, or another officer, spoke with the drivers. Stefano acknowledged that he wrote the police report for the accident, and it stated that Unit 1 (decedent) failed to wait until it was clear to cross Oak Park Avenue, Unit 1 had a stop sign, and Unit 2 (Hernandez) did not have a stop sign. However, Stefano was not sure whether that information was based on conversations with the drivers, if it was obtained from another officer, or if it was based on his observation of the intersection. Stefano also testified that he had not been trained in accident reconstruction.

¶ 8 Although it is not included in the record, it is clear that DeGrange filed a motion for summary judgment, alleging that the Dead Man's Act barred Hernandez from testifying to matters that occurred in the decedent's presence, and, thus, Hernandez would be unable to present any testimony at trial regarding the facts of the accident, or to meet his burden to show that decedent was negligent.

¶ 9 In his response, Hernandez maintained that the Dead Man's Act did not bar him from testifying about his actions leading to the collision, and that because it was uncontroverted that there was a stop sign governing the direction decedent was traveling, there was a presumption that decedent failed to yield the right of way. Hernandez also indicated that the police report showed that decedent failed to yield the right of way to his vehicle, and that such report was admissible as a past recollection recorded. Attached to the response was the police report and Officer Stefano's deposition testimony.

¶ 10 DeGrange replied that a presumption of negligence does not apply when the Dead Man's Act is applicable. He further contended that the police report must be stricken because Hernandez could not lay a proper foundation that would allow Stefano to testify regarding what was said at the scene by either party.

¶ 11 On December 10, 2012, the trial court entered a written order granting DeGrange's motion for summary judgment. Hernandez challenges that ruling on appeal, contending that the police report should have been admitted as a past recollection recorded because it contained an admission by decedent that she failed to yield the right of way.

¶ 12 We initially observe that Hernandez has failed to comply with Supreme Court Rule 341(h) which governs appellate briefs. Rule 341(h)(7) provides, in pertinent part, that the appellant's brief shall contain an argument section with citation to relevant authorities. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). Hernandez' seven-page brief fails to include any citations to authority in his argument section. Failure to comply with the supreme court rules governing appellate review may be cause for dismissal. *Roberts v. Dow Chemical Co.*, 244 Ill. App. 3d 253, 256 (1993). However, we decline to punish Hernandez for the failure of his attorney to cite to legal authority by dismissing his appeal. We thus turn to the merits of his claim that the trial court erred in granting DeGrange's motion for summary judgment.

¶ 13 Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (West 2010). The trial court may grant summary judgment after considering the pleadings, depositions, admissions and affidavits on file in the case and construing that evidence in favor of the non-moving party. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). We review the circuit court's grant of summary judgment *de novo*. *Hall v. Henn*, 208 Ill. 2d 325, 328 (2003).

¶ 14 To recover damages based on negligence, plaintiff must allege and prove that defendant owed a duty to plaintiff, that defendant breached that duty, and that the breach was a proximate cause of plaintiff's injuries. *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 256 (1999).

¶ 15 Although written police reports are generally inadmissible in Illinois because they contain conclusions or are hearsay, they have been admitted into evidence, provided a proper foundation has been laid, as evidence of past recollection recorded. *Kociscak v. Kelly*, 2011 IL App (1st) 102811, ¶25.

¶ 16 Evidence admitted as past recollection recorded must satisfy four prerequisites: "(1) the witness had firsthand knowledge of the recorded event; (2) the written statement was made at or near the time of the event and while the witness had a clear and accurate memory of it, (3) the witness lacks present recollection of the event; and (4) the witness can vouch for the accuracy of the written statement." *Kociscak*, at ¶26, quoting *Roeseke v. Pryor*, 152 Ill. App. 3d 771, 779-80 (1987).

¶ 17 This court's decision in *Kociscak* is instructive. In that case, Officers Zando and Cholewinski responded to the scene of an automobile accident involving Kociscak and Bowen and compiled a police report. Zando, the only officer who was deposed, could not recall speaking to either party, nor did he put any statements made by the parties into his report. Although the report was in Zando's handwriting, he could not recall the source of the information. Moreover, Zando indicated that Cholewinski played a large role in helping him complete his report and investigation. *Kociscak*, at ¶¶11-12.

¶ 18 Kociscak filed a complaint against Bowen, alleging that Bowen negligently operated her vehicle causing an automobile collision. Bowen later passed away from unrelated health problems. The representative of Bowen's estate (Kelly), relying on the Dead Man's Act, filed a

motion for summary judgment, asserting that Kociscak should be barred from testifying because Bowen and Kociscak were the only witnesses to the accident. Kociscak contended Bowen had admitted fault to the officers on the scene, as shown by the police report and Zando's deposition testimony. We affirmed the trial court's summary judgment in favor of Kelly, finding that Kociscak could not prove that Zando's testimony was based on the officer's firsthand knowledge of the accident, and that there was a high probability that at least some of the information was collected by Cholewinski. *Kociscak*, at ¶29. We further found that a proper foundation was not laid for Zando's deposition testimony because he never vouched for the accuracy of his report, a prerequisite for having evidence admitted as past recollection recorded. *Id.* at ¶30.

¶ 19 As in *Kociscak*, Stefano testified regarding events outside his personal knowledge. He did not observe the accident, and could not recall if he, or another officer, spoke with the drivers. Stefano acknowledged that he wrote the police report for the accident, but was unsure whether that information was based on conversations with the drivers, information obtained from another officer, or if it was based on his observation of the intersection. In addition, as in *Kociscak*, a proper foundation was not laid for Stefano's testimony because he never vouched for the truth and accuracy of the report. Moreover, it is clear that under the circumstances he would have been unable to do so. Therefore, the trial court did not err in granting DeGrange's motion for summary judgment where Stefano's testimony and police report could not be admitted as a past recollection recorded. See *Roeseke*, 152 Ill. App. 3d at 780 (barring an officer from testifying about several portions of a police report that were outside his personal knowledge).

¶ 20 We reject Hernandez' characterization of the police report as containing an admission by decedent. When asked, "do you recall speaking with either of the persons who are involved in this collision," Stefano simply responded "[n]o." Moreover, when Stefano was asked, "[i]t's possible then based on what you told me earlier that you did not speak to either one of these

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people," he responded, "[y]es." Instead of admissions, all the police report contains is a narrative that may have been gathered by either Stefano, another police officer, or both. To the extent that Hernandez maintains that the police report was based on an admission made to a responding officer, such an argument is mere speculation and Hernandez cannot establish negligence on the part of decedent based on speculation. See *Smith v. Tri-R Vending*, 249 Ill. App. 3d 654, 657 (1993) (stating that liability must be premised on evidence, not on conjecture or speculation).

¶ 21 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 22 Affirmed.