STATE OF MICHIGAN

COURT OF APPEALS

CARRIE FAHRENBRUCH, Personal Representative of the ESTATE OF SAMUEL GUTHRIE,

Plaintiff-Appellant,

v

THE TAUBMAN COMPANY, LLC,

Defendant/Cross-Plaintiff-Appellee,

and

UNIVERSAL PROTECTION SERVICE, LLC, doing business as ALLIED UNIVERSAL SECURITY,

Defendant/Cross-Defendant-Appellee,

and

SAKS FIFTH AVENUE, LLC, and CAITLYN NIEWIADOMSKI,

Defendants-Appellees.

UNPUBLISHED
September 21, 2023

No. 361598
Oakland Circuit Court
LC No. 2020-182481-NZ

Before: GADOLA, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting summary disposition under MCR 2.116(C)(10) in favor of defendants. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Samuel Guthrie ("decedent") tragically died by suicide three days after being caught shoplifting from the Saks Fifth Avenue store in Great Lakes Crossing shopping mall in Auburn Hills, Michigan. After he was caught, defendant Caitlyn Niewiadomski, defendant Saks Fifth Avenue's loss-prevention agent, detained decedent in the store's loss-prevention office. Plaintiff, decedent's mother, alleged that while Niewiadomski had decedent detained, she convinced him that he was going to prison and would never be able to achieve his goals in life. Plaintiff filed a four-count complaint against defendants, alleging Niewiadomski and the mall's security employees from defendant Allied Universal Security negligently caused decedent's death, and defendant Taubman Company, LLC, Saks Fifth Avenue, and Allied were vicariously liable. The premise of plaintiff's claim was that Niewiadomski's harsh treatment of decedent triggered the onset of a mental illness that eventually caused his death.

Defendants moved for summary disposition under MCR 2.116(C)(10), arguing that they were under no duty to prevent decedent's suicide. Defendants also asserted that they did not cause any injury because suicide is a superseding cause that obviates liability in a negligence claim, the suicide happened days after decedent was detained, and the suicide was not a foreseeable result of a detention that lasted approximately 16 minutes. Defendants argued that, taking the evidence in the light most favorable to plaintiff, the proximate cause of decedent's death was his reaction to the consequences of his wrongful act and not the conduct of defendants. The trial court agreed, and this appeal followed.

II. STANDARDS OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of a plaintiff's claim. *Id*. at 160. When deciding such a motion, a court considers the "affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties" in the light most favorable to the nonmoving party. *Johnson v Vanderkooi*, 502 Mich 751, 761; 918 NW2d 785 (2018). Summary disposition under MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to summary disposition as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Generally, whether a party had a legal duty is a question of law that this Court reviews de novo. *Finazzo v Fire Equip Co*, 323 Mich App 620, 625; 918 NW2d 200 (2018).

III. ANALYSIS

Plaintiff argues that the trial court erred when it granted summary disposition in favor of defendants because there was a genuine issue of material fact whether Niewiadomski's conduct—allegedly telling decedent that, as a result of shoplifting, he was going to prison and would not be successful—caused decedent's suicide. We disagree.

"To establish a prima facie case of negligence, a plaintiff must prove the following elements: (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages." *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011). A duty exists when "the relationship between the actor and the plaintiff

gives rise to any legal obligation on the actor's part to act for the benefit of the subsequently injured person." *Hill v Sears, Roebuck & Co*, 492 Mich 651, 661; 882 NW2d 651 (2012) (quotation marks and citation omitted). A defendant breaches a duty when he or she does not exercise the reasonable care an ordinary person would exercise to avoid injury under the circumstances particular to the case. *Case v Consumers Power Co*, 463 Mich 1, 6-7; 615 NW2d 17 (2000). To establish causation, a plaintiff must show that the injury would not have occurred but for the defendant's actions and that the type of harm caused was foreseeable enough that the defendant can legally be held liable for the injury. *Teal v Prasad*, 283 Mich App 384, 391; 772 NW2d 57 (2009).

