COURT OF APPEALS
DECISION
DATED AND FILED

April 12, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP895 **Cir. Ct. No. 2014CV007395**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

MONTREAL J. BULLY AND JAJUAN R. ALEXANDER,

PLAINTIFFS-APPELLANTS,

V.

ALLSTATE PROPERTY & CASUALTY INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 BRENNAN, J. Montreal J. Bully and JaJuan R. Alexander (hereinafter "Bully") appeal from an order by the trial court granting summary judgment to Allstate Property and Casualty Insurance Company (hereinafter "Allstate"). Bully raises five issues, only two of which are pertinent to our analysis. He claims the trial court erred in granting summary judgment

because: (1) Allstate relied on inadmissible hearsay evidence, specifically the witness statements from the Milwaukee Police Department incident report (hereinafter "police report"); and (2) material facts are in dispute.[1]

¶2 We conclude that: (1) Bully is judicially estopped from arguing on appeal that the witness statements in the police report are inadmissible hearsay because he did not raise the issue below and in fact relied on the same parts of the police report to resist Allstate's summary judgment motion;[2] and (2) after Allstate as the moving party below presented facts from the police report to show that its driver, Samuel J. Bussanich, was not negligent, Bully failed to provide any rebuttal facts or reasonable inference of negligence to support his claim of material factual dispute. Accordingly, we affirm.

BACKGROUND

¶3 This is a civil negligence claim arising out of Bully's injuries from a car collision that was preceded by an unusual chain of events—an attempted armed robbery of Bussanich, the driver who struck Bully; Bussanich's homicide; and ultimately, the auto accident. For the facts, both sides relied on the same

[1] The three remaining issues are Bully's contentions that: (1) the affirmative defense of "illness without forewarning" does not apply; (2) the defendant's alleged superseding cause affirmative defense cannot be invoked because it was created by the defendant; and (3) the trial court considered a criminal duty to flee, which was error because there is no criminal duty in analyzing the tort of negligence in a civil case. We include them here in the interest of completeness, but we do not resolve them in this opinion for the reasons stated herein. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the narrowest possible grounds).

[2] Bully also agreed to the facts from the police report at oral argument before the trial court.

witness statements from the police report.[3] There have been no depositions of any witnesses.

¶4 On September 5, 2014, Bully filed a complaint against Allstate alleging negligence by Allstate's insured, Bussanich. Bully's allegations arose out of an automobile collision that occurred on May 7, 2013, at North 23rd Street and West Center Street in Milwaukee. Bully pled two causes of action for negligence: (1) that Bussanich was the operator of a motor vehicle, and (2) that he operated it negligently and collided with a vehicle in which Bully was the passenger, causing Bully pain and emotional distress. Bully's complaint pled no specific facts from the incident, nor did it mention the police report.

¶5 Allstate filed an answer and affirmative defenses on September 29, 2014, and a motion for summary judgment with supporting brief on January 15, 2015. Allstate's summary judgment motion claimed that Bully failed to show that Bussanich had any duty to Bully under the circumstances, that the harm was not foreseeable, and that even if Bully showed a cognizable claim of negligence, the doctrine of superseding cause and public policy preclude Bully from holding Bussanich liable.[4]

¶6 The facts on which Allstate relied in its summary judgment brief were exclusively based on the police report, principally the statements of

[3] When we refer to the police report, we refer only to the portions of the report that contain the statements of Bussanich's passengers (Russell Paquin and Alyssa Zimmerman), the robber/shooter (Larry T. Whittaker), and Bully's driver (Dearies C. Gray). These are the only parts of the report referred to by the parties even though the full police report is in the record and contains many other statements and documents.

[4] Because we affirm on the ground that Bussanich had no duty to Bully, we do not address Allstate's remaining arguments.

witnesses Russell Paquin and Alyssa Zimmerman. Bully relied exclusively on the *same witness statements from the same police report* in his February 6, 2015 brief opposing Allstate's summary judgment motion.

¶7 The undisputed facts, as stated in the parties' briefs below with citations to the statements of witnesses Paquin and Zimmerman from the police report, are as follow:

- Witnesses Paquin and Zimmerman told police that they had gone with Bussanich, who was driving, to purchase cocaine at North 23rd Street and West Fond du Lac Avenue.

