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2017 IL App (3d) 160048-U

Order filed February 6, 2017

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2017

THOMAS DeMAY,)	Appeal from the Circuit Court
)	of the 13th Judicial Circuit,
Plaintiff-Appellant,)	Bureau County, Illinois.
)	
v.)	Appeal No. 3-16-0048
)	Circuit No. 13-L-7
PEGGY A FABER, Special Representative of)	
the Estate of C. Robert Weber, Deceased,)	
)	Honorable Cornelius J. Hollerich,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Carter and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in granting defendant's motion for summary judgment. The Illinois Dead Man's Act barred plaintiff's testimony and no other admissible evidence supported a finding that the decedent had been negligent or caused the collision.

¶ 2 Following a two-vehicle collision between plaintiff, Thomas DeMay, and the now-deceased defendant, C. Robert Weber, plaintiff filed a personal injury complaint with the circuit court of Bureau County. The court appointed the decedent's daughter, Peggy Faber, to defend the cause of action on behalf of her father's estate. Defendant filed a motion for summary

judgment, which the court granted. On appeal, plaintiff argues the trial court incorrectly applied the Illinois Dead Man's Act (Dead Man's Act) (735 ILCS 5/8-401 (West 2010)) to bar his testimony where (1) the decedent was not awake at the time of the collision, and (2) there was evidence that the decedent drove despite having a condition that caused him to fall asleep suddenly during the day. Alternatively, plaintiff claims defendant waived the Dead Man's Act by attaching plaintiff's deposition testimony regarding the collision to her motion for summary judgment. We affirm.

¶ 3

FACTS

¶ 4

On March 8, 2011, plaintiff and the decedent were involved in a head-on automobile collision on U.S. Route 34 in rural Bureau County, Illinois. The decedent, who was 86 years old at the time of the collision, was pronounced dead at the scene. In February 2013, plaintiff filed a negligence and personal injury complaint against the decedent's estate. The court appointed defendant to defend the cause of action on behalf of her father's estate.

¶ 5

Plaintiff's complaint alleged that he was traveling in an easterly direction on U.S. Route 34 at the same time the decedent was traveling westbound. Plaintiff's complaint further alleged that the decedent had (1) crossed over the centerline into plaintiff's lane of travel, (2) failed to maintain a proper lookout, (3) failed to decrease the speed of his vehicle to avoid colliding with plaintiff's vehicle, and (4) operated his vehicle in an impaired condition due to ongoing medical problems, which caused him to fall asleep while driving. In response, defendant stated that she lacked sufficient information to respond to plaintiff's allegations and denied the same.

¶ 6

On August 5, 2015, defendant filed a motion for summary judgment. In the motion, defendant alleged that plaintiff's cause of action could not withstand summary judgment because plaintiff was the only living witness to the collision, and his testimony regarding the collision

was barred by the Dead Man's Act (735 ILCS 5/8-401 (West 2010)). Specifically, defendant asserted that plaintiff would not be able to testify that the decedent's vehicle crossed over the centerline, that the decedent did not have a proper lookout, that the decedent failed to reduce his speed so as to avoid colliding with plaintiff's vehicle, or that the decedent fell asleep at the wheel of his vehicle before the collision occurred.

¶ 7 Defendant's motion further alleged that no expert witness or investigating officer was able to give an opinion as to the point of impact. Illinois State Police accident reconstructionist, Jonathan Kueker, had testified during his deposition that he was unable to attribute liability to either driver. The roadway did not exhibit any tire marks, scratches, or gouges, and the area of impact could not be determined due to the lack of evidence at the scene and the lack of evidence collected from the scene at the time of the crash.

¶ 8 Defendant's motion further alleged there was no physical evidence to raise a genuine issue of material fact as to plaintiff's claim that the decedent fell asleep at the wheel before the accident or that he was impaired. According to the autopsy report, the decedent was not under the influence of alcohol or drugs at the time of the accident, nor did his glucose level reflect that he was in diabetic shock.