Michigan's common law includes the privilege for a retailer or its agent to detain a suspected shoplifter upon reasonable suspicion, consistent with 2 Restatement Torts, 2d, § 120A, p 202. *Bonkowski v Arlan's Dept Store*, 383 Mich 90, 103; 174 NW2d 765 (1970). Restatement, § 120A provides:

> One who reasonably believes that another has tortiously taken a chattel upon his premises, or has failed to make due cash payment for a chattel purchased or services rendered there, is privileged without arresting the other, to detain him on the premises for the time necessary for a reasonable investigation of the facts.

The Legislature has acknowledged the common-law authority for a retailer to detain a suspected shoplifter by enacting MCL 600.2917, which places restrictions on noneconomic damages in intentional tort claims arising from a suspected-shoplifting detention. *Bonkowski*, 383 Mich at 103-104.

A. STANDARD OF CARE

Plaintiff argues that the standard of care defendants owed to decedent was articulated in *MacDonald v PKT, Inc*, 464 Mich 322, 325-326; 628 NW2d 33 (2001), under which a merchant has "a duty to respond reasonably to situations occurring on the premises that pose a risk of imminent and foreseeable harm to identifiable invitees." However, *MacDonald* is not the standard of care applicable in this case. In *MacDonald*, the Michigan Supreme Court considered the scope of the duty a merchant has to protect invitees from the criminal acts of third parties. *Id*. at 338. The Court held that a merchant's duty to its invitees to respond to third-party criminal acts does not require more than reasonably expediting police involvement. *Id*. However, in this case, defendants were not claimed to have failed to protect decedent from the criminal acts of others, and *MacDonald* does not, therefore, set forth the appropriate standard of care applicable here.

Decedent left Saks Fifth Avenue and was then detained by Allied employees and Niewiadomski outside of the store. Afterwards, he was taken back inside the store, where he was interviewed in the Saks Fifth Avenue loss-prevention office by Niewiadomski. By detaining decedent, Niewiadomski created a special relationship with him, which exists between a plaintiff and a defendant when the defendant "voluntarily takes the custody of [the plaintiff] under circumstances such as to deprive the [plaintiff] of his normal opportunities for protection . . . ." 2 Restatement Torts, 2d, § 314A(4), p 118; see also *Hickey v Zezulka*, 439 Mich 408, 438; 487 NW2d 106 (1992), amended 440 Mich 1203 (1992), superseded by statute on other grounds as stated in *Lamp v Reynolds*, 249 Mich App 591, 604; 645 NW2d 311 (2002) (recognizing that Restatement, § 314A applies in negligence actions arising from a plaintiff being held in custody in a law

enforcement facility). A defendant in a special relationship with a plaintiff has the duties "(a) to protect them against unreasonable risk of physical harm, and (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others." Restatement, § 314A(1). When exercising those duties, a defendant must act with ordinary care, *Terrell v LBJ Electronics*, 188 Mich App 717, 720; 470 NW2d 98 (1991), which is "the care that a reasonably careful person would use under the circumstances." *Case*, 463 Mich at 7.

B. DUTY

"As a general rule, a plaintiff may not recover damages in negligence for the intentional suicide of another." *Hickey*, 439 Mich at 447-448 (RILEY, J., concurring in part). There is an exception, however, when a custodial relationship existed between the parties. *Id*. at 438. In such a circumstance, a duty to prevent suicide may arise if the detainee's death was foreseeable. *Johnson v Detroit*, 457 Mich 695, 711; 579 NW2d 695 (1998) (stating that summary disposition in favor of the defendants was proper because "the defendants had no notice that the decedent might attempt suicide, and therefore they cannot be held responsible for failing to prevent the decedent's death."). When a detainee displays a foreseeable risk of suicide, the defendant has a duty to supervise the detainee while he is in the defendant's custody. *Hickey*, 439 Mich at 439. There is also a duty for such individuals to detain that person in an environment free from instrumentalities that could be used to commit suicide. *Johnson*, 457 Mich at 708-709. However, once the detainee has left the custody of the defendant, the plaintiff must demonstrate "a logical sequence of cause and effect" to establish that the "defendants' actions triggered the causal chain leading to [the decedent]'s suicide." *Teal*, 283 Mich App at 394.

