FIRST DIVISION
October 24, 2016

No. 1-15-2497
2016 IL App (1st) 152497-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BRIAN RODRIGUEZ, Plaintiff-Appellant, v. JESUS SANTIAGO VALIOS, PATRICIA VALIOS, JESUS LOPEZ, JUAN ALVAREZ and PACCAR FINANCIAL CORPORATION, a Foreign Corporation, individually and d/b/a PACCAR LEASING COMPANY and METAL MANAGEMENT, INC., a Foreign Corporation, Defendants, (Juan Alvarez and Metal Management, Inc., a Foreign Corporation, Defendants-Appellees).	)	Appeal from the Circuit Court of Cook County. No. 12 L 12258 Honorable Janet Brosnahan, Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Harris and Simon concurred in the judgment.

ORDER

¶ 1 *Held:* Summary judgment was proper where there was no issue of material fact as to defendants' breach of duty or whether defendants' actions proximately caused plaintiff's injuries; affirmed.

¶ 2 Plaintiff, Brian Rodriguez, appeals an order of the circuit court that granted summary judgment to defendants, Metal Management, Inc., and Juan Alvarez, on plaintiff's complaint, which had alleged negligence relating to a collision between a car in which plaintiff was a passenger and a truck driven by Alvarez. On appeal, plaintiff contends that: (1) the court erroneously engaged in credibility determinations and weighed the evidence; (2) there were genuine issues of material fact with regard to breach of duty and proximate cause; (3) the court erroneously applied the unavoidable collision doctrine; and (4) the court erroneously denied plaintiff's motion to reconsider. We affirm.

¶ 3 On October 29, 2012, plaintiff filed his complaint, alleging that on October 29, 2010, Alvarez was driving a truck that was leased by Metal Management, Inc. According to plaintiff, Alvarez exited I-55 at Damen Avenue and turned left, whereupon he struck a car in which plaintiff was a passenger. Plaintiff asserted that defendants failed to keep a proper lookout, failed to keep their vehicle under sufficient and proper control, and failed to decrease their speed to avoid colliding with another vehicle, among other acts and omissions. Plaintiff further stated that as a direct and proximate result of defendants' acts and omissions, plaintiff was thrown from his vehicle and greatly injured.

¶ 4 Defendants filed a motion for summary judgment on January 20, 2015, and summarized the collision as follows. The vehicle in which plaintiff was a passenger, a Honda CR-V, was involved in a 70-mile-per-hour chase with an unidentified Jeep. The Jeep rammed the CR-V, causing the CR-V to jump over a median and spin into oncoming traffic, where it struck a Suburban and Alvarez's truck. Defendants asserted that the entire sequence of events lasted only a few seconds and left the driver of the Suburban and Alvarez with insufficient time to react or take evasive action. Defendants additionally stated that Alvarez's speed was 10 miles per hour

and the posted speed limit was 30 miles per hour. Overall, defendants contended that plaintiff had not produced any evidence to indicate that defendants breached a duty owed to plaintiff. Defendants also asserted that the accident was unavoidable due to the close proximity of the vehicles involved and the speed at which the CR-V approached Alvarez's truck.

¶ 5 Attached to defendants' motion was an overhead view of the area of the collision. The view indicates that Damen Avenue is elevated above I-55 and there are two northbound and two southbound lanes that are separated by a median. Additionally, the roadway is guarded by barriers on the northbound and southbound sides.

¶ 6 The record contains transcripts of several depositions. Alvarez testified at his deposition that he was a truck driver for Sims Metal Management and was operating a 53-foot tractor trailer on October 29. Just before the collision, Alvarez exited I-55 north at Damen and waited at a red light at the top of an exit ramp in the right lane. Alvarez stated that no one was in front of him and he did not remember if another vehicle was in the lane next to him. While at the light, Alvarez looked straight up at the traffic light, but stated that if he had looked to his left, he could see northbound or southbound traffic on Damen. When the light turned green, he looked to the left to see traffic coming from Damen and completed a left-hand turn while staying in the right lane. The lane was clear and after he had traveled about five feet on Damen, a CR-V hit his tractor. Alvarez rated the impact as heavy. Alvarez stated that he did not see a vehicle before the collision, the collision occurred in a split second, and there was "no time at all" to see the CR-V. Alvarez estimated that at the time of impact, his speed was perhaps 10 miles per hour and he recalled that the CR-V moved into his lane at an angle. Alvarez stated that he did not honk his horn or try to brake before the collision. After impact, Alvarez brought his truck to a stop within about five feet. Alvarez got out of his truck and saw one person on the ground and another

standing up. Alvarez observed that the front end of the tractor had made contact with the left side of the CR-V. Additionally, Alvarez observed skid marks on the median. Alvarez also noted that a Suburban had been involved in the collision, and stated that the Suburban had "just a little damage" on the rear driver's side. After the collision, the Suburban was in front of the truck and facing north.