¶ 9 In response to defendant's motion for summary judgment, plaintiff alleged that there was a genuine issue of material fact regarding whether the decedent was asleep at the time of the collision. Specifically, plaintiff cited to the coroner's inquest, where the coroner claimed the defendant told her that decedent had medical problems in that he would fall asleep very quickly and had done so once or twice. In addition, the decedent's barber, Lorraine Franklin, attested under oath that the decedent had fallen asleep on several occasions while he waited to get his hair cut. On at least one occasion, and possibly more than that, the decedent had mentioned to

Franklin that his family was irritated and unhappy with him for continuing to drive his vehicle because he would fall asleep in the middle of the day, and had difficulty staying awake.

¶ 10 Plaintiff also claimed that the emergency room physician, who evaluated plaintiff on the day of the accident, had testified during his deposition that the history he had obtained in treating the plaintiff indicated that another vehicle had crossed the centerline.

¶ 11 Plaintiff asserted that, even assuming the Dead Man's Act did apply, he would still be able to testify that he was traveling in his lane of travel without any difficulty, and that there were no mechanical difficulties or other problems with his vehicle that would have caused him to inappropriately leave his lane of travel.

¶ 12 On December 9, 2015, the trial court held a hearing on defendant's motion for summary judgment. In ruling on the motion, the trial judge stated:

“[I]t seems to me that evidence simply that the defendant –
– that the decedent had a – – fell asleep a couple of times or
several times in the barber's chair, or that his daughter was
concerned because he had a tendency to fall asleep during the day,
without any more, it seems to me that just invites the jury to
speculate about whether or not the decedent had fallen asleep.

There really isn't any evidence that at the time of the
collision he was asleep, any admissible evidence that at the time of
the collision he was asleep.”

¶ 13 With respect to defendant's statement about the decedent's tendency to fall asleep during the day, the judge stated:

“I don’t see the statement by her that – – to whatever extent she said he had a tendency to fall asleep, that that’s an admission against interest. I just don’t think it is. I might be wrong about that, but I don’t think it is.

I think the evidence basically invites the jury to speculate about whether the decedent was asleep or not at the time of the collision, and I think you need more than that to raise a genuine issue of material fact.”

¶ 14 Addressing the applicability of the Dead Man’s Act, the court explained:

“I don’t make this decision, as I said, cavalierly. Someone was killed in the accident and someone was seriously injured in the accident. The Dead Man’s Act has been the subject of a certain amount of controversy.

The spirit of the Act has certainly been acknowledged. The decedent and the decedent’s estate shouldn’t be prejudiced because the decedent isn’t here to testify to something that the plaintiff can testify to. I don’t think anyone disputes that.

On the other hand, it does create a situation where perhaps valuable or important evidence is not presented to the trier of fact because the other party – – in this case, the plaintiff – – cannot testify to something that the plaintiff otherwise would have been able to testify to.

If you're interested in the evidence and the presentation of evidence and a just outcome, there is something about that that's a little bit troubling also. There is probably no way to square the circle, but in this instance I think I'm following the law as I understand it. I'm not sure what else I can do but that, and I think the law requires that the motion for summary judgment be granted."

¶ 15 The trial court thereafter entered an order granting defendant's motion for summary judgment.

¶ 16 Plaintiff appeals.

¶ 17 ANALYSIS

¶ 18 On appeal, plaintiff argues that the trial court erred in granting defendant's motion for summary judgment. Specifically, he claims the court was incorrect in its finding that the Dead Man's Act barred his testimony regarding the cause of the collision.

¶ 19 Summary judgment is appropriate if the pleadings, depositions, admissions, affidavits and other relevant matters on file show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010). At this preliminary stage, plaintiff must present "facts sufficient to support the elements of his claim" (*Kuwik v. Starmark Star Marketing & Administration, Inc.*, 232 Ill. App. 3d 8, 12 (1992)), or, at the very least, "some factual basis which would arguably entitle [him] to judgment." *Barber-Colman Co. v. A. & K Midwest Insulation Co.*, 236 Ill. App. 3d 1065, 1071 (1992).

¶ 20 To recover in an 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 proximately caused by

that breach. *Wojdyla v. City of Park Ridge*, 148 Ill. 2d 417, 421 (1992). “[N]o presumption of negligence arises from the mere happening of an accident.” *McInturff v. Chicago Title & Trust Co.*, 102 Ill. App. 2d 39, 51 (1968). On the contrary, “the plaintiff must come forward with evidence of negligence on the part of the defendant and with evidence that defendant’s negligence was the proximate cause of the plaintiff’s injuries.” *Downs v. University of Illinois*, 50 Ill. Ct. Cl. 260, 268 (1997) (citing *Lindenmier v. City of Rockford*, 156 Ill. App. 3d 76, 85 (1987)). In other words, liability must be premised on evidence and not on mere conjecture or speculation. *Id.*; see also *Whitman v. Lopatkiewicz*, 152 Ill. App. 3d 332, 338 (1987).