In *Tucker v Meijer, Inc*, unpublished per curiam opinion of the Court of Appeals, issued May 5, 2005 (Docket No. 251771),[1] this Court addressed a factually-similar scenario to the case at bar. There, three teenage girls went to Meijer late in the evening, during which time one girl convinced another to steal an item. *Tucker*, unpub op at 2. The girls were caught, detained by store employees, and their parents were called. *Id*. The plaintiff's daughter, who was one of the three girls, committed suicide the next day. *Id*. at 2-3. The plaintiff brought several claims against Meijer including, as relevant here, a claim for wrongful death. *Id*. at 3.

Affirming the trial court's order granting the defendants' motion for summary disposition, we rejected the plaintiff's argument that the defendants were liable for the decedent's death under a theory of negligence. *Id*. at 5-6. Framing the issue as one of duty, the Court remarked that the plaintiff "failed to present any evidence that defendants assumed a duty to protect [the decedent] from committing suicide." *Id*. at 6. The duty did not arise, according to the Court, because "the events leading to the injury or the harm itself must be foreseeable in order to impose such a duty." *Id*. Because the plaintiff failed to present any evidence that the decedent's death was foreseeable, the defendants had no duty, and the trial court did not err when it granted summary disposition in their favor. *Id*.

[1] Unpublished decisions of this Court are not binding but may be considered for their persuasive value. *Eddington v Torrez*, 311 Mich App 198, 203; 874 NW2d 394 (2015).

In this case, decedent's suicide arguably became foreseeable when he stated that he engaged in self-harm, but that statement was made after he was already in police custody and was no longer with Niewiadomski or under defendants' custody or control. Plaintiff argues that defendants were under a duty to take some affirmative step to prevent decedent's death after leaving their custody; however, there is no liability when the risk of suicide is not imminent when the decedent is released from the custody of the defendant. *Teal*, 283 Mich App at 394; see also *Tucker*, unpub op at 4-6. Plaintiff presented no evidence that decedent posed an immediate suicide risk or that his death was otherwise foreseeable when he left the loss-prevention office. Under these circumstances, plaintiff has not shown that defendants had any duty to decedent.

C. CAUSATION

Likewise, plaintiff failed to establish that any of defendants' acts or omissions caused decedent's death. Plaintiff contends she can establish causation and liability in a negligence action arising from a suicide when the defendant's conduct created a mental illness within the decedent that caused an uncontrollable impulse to commit suicide. See *Jamison v Storer Broadcasting Co*, 511 F Supp 1286 (ED Mich, 1981) (stating that "if the negligent wrong causes mental illness which results in an uncontrollable impulse to commit suicide, then the wrongdoer may be held liable for the death").[2] To support this theory of causation,[3] plaintiff primarily relies on her own deposition testimony, in which she testified that decedent was generally a stable person who had no mental health issues before his encounter with Niewiadomski. However, plaintiff's deposition testimony relating that opinion is insufficient to create a genuine issue of material fact because plaintiff's testimony is refuted by other evidence, including from plaintiff, of decedent's history of mental health issues. See *Auto-Owners Ins Co v Campbell-Durocher Group Painting & Gen Contracting, LLC*, 322 Mich App 218, 230; 911 NW2d 493 (2017) (stating that a bald assertion by a party does not necessarily create a genuine dispute of material fact).