¶ 7 The driver of the Suburban, Jose Jesus Lopez, testified at his deposition that just before the collision, he had exited I-55 and planned to turn north on Damen. He waited in the right lane at a stoplight behind a truck. When the light changed, he moved into the left lane to pass the truck and completed his turn. Lopez stated that he drove about 10 feet past the truck when the collision with the CR-V occurred, and at that time, the truck was to his right. Lopez further stated that when he first saw the CR-V, it was five or six feet away in the southbound lanes. According to Lopez, the CR-V came very fast and jumped the median before striking Lopez's Suburban. Lopez stated that he went "a little bit" into the right lane to avoid the CR-V. Lopez further stated that the CR-V hit his Suburban between the tire and rear bumper and then hit the truck. Lopez agreed that the CR-V "grazed" his Suburban.

¶ 8 The driver of the CR-V, Jesus Valios, testified at his deposition that on the afternoon of October 29, he was driving with another friend and encountered plaintiff, who had been walking around. Plaintiff entered the CR-V and the three friends drove on. At the intersection of Blue Island and Damen, occupants of a Jeep Cherokee started hitting the CR-V and a fight broke out. At some point, Valios, plaintiff, and the third friend drove away and went southbound on Damen toward I-55. Valios stated that the Jeep followed the CR-V, and that he exceeded the 45-mile-per-hour speed limit because he was trying to get away. Before Valios reached the intersection with I-55, the Jeep began swerving and hitting the CR-V. Valios lost control and the CR-V spun

around repeatedly and crossed the median. Valios blacked out, but stated that a semi tractor trailer hit the CR-V. Valios also stated that when the CR-V was first struck by the Jeep, the CR-V was going 70 or 80 miles per hour.

¶ 9 Amanda Albright, a witness to the collision, testified at her deposition that she had been facing south and waiting at a light to enter I-55 when she heard a noise that sounded like something being hit. Albright looked up from her phone and saw the CR-V spinning from the southbound lanes into the median area, and then saw it was struck by a large 18-wheeler truck that was heading north on Damen. Albright stated that she ducked at the point of impact, and when she looked up, the CR-V was lined up with her vehicle. Albright also saw two people on the roadway. According to Albright, two or three seconds elapsed from when she first looked up from her phone to the time she believed the collision would take place.

¶ 10 Officer Scott Ahern, who had been dispatched to the scene of the collision, testified at his deposition that he determined that a Jeep rear-ended the CR-V, which caused it to lose control and strike the Suburban and Alvarez's truck in the northbound lanes of traffic. Officer Ahern further stated that the Jeep fled the scene.

¶ 11 In his response to defendants' motion for summary judgment, plaintiff contended that a genuine question of material fact existed regarding defendants' actions and responsibilities. Plaintiff asserted in part that a motorist has a duty to maintain a proper lookout, and that Alvarez testified that he looked, but did not see the CR-V. Plaintiff further contended that the collision was avoidable, and noted that Lopez had moved to the right to avoid impact and had been traveling faster than Alvarez. Plaintiff further asserted that Alvarez had a better vantage point than Lopez because he was higher up in the cab of his truck and had more time to react to the oncoming CR-V, and yet never saw a vehicle that was right in front of him before impact.

Plaintiff also stated that Alvarez could have moved into the left lane to avoid the CR-V because there were no cars to the left of him.

¶ 12 On April 7, 2015, the court entered an order granting summary judgment to defendants and against plaintiff and dismissing the case. The record does not contain a transcript of this proceeding or a written explanation of the court's reasoning.

¶ 13 Subsequently, on May 7, 2015, plaintiff filed a motion to reconsider, contending that the court erred in its interpretation of existing law and relevant facts. Plaintiff asserted that the applicability of the unavoidable collision doctrine had been diminished after *Powell v. Dean Foods Co.*, 2013 IL App (1st) 082513-B. Plaintiff also stated that the doctrine had been held not to apply when vehicles with less time and distance to either observe or react to a vehicle's sudden appearance in their right-of-way were able to take effective evasive measures. According to plaintiff, Lopez's shift to the right lane was an effective evasive measure. Plaintiff further stated that there was a question as to Alvarez's actions because he stated that he did not see the CR-V until a split-second before the collision, but two other witnesses were able to see the CR-V for at least two to three seconds. Plaintiff also asserted that he had brought forth additional authority and evidence in the form of photos of the subject vehicles.