- While they were waiting for the person they usually buy cocaine from, an individual came up to the driver's side window and demanded that Bussanich "give him everything."

- As Bussanich drove away, the shooter opened fire on the car from about two feet away and continued shooting.

- At some point Bussanich "went limp" and Paquin said he tried to steer from the rear seat and Zimmerman said she tried to throw the gear into park. The car proceeded three blocks before striking Bully's car.

- Responding police officers reported that Bussanich died at the scene of the collision from three gunshot wounds and that the police found nine cartridge casings at the scene.

¶8 At the summary judgment motion hearing, the parties disputed whether the facts from the police report created a reasonable inference of negligence. Counsel for Bully, relying on the facts from the police report and without making any hearsay objection to the police report, argued that the witnesses' statements did not resolve the question of *when in the chain of events Bussanich became incapacitated*. Therefore, he argued, he was entitled to the reasonable inference that Bussanich was conscious when driving and negligent: "[W]e don't know if he instantaneously died or if he just lost consciousness before the impact happened." Allstate argued that the witnesses' statements showed Bussanich was "limp" right away.

¶9 The trial court granted Allstate's motion for summary judgment after finding that Bully failed to support his claim of negligence with facts that showed Bussanich had any ability to control the car after he had been shot. The court said: "And failure to pull over after he was shot, again, it's speculation whether he was even able to do so. There's really no proof that Mr. Bussanich was even able to do so, and I don't think there'll ever be any proof that he was able to do so."

¶10 Bully appeals the trial court's decision.

¶11 In Bully's brief on appeal he once again relies exclusively on the police report for the facts, principally the interviews with witnesses Paquin and Zimmerman.

¶12 The pertinent part of Paquin's statement in the police report states:

> As [Bussanich] is putting the car in drive, he hears gunfire, sees sparks flying, and here's [sic] an[d] observed [g]lass breaking. [Bussanich] is able to drive off, traveling northbound on N. 23rd St., and he heard an additional 3 to 4 shots being fired. While they are driving off, according to Paquin, [Bussanich] goes limp and is slumped over

> leaning towards the drivers front door, and his hands are off the steering wheel. He reaches from the back seat through the center counsel and attempted to steer the vehicle.

¶13 The pertinent part of Zimmerman's statement to police is:

> Moments later, a black male suspect, in his early 20s, possibly wearing a gray hooded sweatshirt, appeared on the driver side, and pointed a black large semi automatic handgun to the head of Bussanich and demanded monies. They yelled for Bussanich to drive off, however, before they were able to drive off, the suspect fired more than 2 gunshots into the vehicle.

DISCUSSION

1. Legal Standards

¶14 We review a trial court's grant of summary judgment *de novo*, applying the summary judgment statute in the same manner as the trial court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). The summary judgment statute, WIS. STAT. § 802.08(2) (2013-14),[5] provides, in pertinent part, as follows:

> The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In applying this statute, we must do the following:

> (1) examine the pleadings to determine whether the complaint states a claim and an issue of material fact, (2) examine the moving party's affidavits and other proof to determine whether the moving party has made out a *prima facie* case for summary judgment, and, (3) examine the non-moving party's affidavits and other proof to

[5] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

> determine whether there is a dispute over a material fact from which alternative reasonable inferences could be drawn.

Weigel v. Grimmett, 173 Wis. 2d 263, 267, 496 N.W.2d 206 (Ct. App. 1992).

¶15 In examining the pleadings in a summary judgment motion, we look to the supporting papers of both parties. *See* WIS. STAT. § 802.08(3). The adverse party "must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party." ***Id.*** If, upon examining the pleadings, we find that "no proper claim has been stated, the inquiry ends, and the motion must be denied." *See* ***Miller Brands-Milwaukee, Inc. v. Case***, 162 Wis. 2d 684, 694, 470 N.W.2d 290 (1991).