Plaintiff also did not come forward with any admissible evidence to establish what Niewiadomski actually said to decedent, if anything,[4] before the audio recording of the interview in the Saks Fifth Avenue loss-prevention office began. Plaintiff argues that the trial court erred when it declined to consider plaintiff's testimony regarding what Niewiadomski said to decedent before the recording began because the court concluded those statements were hearsay. "Opinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy [MCR

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[2] Decisions from lower federal courts are not binding but may be considered for their persuasive value. *Harper Woods Retirees Ass'n v Harper Woods*, 312 Mich App 500, 509-510; 879 NW2d 897 (2015).

[3] We need not decide whether this Court should embrace such a rule of causation because even if *Jamison* were the standard under Michigan law, plaintiff's cause of action fails under it.

[4] Plaintiff claims that there was a four-minute time period between the time when decedent and Niewiadomski entered the office alone and when the audio recording from Allied began. It is during this time period that plaintiff claims Niewiadomski berated decedent and triggered his mental illness. We find no support in the record that there was a time when decedent and Niewiadomski were alone before the audio recording began. But even if plaintiff were correct, she has not come forward with admissible evidence regarding what was said between the two.

2.116(C)(10)]; disputed fact (or the lack of it) must be established by admissible evidence." *SSC Assoc Ltd Partnership v Gen Retirement Sys of the City of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991). Facially conflicting evidence may "be removed from the trier of fact's consideration if it is based on testimony that is essentially impossible or is irreconcilably contradicted by unassailable and objective record evidence." *Jewett v Mesick Consol Sch Dist*, 332 Mich App 462, 476; 957 NW2d 377 (2020). For a factual dispute to be genuine, the dispute must be one over which reasonable jurors could reach different conclusions. *Dextrom v Wexford Co*, 287 Mich App 406, 415-416; 789 NW2d 211 (2010).

Hearsay "is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is not admissible as evidence unless an exception to it applies to the statement. MRE 802. Plaintiff asserts that her testimony that Niewiadomski verbally abused decedent, in general, did not constitute hearsay and could be admitted as evidence without establishing an exception to the rule. This is incorrect. Plaintiff's knowledge regarding what Niewiadomski told decedent was either told to plaintiff by decedent or his girlfriend and was offered to prove the truth of the matter asserted, i.e., that Niewiadomski told decedent he was going to prison. In other words, the statements are hearsay.

Plaintiff specifically identifies two statements made during her own deposition to support her argument that her testimony was admissible. In the first statement, plaintiff described a conversation she had with decedent's girlfriend, in which the girlfriend told plaintiff that decedent said, "[T]hey said I am going to prison no matter what." Plaintiff argues that this statement would be admissible under the state of mind hearsay exception under MRE 803(3):

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

"[T]he scope of MRE 803(3) is very narrow and does not allow the admission of any statements explaining the declarant's state of mind." *Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America v Dorsey*, 273 Mich App 26, 38; 730 NW2d 17 (2006). Further, when the statements "do not reflect the declarant's state of mind, but merely serve to explain a past sequence of events or behavior, the statements are specifically excluded from the exception and not admissible." *Ykimoff v Foote Mem Hosp*, 285 Mich App 80, 107; 776 NW2d 114 (2009).

Plaintiff's statement regarding what Niewiadomski allegedly said to decedent is not admissible as evidence under MRE 803(3) to establish the truth of the matter asserted, which is that Niewiadomski allegedly told decedent that he was going to prison for shoplifting. As an initial matter, plaintiff's testimony constitutes hearsay within hearsay, which occurs when the declarant's statement has been related through more than one person. *Maiden v Rozwood*, 461 Mich 109, 123; 597 NW2d 817 (1999). Hearsay within hearsay is only admissible as evidence when an exception to the rule against hearsay applies to each level. MRE 805. Such is not the case here.