¶ 21 The Dead Man’s Act addresses the situation in which a party sues a deceased person and provides that an adverse party may not testify on his own behalf to any conversation with the decedent or to any event which took place in the presence of the decedent. *Rerack v. Lally*, 241 Ill. App. 3d 692, 695 (1992). The Dead Man’s Act “is intended to remove the temptation of a survivor to testify to matters that cannot be rebutted because of the death of the only other party to the conversation or witness to the event, but it is not intended to disadvantage the living.” *Balma v. Henry*, 404 Ill. App. 3d 233, 238 (2010). The objective of the Dead Man’s Act is fairness, and its purpose is to bar only such evidence which the decedent could have refuted. *Rerack*, 241 Ill. App. 3d at 695 (citing *Brown v. Arco Petroleum Products Co.*, 195 Ill. App. 3d 563, 569 (1990)); see also 735 ILCS 5/8-401 (West 2010).

¶ 22 On appeal, plaintiff argues the Dead Man’s Act should not apply to bar his testimony because the decedent was asleep at the time of the collision. This is a circular argument that fails on its face. Plaintiff claims because the decedent was asleep, he could not have observed the collision and, therefore, could not have refuted plaintiff’s testimony. Well, he could have refuted plaintiff’s allegation that he was asleep had he lived. Setting aside the fact that a person cannot

truthfully testify as to whether another person is asleep at any given time (*Tennes v. Tennes*, 320 Ill. App. 19, 33 (1943)), the collision in this case took place in the presence of the decedent. The Dead Man’s Act bars any testimony from plaintiff regarding decedent’s state of consciousness at the time of the collision.

¶ 23 In the alternative, plaintiff argues defendant’s use of the Dead Man’s Act to obtain summary judgment was erroneous because there were disputed issues of fact. Specifically, plaintiff claims there were issues concerning whether decedent was awake at the time of the collision and whether decedent continued to drive despite his propensity to suddenly and regularly fall asleep during the day. Again, we disagree.

¶ 24 As the court explained in *Keating v. 68th & Paxton, LLC*, 401 Ill. App. 3d 456, 473 (2010), “a fact cannot be established through circumstantial evidence unless the circumstances are so related to each other that it is the only probable, and not merely possible, conclusion that can be drawn.” When the circumstantial evidence demonstrates that the nonexistence of the fact to be inferred from the circumstantial evidence is just as probable as its existence, then the conclusion that the fact sought to be inferred exists is based on speculation, surmise, and conjecture. *Argueta v. Krivickas*, 2011 IL App (1st) 102166, ¶ 10.

¶ 25 Moreover, allowing the trier of fact to infer that the decedent was asleep on the basis of Franklin’s statement that decedent had occasionally fallen asleep while waiting to get his hair cut and had mentioned that his family was upset that he continued to drive would be wholly inappropriate. See *Simmons v. Aldi-Brenner Co.*, 162 Ill. App. 3d 238, 247 (1987) (testimony of proposed witness that he saw driver passed out in her car on an occasion prior to her driving through store window was too speculative to justify its admission as evidence of prior occurrence of driver's unconsciousness).

¶ 26 Unlike the defendant in *Evans v. Brown*, 399 Ill. App. 3d 238, 251 (2010), which plaintiff relies upon, neither defendant nor the decedent in this case made any admissions or statements to anyone that at the time of the accident that the decedent was asleep. To allow plaintiff to establish this crucial fact solely by statements made in a separate context would be to allow the trier of fact to come to a conclusion based purely on speculation and conjecture. Plaintiff failed to set forth any admissible evidence that the decedent was asleep at the time of the accident. On these facts, the trial court correctly granted defendant’s motion for summary judgment.

¶ 27 **CONCLUSION**

¶ 28 For the foregoing reasons, we affirm the circuit court of Bureau County’s grant of summary judgment in defendant’s favor.

¶ 29 Affirmed.