STATE OF MICHIGAN

COURT OF APPEALS

LISA RENEE REDFORD,

Plaintiff-Appellant,

v

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellee,

and

STATE FARM MUTUAL AUTO INSURANCE COMPANY, PROGRESSIVE INSURANCE COMPANY, and ALLSTATE INSURANCE COMPANY,

Defendants.

UNPUBLISHED
September 23, 2014

No. 316740
St. Clair Circuit Court
LC No. 11-001813-NF

Before: OWENS, P.J., and JANSEN and O'CONNELL, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting defendant Auto Club Insurance Association's ("ACIA") motion for reconsideration and granting summary disposition under MCR 2.116(C)(10) in favor of ACIA. We affirm.

Plaintiff and her husband, Joseph Redford ("Redford"), were involved in an accident when their motorcycle, driven by Redford, went off of the shoulder of an Arizona highway. Plaintiff alleged that a pickup truck was involved in the accident. Specifically, plaintiff alleged that the motorcycle drifted into the oncoming traffic lane, that the truck was approaching in the oncoming lane, and that Redford lost control of the motorcycle when he swerved abruptly to avoid the truck. The only evidence of the truck's involvement, however, was an oral statement attributed to the truck passenger, David Netz, by the responding officer, Daniel Voelker. Voelker wrote in his report, "I asked Netz what he saw and he said he first noticed the motorcycle heading towards him in his lane." However, Netz later testified that he did not recall telling Voelker that the motorcycle was in the truck's lane of traffic. In addition, Netz testified that he never saw the motorcycle in the truck's lane.

Plaintiff sought personal protection insurance ("PIP") benefits from ACIA under MCL 500.3114(5)(c), which provides that the operator or passenger of a motorcycle who suffers "accidental bodily injury arising from a motor vehicle accident which shows evidence of the involvement of a motor vehicle" may seek benefits from the "motor vehicle insurer of the operator of the motorcycle involved in the accident." ACIA moved for summary disposition and argued that there was no evidence the truck was involved in the accident. The circuit court initially denied ACIA's motion on the ground that there was a factual issue concerning involvement of the truck in the accident. ACIA moved for reconsideration, arguing that Netz's statements were not admissible evidence and that absent Netz's statements there was no evidence of the truck's involvement. The circuit court granted reconsideration and then determined that Netz's oral statement was inadmissible. The court further determined that there was no admissible evidence to establish the truck's involvement in the accident. Because there was no admissible evidence of the truck's involvement, the court concluded that ACIA was entitled to summary disposition.

On appeal, plaintiff argues that the circuit court erred when it determined that Netz's oral statement was inadmissible, and that the court should not have granted summary disposition. We review de novo the circuit court's ruling on the summary disposition motion. *Anzaldua v Neogen Corp*, 292 Mich App 626, 629; 808 NW2d 804 (2011). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition "is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *McCoig Materials, LLC v Galui Const, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ." *Bronson Methodist Hosp v Auto-Owners Ins Co*, 295 Mich App 431, 441; 814 NW2d 670 (2012).

We review the circuit court's decision to grant a motion for reconsideration for an abuse of discretion. *Aromas Wines and Equip, Inc v Columbia Dist Servs, Inc*, 303 Mich App 441, 451; 844 NW2d 727 (2013). We also review for an abuse of discretion the circuit court's decision to exclude evidence. *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Jilek v Stockson*, 297 Mich App 663, 665; 825 NW2d 358 (2012).

MCR 2.116(G)(4) provides, in part, that a party opposing a motion for summary disposition brought under MCR 2.116(C)(10) "may not rest upon the mere allegations or denials of his or her pleading, but must . . . set forth specific facts showing that there is a genuine issue for trial." Because a motion under MCR 2.116(C)(10) challenges the factual sufficiency of the complaint, reviewing courts "consider the substantively admissible evidence actually proffered in opposition to the motion." *Adair v State*, 470 Mich 105, 120; 680 NW2d 386 (2004). Therefore, if the moving party properly supports the motion, the nonmoving party must produce admissible evidence in opposition to the motion. *Id.*