Under MRE 803(3), decedent's girlfriend would nominally be able to offer testimony regarding the effect Niewiadomski's alleged statements had on decedent's mental state, which was that those statements apparently caused him to suffer great distress. However, decedent's statements about what Niewiadomski actually said to him are not admissible under MRE 803(3) to prove the truth of what Niewiadomski said, because decedent's statement would be used to establish "a statement of memory or belief to prove the fact remembered." MRE 803(3); see also *Ykimoff*, 285 Mich App at 107 (holding that statements are inadmissible if they are used to explain a past sequence of events or behavior). But even to the extent decedent's girlfriend could testify about anything under MRE 803(3), such an exception would not apply to plaintiff, who herself constitutes another level of hearsay in the chain. The declarant in plaintiff's deposition testimony was decedent's girlfriend, who was not relating her own mental state, but decedent's. No possible exception applies to this level of hearsay. "By presenting inadmissible hearsay evidence, a nonmoving party is actually promising to create an issue for trial where the promise is incapable of being fulfilled. The nonmovant is not *showing* that a genuine issue exists." *Maiden*, 461 Mich at 123 n 5. Therefore, plaintiff's deposition testimony has not created a genuine issue of material fact for trial.

In the second statement cited by plaintiff in her deposition testimony, plaintiff described decedent as acting logically and rationally until after he was detained for shoplifting, after which he became irrationally convinced that he was going to prison and that his life was over. We agree with plaintiff that this testimony is not hearsay. It does not identify any particular out-of-court statement or offer a statement for the truth of the matter asserted, but rather offers a lay opinion about decedent's mental state.

The record establishes, however, that decedent's decline in mental health predated the shoplifting episode. After Niewiadomski asked decedent if he wanted her to call an ambulance for him because he appeared to begin to panic, decedent stated that he suffered from similar episodes "all the time." Decedent's Facebook page contained various messages, predating the shoplifting incident, indicating suicidal ideation. Plaintiff stated, when interviewed by police after the suicide, that she always suspected that decedent might die by suicide because he was not happy as a child. Moreover, in the suicide note he left behind, decedent lamented that his mental health issues had been a burden for so long. Thus, while not hearsay evidence, plaintiff's deposition testimony was contradicted by the documentary evidence that decedent was struggling with depression and mental health well before his encounter with Niewiadomski.

In addition to the hearsay statements, plaintiff also contends that circumstantial evidence regarding Niewiadomski's conduct shows that she was predisposed against decedent and, therefore, caused his death. Specifically, plaintiff relies on the fact that Niewiadomski wanted decedent to be charged with assault and that she checked decedent's Facebook page after his arrest to investigate whether he was selling stolen merchandise. We find these arguments unconvincing.

Contrary to plaintiff's assertion, Niewiadomski never directly said she wanted decedent to be charged with assault. When asked if she wanted to press assault charges against him, Niewiadomski briefly described to the officer that upon stopping decedent, the two fought back and forth over control of his backpack. There is no other evidence that Niewiadomski sought assault charges against decedent. Niewiadomski's decision to check decedent's Facebook page for evidence he was selling stolen merchandise was also not out of the ordinary for her.

Niewiadomski testified that she routinely checked the Facebook pages of shoplifters to see if they attempted to sell stolen items. These two instances cited by plaintiff do not raise an issue for trial that Niewiadomski had any unusual animus toward decedent that would support a reasonable inference that Niewiadomski caused him to suffer a mental illness that, in turn, caused his suicide.[5]

Affirmed. Defendants, as the prevailing parties, may tax costs. MCR 7.219(A).

/s/ Michael F. Gadola
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly

[5] Plaintiff also argues that the trial court erred by not making adequate findings to support its decision to grant summary disposition in favor of defendants. Plaintiff contends that, under MCR 2.504(B(2), the trial court was required to articulate specific findings of fact before granting summary disposition. This argument lacks merit; MCR 2.504(B)(2) is inapplicable in this case, as the rule applies to findings of fact made in cases that are tried without a jury, not court's decision to grant summary disposition. Generally, the trial court is not permitted to make factual findings on disputed issues when deciding a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).