¶ 14 In response, defendants contended that plaintiff did not present new evidence or demonstrate a change in Illinois law or how the court misapplied controlling Illinois law. Defendants stated that even if Alvarez had time to react, he could not have taken evasive action because a cement wall was to his right and any maneuver to his left would have brought him into contact with the CR-V.

¶ 15 A hearing was held on plaintiff's motion to reconsider on August 4, 2015. At that hearing, plaintiff's counsel conceded that the photos had been available during the previous hearing on

summary judgment, but were not submitted. The court stated that its previous ruling had been based on a failure to show that Alvarez breached a duty and a lack of proximate cause. In denying plaintiff's motion to reconsider, the court stated that while there were differences in how the parties reacted, there were no differences in the versions of the events presented. The court found that Alvarez could not have avoided contact with the CR-V, did not breach any duty, and did not proximately cause plaintiff's injuries. Plaintiff filed a notice of appeal on September 2, 2015.

¶ 16 On appeal, plaintiff challenges the court's summary judgment ruling on several grounds. Summary judgment is warranted if the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012). In determining whether there exists a genuine issue as to any material fact, a court construes the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). "Summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt." *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). The purpose of summary judgment is not to try a question of fact, but to determine whether one exists. *Libolt v. Wiener Circle, Inc.*, 2016 IL App (1st) 150118, ¶ 24. A triable issue that precludes summary judgment exists where the material facts are disputed or where reasonable people might draw different inferences from the undisputed material facts. *Adams*, 211 Ill. 2d at 43. Further, summary judgment for the defendant is proper if the plaintiff fails to establish any element of the cause of action. *Libolt*, 2016 IL App (1st) 150118, ¶ 25. We review summary judgment rulings *de novo*. *Outboard Marine Corp*., 154 Ill. 2d at 102.

¶ 17 We first address plaintiff's contention that the circuit court erroneously engaged in credibility determinations and weighed the evidence in concluding that there were no distinctions among the witnesses' versions of the events. Plaintiff correctly states that the trial court cannot make credibility determinations or weigh the evidence at the summary judgment stage. *Gulino v. Economy Fire and Casualty Co.*, 2012 IL App (1st) 102429, ¶ 25. However, plaintiff's contention does not warrant reversal. The record does not contain a transcript of the original summary judgment hearing and the circuit court apparently did not explain its ruling in a written order. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) (an appellant has the burden to present a sufficiently complete record of the proceedings to support a claim of error). As a result, we cannot determine whether the court engaged in credibility determinations and weighed evidence at that proceeding. However, even if it did at either proceeding, that alone would not be a basis for reversal. As stated above, our review is *de novo*, "and thus we are examining the depositions and pleadings anew to determine whether a material question of fact exists." *Coole v. Central Area Recycling*, 384 Ill. App. 3d 390, 396 (2008). Further, we may affirm the court's grant of summary judgment on any basis in the record. *Id.* at 396-97. For those same reasons, we will not address plaintiff's argument that the court erred in concluding that Alvarez's actions were not the proximate cause of plaintiff's injuries because there were two impacts to the CR-V. As noted above, the court's reasons for granting summary judgment are not in the record, and so we have no way to verify whether that was actually the basis of the court's ruling. Further, as our review is *de novo*, we do not need to defer to the circuit court's reasoning and our review is completely independent of the circuit court's decision. See *Nationwide Advantage Mortgage Co. v. Ortiz*, 2012 IL App (1st) 112755, ¶ 20.

¶ 18 We next address plaintiff's contentions that Alvarez breached a duty to plaintiff and that Alvarez's actions proximately caused plaintiff's injuries. To sustain a cause of action for negligence, a plaintiff must establish the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury to the plaintiff that was proximately caused by the breach. *Yates v. Shackelford*, 336 Ill. App. 3d 796, 802 (2002). Generally, the question of whether a driver is negligent is for the jury or other fact finder to decide, but there must be a question for the jury to decide. *Rettig v. Heiser*, 2013 IL App (4th) 120985, ¶ 33.

¶ 19 A driver has a duty to maintain a proper lookout for other cars traveling on the road, even when the other car is traveling on the wrong side of the road. *Chevrie v. Gruesen*, 208 Ill. App. 3d 881, 884 (1991). A driver also has a duty to reduce his speed to avoid collisions. *Id*. At the same time, the happening of an accident, by itself, does not raise a presumption that the defendant was negligent. *Williams v. Elkin*, 239 Ill. App. 3d 1094, 1098 (1992). Further, a sudden swerve into a defendant's right-of-way by an approaching vehicle does not give rise to a defendant's negligence. *Id*. Courts do not view a party's acts with hindsight, but under all the circumstances of what a prudent person would have been likely to do under the same circumstances. *Wilmere v. Stibolt*, 152 Ill. App. 3d 642, 647 (1987).