ACIA's liability in this case turns on whether the truck was involved in the accident. MCL 500.3114(5)(c). In *Detroit Med Ctr v Progressive Ins Co*, 302 Mich App 392; 838 NW2d 910 (2013), this Court addressed the issue of whether a motor vehicle was "involved" in a

motorcycle accident under the no-fault act. The motorcyclist in *Detroit Med Ctr* was speeding down a deserted side street, saw headlights from an approaching motor vehicle, applied the motorcycle's brakes, and lost control of the motorcycle. *Id.* at 394. The motorcycle never came into contact with the vehicle, but the motorcyclist sustained serious injuries, and the plaintiff hospital sought PIP benefits from the defendant, the motorcyclist's insurer. *Id.* The circuit court concluded that "the motor vehicle was sufficiently involved in the accident to allow recovery of no-fault benefits." *Id.* The question on appeal was "whether, as a matter of law, the evidence established that the motor vehicle, which did not make physical contact with the motorcycle, was sufficiently involved in the accident to trigger the motorcyclist's entitlement to no-fault benefits." *Id.*

Because the record did not establish "an actual, objective need for the motorcyclist to take evasive action," the Court reversed the circuit court, and explained:

> We can find no causal connection between the motorcyclist's injuries and the use of a motor vehicle as a motor vehicle sufficient to trigger entitlement to no-fault benefits under MCL 500.3105(1). The motorcyclist applied his brakes when he saw the vehicle's headlights approaching. The motorcyclist's evasive action in braking rapidly was in response to seeing the moving vehicle's headlights and because of the braking he fishtailed and lost control of the motorcycle, ultimately causing him to crash. But this does not mean that the motor vehicle was causally connected to the motorcyclist's injuries, that is, that the injury "originated from," "had its origin in," "grew out of," or "flowed from" the use of the vehicle as a motor vehicle.
>
> Rather, the evidence established that the causal connection between the motorcyclist's injuries and the motor vehicle was merely incidental, fortuitous, or "but for." We cannot say that the motor vehicle actively contributed to the accident rather than merely being present. While it is true that "a vehicle which is motionless in a lawful position is less likely to be considered involved," and that "a moving vehicle is much more likely to be held to be involved," that does not equate to a conclusion that the motor vehicle was involved merely because it was moving. There still needs to be a causal connection between the injuries and the motor vehicle. For example, in [*Bromley v Citizens Ins Co of America*, 113 Mich App 131, 133-135; 317 NW2d 318 (1982)], this Court determined that the motor vehicle was involved when that vehicle forced the motorcyclist off the road when the vehicle veered over the center line. And in [*Greater Flint HMO v Allstate Ins Co*, 172 Mich App 783, 785, 788; 432 NW2d 439 (1988)], the Court arrived at a similar conclusion when a motor vehicle made a sudden and unexpected stop that caused a chain reaction of emergency stops that ultimately resulted in two motorcyclists colliding with each other while attempting to avoid a car in front of them that had stopped.
>
> In this case, there is no evidence that the motorcyclist needed to take evasive action to avoid the motor vehicle. Rather, the evidence only established that the motorcyclist was startled when he saw the approaching headlights and overreacted to the situation. And while fault is not a relevant consideration in

> determining whether a motor vehicle is involved in an accident for purposes of no-fault benefits, we believe that principle is limited to not considering fault in the cause of the accident, not whether the motor vehicle was actually involved in the accident. That is, had the motorcycle actually collided with the motor vehicle, we would not consider whether the motorcyclist or the motor vehicle driver was at fault in causing the accident, nor would we consider whether the motorcyclist could have taken evasive action and avoided the accident. But, where there is no actual collision between the motorcycle and the motor vehicle, we cannot say that the motor vehicle was involved in the accident merely because of the motorcyclist's subjective, erroneous perceived need to react to the motor vehicle. Rather, for the motor vehicle to be considered involved in the accident, the operation of the motor vehicle must have created an actual need for the motorcyclist to take evasive action. That is, there must be some activity by the motor vehicle that contributes to the happening of the accident beyond its mere presence. [*Id.* at 397-399 (some citations omitted).]