¶16 Here, Bully alleges negligence, the specific elements of which are: (1) a duty of care; (2) a breach of that duty, which involves a failure to exercise ordinary care; (3) a causal connection between the conduct and the injury; and (4) damages as a result of the injury. *See* ***Green Spring Farms***, 136 Wis. 2d at 319. Accordingly, as the moving party offered the witness statements in the police report to show Bully failed to produce evidence of any duty owed by Bussanich under the circumstances, Bully as the non-moving party has the burden of putting forth evidence "to determine whether there is a dispute over a material fact from which alternative reasonable inferences could be drawn," which would support all four elements of its negligence claim. *See* ***Weigel***, 173 Wis. 2d at 267. Bully attempts to do that in this appeal by eliminating Allstate's proof as inadmissible hearsay and, alternatively, by arguing that even without the police report, the evidence is sufficient to show a material factual dispute on duty.

2. The doctrines of judicial estoppel and forfeiture prevent Bully from objecting to the trial court's admission of the police report and reliance on it.

¶17 We first address Bully's argument that the trial court improperly relied on inadmissible hearsay evidence, specifically, the witness statements in the police report.[6] Bully complains that in order to show that the facts failed to support Bully's negligence claim, Allstate put forth hearsay in the form of the witnesses' statements in the police report. Bully's hearsay objection fails for two reasons. The first and most significant reason is that, because Bully relied on the very same police report below and relies on it in this appeal, he is judicially estopped from asserting an inconsistent position regarding that report. A party cannot both claim evidence is inadmissible and rely on it to prove its case. *See* ***Olson v. Darlington Mut. Ins. Co***., 2006 WI App 204, ¶4, 296 Wis. 2d 716, 723 N.W.2d 713. "Judicial estoppel is properly invoked to prevent a party from adopting inconsistent positions in legal proceedings…. [T]he purpose of judicial

[6] Bully's hearsay argument was based on WIS. STAT. §§ 908.01 and 908.02; *see also* ***Mitchell v. State***, 84 Wis. 2d 325, 330, 267 N.W.2d 349 (1978) (When a police report contains out-of-court assertions by others, a level of hearsay in addition to the business records exception is contained in the report and an exception for that hearsay must also be found for the report to be admissible; police reports cannot establish more than their maker could if he or she were testifying in court on the subject matter). Allstate's contrary argument was that the police report is admissible under the public records hearsay exception, which permits:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law, or (c) *in civil cases* and against the state in criminal cases, *factual findings resulting from an investigation made pursuant to authority granted by law*, unless the sources of information or other circumstances indicate lack of trustworthiness.

WIS. STAT. § 908.03(8) (Emphasis added by Allstate). We need not resolve whether the police report was admissible under the hearsay rules for the reasons stated herein.

estoppel is to preserve the integrity of the judicial system and prevent litigants from playing 'fast and loose' with the courts." ***Id.*** (citations and two sets of quotation marks omitted). Whether the elements of judicial estoppel have been met is a question of law which we review *de novo*. *See* ***id.***, ¶3.

¶18 The required elements of judicial estoppel are: (1) "'the later position must be clearly inconsistent with the earlier position"'; (2) "'the facts at issue should be the same in both cases"'; and (3) "'the party to be estopped must have convinced the first court to adopt its position—a litigant is not forever bound to a losing argument."' *See* ***id.***, ¶4.

¶19 Here, the first element, inconsistent position, is clearly present: Bully relied on the police report below to resist summary judgment. On appeal he argues that the police report is inadmissible hearsay. He takes a second inconsistent position within this appeal: he relies on the facts in the police report for his factual statement on appeal while also arguing on appeal that the report is inadmissible hearsay. Both inconsistent positions doom Bully's hearsay argument.

¶20 As to the second element of judicial estoppel, the facts at issue are clearly the same set of facts, namely, those from the witness statements in the police report.

¶21 The third element is met as well. Bully relied on the police report to resist summary judgment below, and the trial court was convinced to adopt it as the facts in the case. Even though Bully lost his summary judgment argument below and cannot be said to have "convinced" the trial court to rule in his favor, nonetheless this element is satisfied because in its summary judgment ruling, the trial court adopted and relied upon the same facts from the police report as those

that Bully relied on. Bully not only failed to object to the police report as hearsay, but also expressly stated to the trial court that he agreed with the facts therein.

> THE COURT: So he was shot three city blocks away and then continued to travel the three city blocks at a high rate of speed until he passed out or died or was incapacitated, at which point he then rear ended the vehicle.
>
> Is that generally the facts that are coming through on this?
>
> [Counsel for Bully]: That is correct, Your Honor.