¶ 20 No evidence in the record suggests that Alvarez breached a duty to plaintiff. Plaintiff contends that testimony from numerous witnesses and Alvarez himself indicated that Alvarez was in a position to have observed northbound and southbound traffic on Damen if he had wanted to, but he did not because he chose to look only straight ahead. Plaintiff also asserts that the CR-V was unequivocally in front of him for a significant period of time. In actuality, Alvarez testified that he could have seen the northbound or southbound traffic when he was stopped at the traffic light, but did not testify that he could see the southbound traffic once he completed his

turn, which is the time period at issue. Further, Alvarez testified there was "no time at all" to see the CR-V and that it moved at an angle. Alvarez also stated that he was traveling around 10 miles per hour. Lopez was able to see the CR-V when it was five or six feet away, but he was in the left lane and ahead of Alvarez's truck at that point and he also stated that the CR-V "came very fast." Valios testified that when the CR-V was first hit by the Jeep, the CR-V was traveling 70 or 80 miles per hour. Albright testified that only two or three seconds elapsed from when she heard a noise to when she believed the CR-V hit Alvarez's truck. The record does not show that Alvarez failed to keep a proper lookout for the fast-approaching CR-V that suddenly spun out of control and hit his truck. As a result, there is no evidence that Alvarez breached his duty to plaintiff.

¶ 21 We turn next to proximate cause, an element with two requirements: cause in fact and legal cause. *Yates*, 336 Ill. App. 3d at 803. "Cause in fact exists when there is a reasonable certainty that a defendant's acts caused the injury or damage." (Internal quotation marks omitted.) *Coole*, 384 Ill. App. 3d at 397. To decide this issue, courts address whether the injury would have occurred without the defendant's conduct, and when multiple factors may have combined to cause the injury, courts consider whether the defendant's conduct was a material element and a substantial factor in bringing about the injury. *Id.* In contrast, legal cause is "essentially a question of foreseeability." *Yates*, 336 Ill. App. 3d at 803. The relevant question is whether the injury is of a type that a reasonable person would see as a likely result of his conduct. *Id.*

¶ 22 Of note, an unavoidable collision is without proximate cause, and a driver's acts or omissions in breach of a duty are not material. *Guy v. Steurer*, 239 Ill. App. 3d 304, 310 (1992). Plaintiff challenges the unavoidable collision doctrine in two ways. First, he contends that the doctrine applies only to circumstances that involve a preferential driver at an intersection and a

driver on a secondary road controlled by a traffic device who disregards that traffic device, citing *Guy*, 239 Ill. App. 3d at 309. Second, plaintiff asserts that the doctrine was significantly narrowed by *Powell*, 2013 IL App (1st) 082513-B.

¶ 23 As for plaintiff's first assertion, we disagree that the doctrine only applies in the narrow circumstances he describes. Plaintiff's description is one example of when the unavoidable collision doctrine could apply. Indeed, *Guy* makes the broader statement that an unavoidable collision normally occurs when a driver is confronted with a sudden swerve into his right-of-way by an approaching vehicle, and the driver has insufficient time to react and take evasive action. *Guy*, 239 Ill. App. 3d at 310. Thus, the unavoidable collision doctrine is not limited to scenarios involving traffic devices. As for plaintiff's second assertion, while *Powell* may have narrowed the doctrine, that case did not eliminate it. *Powell* provided that the driver on the preferential road "does not have an absolute right to proceed into the intersection. Rather, the preferential driver 'has a duty to keep a proper lookout, observe due care in approaching and crossing intersections, and drive as a prudent person would to avoid a collision when danger is discovered or, by the exercise of reasonable care, should have been discovered.' " *Powell*, 2013 IL App (1st) 082513-B, ¶ 59 (quoting *Johnson v. May*, 223 Ill. App. 3d 477, 484 (1992)).