In this case, plaintiff argues that Redford took evasive action in response to what he thought was an imminent collision between the motorcycle and the truck. Plaintiff and Redford did not remember how the accident occurred, and Joshua Payne, who was driving the pickup truck, did not see any of the events that preceded the crash.

To present a factual issue concerning whether the motorcycle was traveling in the wrong lane, thereby creating an "actual, objective need" for Redford to take evasive action, plaintiff must establish the admissibility of Voelker's police report or testimony relating the contents of his conversation with Netz at the accident scene. MCR 2.116(G)(4); *Adair*, 470 Mich at 120 (holding that evidence in opposition to a motion for summary disposition must be admissible). Netz's statement, as recorded in Voelker's police report and deposition testimony, "hearsay within hearsay," which is "not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule."[1] MRE 805; see also *In re Forfeiture of a Quantity of Marijuana*, 291 Mich App 243, 254; 805 NW2d 217 (2011). Thus, plaintiff must establish that the statements Voelker attributed to Netz are admissible with a hearsay exception.

Plaintiff first argues that Netz's statement was admissible as a present sense impression. We disagree. A present sense impression is a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter," and is not excluded by the hearsay rule. MRE 803(1); *Ykimoff v Foote Mem Hosp*, 285 Mich App 80, 105; 776 NW2d 114 (2009). This exception is justified by "the trustworthiness of the statement, which is based on the substantially contemporaneous nature of

[1] "Hearsay" is a statement, other than the one made by the declarant while testifying at a hearing, offered in evidence to prove the truth of the matter asserted, and is not admissible unless a specific exception applies. MRE 801(c); *Campbell v Human Servs Dep't*, 286 Mich App 230, 245; 780 NW2d 586 (2009).

the statement with the underlying event," and is satisfied if three criteria are met: "(1) the statement must provide an explanation or description of the perceived event, (2) the declarant must personally perceive the event, and (3) the explanation or description must be 'substantially contemporaneous' with the event." *Id.*, citing *People v Hendrickson*, 459 Mich 229, 235-236; 586 NW2d 906 (1998).

Further, "in order to establish the foundation for the admission of a hearsay statement pursuant to the present sense impression exception, other evidence corroborating the statement must be brought forth to ensure its reliability." *Id.* at 106, citing *Hendrickson*, 459 Mich at 238. Plaintiff appears to argue that this independent-proof requirement is invalid because the Michigan Supreme Court justices who decided *Hendrickson* did not agree on how the requirement would be satisfied. This argument lacks merit for three reasons. First, *Hendrickson* has not been overruled, and this Court is "bound by the rule of stare decisis to follow the decisions of our Supreme Court." See *Duncan v State*, 300 Mich App 176, 193; 832 NW2d 761 (2013). Second, the independent-proof requirement was adopted by four justices,[2] and a "decision of four or more of our Supreme Court justices on a specific point of law is binding upon this Court with regard to that point of law." *Felsner v McDonald Rent-A-Car, Inc*, 193 Mich App 565, 569; 484 NW2d 408 (1992). Finally, this Court reaffirmed the independent-proof requirement. See *Ykimoff*, 285 Mich App at 106. Because "there is neither documentary evidence nor verbal testimony to corroborate the alleged statements," *id.*, Netz's statement that he saw plaintiff and Redford's motorcycle traveling in the wrong lane was not admissible as a present sense impression under MRE 803(1).

Plaintiff next argues that Netz's statement was admissible as an excited utterance. Again, we disagree. The exception to the hearsay rule for excited utterances provides that a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not excluded by the hearsay rule. MRE 803(2); *McCallum v Dep't of Corrections*, 197 Mich App 589, 604; 496 NW2d 361 (1992). To qualify for the exception, the out-of-court statement must meet certain criteria: "(1) that there is a startling occasion, startling enough to produce nervous excitement, and render the utterance spontaneous and unreflecting; (2) that the statement must have been made before there has been time to contrive and misrepresent; and (3) the statement must relate to the circumstances of the occurrence preceding it." *People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988) (citation and quotation marks omitted). In deciding the preliminary question of fact whether a startling occasion existed, the circuit court "may consider *any* evidence regardless of that evidence's admissibility at trial, as long as the evidence is not privileged, in determining whether the evidence proffered for admission at trial is admissible." *People v Barrett*, 480 Mich 125, 134; 747 NW2d 797 (2008), citing MRE 104(a), MRE 1101(b)(1) (emphasis in original). *Barrett* held that MRE 803(2) "does not premise the admissibility of an excited utterance on the