Thus it can be said that Bully's reliance on the police report—and complete omission of any other factual evidence of any kind—convinced the trial court to rely on those facts in its ruling. Because all of the elements for judicial estoppel are met, Bully is estopped from arguing the police report is inadmissible because he relied on it below.[7]

¶22 The second reason Bully's hearsay argument fails is that Bully forfeited it by not raising it below. Allstate argues, and Bully does not dispute in his reply brief, that Bully failed to object to the police report as hearsay at summary judgment below. The record supports Allstate's claim. A party must preserve an issue for appeal by a timely objection below or it is forfeited. *See* ***Schill v. Wisconsin Rapids Sch. Dist.***, 2010 WI 86, ¶45, 327 Wis. 2d 572, 786 N.W.2d 177.

[7] Allstate argues that Bully's trial counsel's acknowledgement of the trial court's factual summary is a "judicial admission." While it is true that counsel's statement fits the definition of a judicial admission—"an express waiver made in court … by the party or his attorney conceding for the purposes of the trial the truth of some alleged fact…," we do not base our decision here on whether counsel's statements to the trial court were *true*, so much as whether Bully *relied* on the police report. *See* ***Fletcher v. Eagle River Mem'l Hosp., Inc.***, 156 Wis. 2d 165, 456 N.W.2d 788 (1990) (citations omitted). Thus the doctrine of judicial admission is not a basis of our decision in this case.

3. Summary judgment was appropriate because there were no material facts in dispute.

¶23 Alternatively, Bully contends that the trial court erred in granting summary judgment to Allstate because there are material facts in dispute as to whether Bussanich was conscious when he drove three blocks. He argues that the facts in the police report create a reasonable inference that Bussanich was conscious because the car could not have traveled three blocks if he were unconscious. Notably, Bully does not claim that any witness's statement or other evidence establishes consciousness, but instead relies solely on the inference that the car could not have traveled three blocks without Bully's consciousness and control.[8]

¶24 Bully's material factual dispute argument fails because of the application of well-established principles of summary judgment methodology. Bully's burden in response to Allstate's prima facie case was to produce "affidavits and other proof to determine whether there is a dispute over a material fact from which alternative reasonable inferences could be drawn." ***Weigel***, 173 Wis. 2d at 267. To survive summary judgment, the opposing party must do more than say it will present evidence later. *See* ***Rechsteiner v. Hazelden***, 2007 WI App 148, ¶21, 303 Wis. 2d 656, 736 N.W.2d 219, *aff'd* 2008 WI 97, 313 Wis. 2d 542, 753 N.W.2d 496. If the party opposing summary judgment fails to offer specific evidentiary facts to demonstrate a genuine issue for trial,

[8] Bully argues that he "should be allowed the opportunity to depose the witnesses to the accident … because they will produce admissible evidence about the facts of the case which are currently in dispute." He implies that he was somehow prevented from doing so by the court and parties. The record reveals that counsel for Bully admitted that he tried and failed to find the witnesses. Bully fails to make any legal argument to support the contention that summary judgment for Allstate should be reversed to allow him more time.

summary judgment "'shall be entered against such party.'" *See* ***Larson v. Kleist Builders, Ltd.***, 203 Wis. 2d 341, 345, 553 N.W.2d 281 (Ct. App. 1996) (citation omitted).

¶25 To establish its summary judgment case, Allstate relied on the police reports, particularly the statements of witnesses Paquin and Zimmerman saying that Bussanich was shot at the scene of the attempted robbery and became immediately limp, slumped against the driver's door, and his hands fell off the wheel, thereby demonstrating he was unconscious and not negligent for the collision. In response, Bully presented no additional or contradictory facts. Bully made no argument that the statements made by Paquin or Zimmerman were untrue. Therefore, he cannot show that any material factual dispute exists. His attempt to argue that undisputed facts, namely that the car traveled three blocks, creates a reasonable inference of consciousness fails because it is contradicted by the witnesses' statements, leaving no reasonable inference to the contrary.