¶ 24 This case warrants application of the unavoidable collision doctrine, and is similar to the circumstances presented in *Williams v. Elkin*, 239 Ill. App. 3d 1094 (1992). There, the plaintiff's car moved into the opposite lane of traffic and then collided with the defendant's vehicle. *Williams*, 239 Ill. App. 3d at 1096. A witness to the accident estimated that the plaintiff's car was partially in the opposite lane of traffic for three or four seconds before the crash. *Id*. The court found that the witness testimony failed to point to any evidence of negligence attributable to the defendant, and that the testimony showed that the only cause of the accident was the plaintiff's

"abrupt invasion of the opposite side of the highway." *Id.* at 1099. The court also found there was no act or omission on the defendant's part that could be considered the proximate cause of the collision and the plaintiff's injuries. *Id.* Here, there was also no evidence that any act or omission on Alvarez's part was the proximate cause of the plaintiff's injuries. The testimony indicates that Alvarez was in his lane and driving 10 miles per hour. Further, according to Alvarez, the CR-V appeared "in a split second" and there was "no time at all" to see the CR-V. Albright testified that two or three seconds elapsed from when she first heard a noise to when she believed the collision between the CR-V and the truck occurred. This is a shorter period of time than the three or four seconds at issue in *Williams*. Moreover, it has been held that the reaction time needed to stop a vehicle is at least one second (*Johnson*, 223 Ill. App. 3d at 484), which would have left Alvarez with only one to two seconds to make his 53-foot truck evade the collision.

¶ 25 Plaintiff also relies on *Chevrie*, 208 Ill. App. 3d 881, in which the court did not apply the unavoidable collision doctrine because two drivers with less time and distance to observe the plaintiff's car or react to the plaintiff's sudden appearance in their right-of-way were able to take effective evasive measures. *Chevrie*, 208 Ill. App. 3d at 886. Plaintiff asserts that Lopez was traveling faster than Alvarez and was able to move to the right to avoid an impact with the CR-V. Plaintiff contends that even though Lopez's vehicle was clipped, Lopez took effective evasive action, and thus the unavoidable collision doctrine does not apply.

¶ 26 Plaintiff's argument is unavailing because Lopez and Alvarez were not similarly situated. Lopez was able to move to the right to avoid the CR-V because he was in the left lane. Meanwhile, Alvarez was already in the right lane and to his right was a barrier, below which was I-55. Further, in *Chevrie*, the plaintiff's car crossed four lanes of traffic and a median, and collided with two other cars before the impact with the defendant's car. *Id.* Here, there was far

less opportunity for Alvarez to have observed the CR-V. Even Lopez, who moved his car to the right, stated that when he first saw the CR-V, it was only five or six feet away. Although we construe the facts liberally in favor of the nonmovant when we consider a motion for summary judgment, we do not need to strain to adduce some remote factual possibility that will defeat the motion. *Wilmere*, 152 Ill. App. 3d at 648. To suggest that Alvarez—already in the right lane, in a 53-foot truck, and traveling only 10 miles per hour—could have avoided the CR-V would indeed be a remote factual possibility. The collision was unavoidable and without proximate cause. Because there was no evidence of a breach of duty or proximate cause, the court properly granted summary judgment to defendants.

¶ 27 Lastly, plaintiff contends that the court erred in denying his motion to reconsider. Plaintiff contends that that the court made numerous errors regarding the facts and the application of existing law to those facts that are set forth in his other arguments. Plaintiff further asserts that he offered additional evidence in the form of photographs of the subject vehicles.

¶ 28 We addressed the alleged errors raised by plaintiff previously in this order, but we will clarify the standard of review for plaintiff's motion to consider because it is disputed by the parties. As a general note, the purpose of a motion to reconsider is to alert the court to newly discovered evidence that was unavailable at the time of the hearing, changes in the law, or errors in the court's application of the law. *Belluomini v. Zaryczny*, 2014 IL App (1st) 122664, ¶ 20. Plaintiff correctly argues for *de novo* review of the denial of his motion to reconsider, while defendant incorrectly asserts that we should review the denial for an abuse of discretion. When we review a denial of a motion to reconsider that was based on new matters, such as additional facts or new arguments, we use an abuse of discretion standard. *Muhammad v. Muhammad-Rahmah*, 363 Ill. App. 3d 407, 415 (2006). When we review a denial of a motion to reconsider

based only on the court's application of existing law, our review is *de novo*. *Id*. At the hearing on the motion to reconsider, plaintiff conceded that the photos were available, but not submitted, during the previous summary judgment hearing. Thus, they were not newly discovered evidence. See *Emrikson v. Morfin*, 2012 IL App (1st) 111687, ¶ 30 (newly discovered evidence is evidence that was not available prior to the hearing). As a result, plaintiff's motion to reconsider was based on errors in the court's application of existing law, triggering *de novo* review. Having applied that standard of review and for the reasons set forth elsewhere in this order, the court properly denied the motion to reconsider.

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

¶ 30 Affirmed.