[2] Justice Brickley stated, in his partial concurrence, that the extrinsic-evidence requirement was not satisfied with additional evidence that the underlying event occurred, but the additional evidence must corroborate the hearsay statement itself. *Hendrickson*, 459 Mich at 251-253 (Brickley, J., concurring in part and dissenting in part).

proponent's ability to establish the existence of a startling event or condition without considering the utterance itself." *Id.* at 137.[3]

The circuit court found that there was "nothing in Officer Voelker's deposition testimony or in his police report to suggest [that Netz] was under any stress or excitement at the time [Voelker] spoke to him" because there were "no references to Netz's demeanor, manner of speech or other conduct to suggest he was still under stress or excitement because a motorcycle was in the wrong lane approaching his vehicle." Voelker testified that he arrived on the scene less than 15 minutes after the accident. Netz estimated that it took Voelker closer to 30 minutes to arrive, and although Netz remarked that "the excitement of everything" may have caused him to inaccurately describe the motorcycle tipping over, Netz did not indicate that he was unduly startled at the time. The circuit court's conclusion that Netz was not under stress or excitement when he spoke to Voelker was not "outside the range of principled outcomes," *Jilek*, 297 Mich App at 665. The court did not abuse its discretion when it found that the spoken statement was not admissible under the excited-utterance exception.

We further conclude that Netz's statement does not come with the recorded-recollection exception to the hearsay rule. The recorded-recollection exception, MRE 803(5), provides that the following are not excluded by the hearsay rule:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Hearsay documents may be admitted under MRE 803(5) if they meet three criteria:

> (1) The document must pertain to matters about which the declarant once had knowledge; (2) the declarant must now have an insufficient recollection as to such matters; and (3) the document must be shown to have been made by the declarant or, if made by one other than the declarant, to have been examined by the declarant and shown to accurately reflect the declarant's knowledge when the matters were fresh in his memory. [*People v Dinardo*, 290 Mich App 280, 293; 801 NW2d 73 (2010) (citation omitted).]

The third element is not present in this case. The record indicates that Netz continues to dispute the accuracy of his initial spoken statement. Nor can the second element be shown because there is no evidence that Netz has an "insufficient recollection" of the events leading up

[3] In so holding, *Barrett* overruled *People v Burton*, 433 Mich 268, 294; 445 NW2d 133 (1989), which established an independent-proof requirement for excited utterances. While *Hendrickson* relied on *Burton* in establishing an independent-proof requirement for present sense impressions, see *Hendrickson*, 459 Mich at 239, *Barrett* did not overrule or mention *Hendrickson*.

to the accident; to the contrary, he affirmatively testified at his deposition that he did not see a motorcycle driving in the wrong lane. Plaintiff's assertion that "Netz expressed uncertainty and inability to recall . . . certain . . . events" is not supported by any citation to the record.[4] A general vagueness in memory does not establish a foundation for the admittance of hearsay under MRE 803(5); rather, the declarant's recollection must have been adversely affected with respect to the specific events described in the proffered statement.

In sum, Netz's spoken statement that he saw the motorcycle in the same lane as the oncoming pickup truck, recorded in Voelker's police report and described by Voelker in his deposition testimony, is hearsay and does not qualify for any exception. Therefore, plaintiff has not shown that the accident was caused by an "actual, objective need" for Redford to take evasive action, there was "no causal connection between [plaintiff's] injuries and the use of a motor vehicle as a motor vehicle sufficient to trigger entitlement to no-fault benefits under MCL 500.3105(1)." *Detroit Med Ctr*, 302 Mich App at 397, 399. Accordingly, summary disposition in favor of ACIA was warranted because there remained no genuine issue of material fact. *McCoig Materials, LLC*, 295 Mich App at 693.

Affirmed.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Peter D. O'Connell

[4] "Facts stated must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the circuit court." MCR 7.212(C)(7).