¶26 Bully, like Allstate, cited to pages in the police report containing the statements of witnesses Paquin and Zimmerman. These statements are in the record and relied on by each party. Neither statement supports any reasonable inference of consciousness or control by Bussanich starting at the scene of the attempted armed robbery. Paquin stated that *while* Bussanich was driving off, Bussanich went limp and slumped toward the driver's door, and his hands were off the wheel. Zimmerman reported that when Bussanich was faced with a gun, and *before* he drove off, the shooter fired more than two shots *into* the vehicle. As shown, neither witness statement supports Bully's argument that Bussanich was conscious as he drove three city blocks.

¶27 Bully's only rebuttal is his argument for the inference that the car could not have traveled three blocks if Bussanich had not been conscious. While it is true that the non-moving party is entitled to all reasonable inferences in summary judgment, *see* ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶23, 241 Wis. 2d 804, 623 N.W.2d 751, here that inference is not reasonable or proper. Paquin's statement is uncontradicted and establishes that Bussanich was shot, went limp, and slumped with his hands off the wheel right away. He clearly was not conscious while driving. And while it is not disputed that the car traveled three blocks before striking Bully's vehicle, Paquin explained in the police report that he steered from the back seat and presumed they were going forward because Bussanich's foot was on the pedal:

> Paquin stated as they are driving off, the vehicle is accelerating, leading him to believe that Sam's foot is still in [sic] the gas pedal. In addition to steering the vehicle, Paquin stated he is also trying to shift gears into neutral and reverse an [sic] attempt to stop the vehicle, however he is unsuccessful. While they are traveling at a higher rate of speed, according to Paquin, proximally 60 to 70 miles an hour, he observed a white minivan stopped at a stop sign. Paquin indicated he was unable to stop the vehicle and believe that they were going to run into the back of the minivan. Paquin stated he then jumped in the back seat behind Zimmerman and embraced himself for the impact.

Bully failed to rebut that evidence with any other.

¶28 Bully relies on ***Lambrecht*** for the proposition that despite his failure to prove when Bussanich lost consciousness, he is still entitled to go to trial. In ***Lambrecht*** there was a dispute as to whether the defendant driver suffered a heart attack before or after the collision, medical experts submitted affidavits and were deposed, and the defense medical expert stated that the driver had between five

and twenty seconds from the onset of symptoms to loss of consciousness. ***Id.***, 241 Wis. 2d 804, ¶15-16. But ***Lambrecht*** is distinguishable from this case.[9] Here, Bully presented no evidence at all as to when Bussanich became unconscious. He presented no medical experts' affidavits, and none have been deposed. Unlike in ***Lambrecht***, where it was left to the jury to determine "whether the heart attack occurred before, during, or after the collision," *see* ***id.***, ¶79, there is no dispute to the statements of Paquin and Zimmerman that Bussanich was shot before the collision as he was driving away from the scene of the attempted armed robbery.

¶29 Given that Bussanich was undisputedly shot and unconscious while the car was being propelled, Bully has failed to establish a duty. Under Wisconsin law, a duty to use ordinary care exists whenever it is foreseeable that a person's actions or failure to act might cause harm to some other person. *See* ***Alvarado v. Sersch***, 2003 WI 55, ¶14, 262 Wis. 2d 74, 662 N.W.2d 350. Here, because Bussanich was unconscious, he had no volition. Accordingly, he could neither act nor fail to act. Therefore, he had no duty of care, ordinary or otherwise. Without volition, as a matter of law Bussanich could not be negligent.

¶30 In a related, but somewhat different argument, Bully argues foreseeability in that it was "highly foreseeable that stepping on the gas and trying to flee a robber with a gun pointed at point blank range will result in being shot," which in turn would lead to risk of injury to others on the road. He makes this argument to demonstrate that the defenses of (1) illness without forewarning,

[9] Regardless, the facts in ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, 241 Wis. 2d 804, 623 N.W.2d 751, go to the sudden medical emergency defense, which Allstate does not claim. Instead, Allstate contends that Bussanich has no duty to Bully, which we discuss herein.

(2) superseding cause, and (3) emergency should be considered and rejected. However, we need not reach these issues because of our conclusion that Bully has failed to present any facts or reasonable inferences demonstrating that Bussanich was conscious from the time he was shot at the attempted robbery scene. Bully fails in the first instance to meet his summary judgment burden. Accordingly, we need not examine Bussanich's available defenses.

¶31 Accordingly, we affirm the trial court's grant of summary judgment to Allstate.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.