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2019 IL App (5th) 180444-U

NOTICE
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NO. 5-18-0444

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

MICHAEL A. RICHARDSON,

Plaintiff-Appellant,

v.

KEITH WARD, Special Administrator
of the Estate of John Fitzpatrick,
Deceased,

Defendant-Appellee.

) Appeal from the
) Circuit Court of
) Franklin County.
)
) No. 15-L-40
)
)
) Honorable
) Eric J. Dirnbeck,
) Judge, presiding.

JUSTICE BOIE delivered the judgment of the court.
Justices Welch and Barberis concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court’s evidentiary rulings concerning the exclusion of testimony based on the Dead-Man’s Act were proper and the order entering summary judgment is affirmed.

¶ 2 This litigation arose from a July 9, 2013, automobile accident involving plaintiff, Michael A. Richardson, and the now-deceased defendant, John Fitzpatrick. Plaintiff appeals from the trial court’s order granting summary judgment in favor of defendant, arguing the Dead-Man’s Act was improperly applied and the evidence supported a

finding that there were genuine issues of material fact that should have been decided by a jury. We affirm.

¶ 3

I. Background

¶ 4 On July 2, 2015, plaintiff, Michael Richardson, filed a complaint in the circuit court of Franklin County against John Fitzpatrick (Fitzpatrick), seeking recovery for personal injury that plaintiff suffered as a result of a motor vehicle collision. The filing was later supplemented by a second amended complaint (complaint) which is the pleading that is the subject of this litigation. The plaintiff alleged that a collision occurred in Benton, Illinois, on July 9, 2013, when Fitzpatrick backed out of a parking space and collided with plaintiff's vehicle while he was travelling around the public square. The complaint alleged negligence on behalf of Fitzpatrick in the operation of his motor vehicle while backing out of a parking space into traffic, striking plaintiff's vehicle in the door and right side. The plaintiff's complaint alleged that Fitzpatrick: "(1) drove his vehicle at a speed which was greater than was reasonable and proper with regard to traffic conditions and the use of the highway, endangering the safety of persons and property, in violation of 625 ILCS 5/11-601; (2) failed to exercise due care to avoid a collision, in violation of 625 ILCS 5/11-1003.1; (3) failed to reduce his speed to avoid a collision; (4) failed to keep a proper lookout for other vehicles upon the roadway; and, (5) improperly backed his vehicle from the parking space in violation of 625 ILCS 5/11-803." After the accident no police report was made and there were no independent witnesses to the accident.

¶ 5 Fitzpatrick and the plaintiff travelled to Fitzpatrick's insurance provider's office after the collision. The provider was State Farm. State Farm settled the property damage claim by paying \$1090.92 to the plaintiff. Fitzpatrick passed away prior to the filing of this lawsuit seeking damages for personal injury resulting from the accident and the trial court appointed a special administrator, Keith Ward (defendant), to defend the legal action. The defendant filed an answer wherein he averred a lack of knowledge sufficient to answer the allegations listed above. Plaintiff was deposed and answered questions about the accident posed by defendant's counsel about the circumstances surrounding the accident as well as his injuries. The relevant questions and answers from plaintiff's deposition follow:

“Q. Where was the driver that hit you? Where was his location in relation to where you were?

A. I assume that he was parked along the square.

Q. So if he was parked on the square, were you driving westbound in the square towards West Frankfort?

A. Yes.

Q. Do you have any guess as to how fast you were going?

A. No. Maybe 10 miles per hour.

Q. Can you just describe the accident itself to me?

A. As I entered the square, I turned right in the traffic. All of a sudden my truck was hit and spun into the intersection, and it shut the truck off. I looked around. I got out of the truck and a new model truck with an elderly

gentleman had impacted the right rear of my pickup truck. So we were blocking traffic, so I started the truck. I pulled over to the side. I went over to the gentleman. I could see he was really old and he was shaking and he apologized. He said 'I'm going right to my insurance office.'

Q. He said that?

A. Yeah. He backed out and I followed him because he was leaving the scene. I followed him to the State Farm office just a few blocks north of the square on the west side.

Q. I'll back up a little bit. You said your truck spun when it was impacted. How far? Did it spin a full 360?

A. No. Probably 30 degrees.

Q. Okay. What did your body physically do when you were impacted?

A. My head—well, my body went to the right and then it went back and hit the windshield. Or I'm sorry. Hit the driver's door window.

Q. Were you wearing a seat belt?

A. Yes. Oh yes.

Q. How was the weather that day, if you remember?

A. It was dry and clear."

¶ 6 Defense counsel and plaintiff discussed plaintiff's personal injury and then returned to discussion of the circumstances of the accident as follows:

"Q. You said when this collision occurred you had come into the square from the north side, true?

A. Southbound, yes.

Q. And you were coming around the courthouse?

A. I just made the turn.

Q. Okay. What was your intent? Were you going to go west on 14 or continue around south on 37?

A. I was going to continue south on 37.

Q. And so the accident itself happened in the northwest quarter—

A. Quadrant.

Q. —quadrant of the square?

A. Yes, sir.

Q. Did you ever see the vehicle that struck you before?

A. No, sir.

Q. And if you remember, was the vehicle then parked on the north side of that quadrant or on the west side like in front of Paula's office?

A. It was parked on the north side.

Q. Okay.

A. It was pulled in. And when he backed out, he hit me hard. So I don't know if the accelerator stuck or, like I said, I felt bad for the man. He was really badly shaken. I followed him to State Farm, and he made a statement there at the office. At that point I didn't feel a need for a police report, so we didn't get one."

¶ 7 The defendant successfully moved for summary judgment, contending that the plaintiff could not establish defendant's negligence without testimony that would be

inadmissible under the Dead-Man's Act (735 ILCS 5/8-201 (West 2012)). On the day of the hearing for defendant's motion for summary judgment, plaintiff filed a reply to the motion for summary judgment which argued that he could prove his complaint by "calling other various witnesses who have knowledge of the accident," along with a supplemental list of witnesses which listed employees of State Farm. The subject matter of the witnesses' testimony was not included in any pleading before the trial court. The plaintiff's reply to the motion for summary judgment included allegations that "[t]he insurance adjusters who corresponded with the [p]laintiff, for nearly two years, Lisa Keith, Mary Stein or Loressa McGregor, may be called as an adverse witness by [p]laintiff." The trial court entered a docket order granting defendant's motion for summary judgment.

¶ 8 Plaintiff filed a motion to reconsider the order of summary judgment, arguing that he had "proposed various ways that facts could be elicited to establish the needed facts." The pleading does not detail those proposed ways that facts could be elicited and again, no summary of the witnesses' testimony was provided to the trial court. The motion to reconsider states that "[p]laintiff has disclosed several witnesses, to the court, and explained the substance of the testimony, whose testimony is not barred by the Dead-Man's Act, who has knowledge of this occurrence." However, neither affidavits of the proposed witnesses nor a transcript of the hearing on the motion for summary judgment and motion to reconsider were provided to this court.

¶ 9 A memorandum was filed with plaintiff's motion to reconsider that asserts two issues. First, that summary judgment is not always appropriate merely because the

defendant has died. Second, that the defendant waived his claim to impose the Dead-Man's Act as a bar to certain evidence for two reasons: (a) defendant paid the property damage claim of plaintiff; and, (b) defendant, by his authorized representative, deposed the plaintiff and elicited statements about the accident.

¶ 10 Plaintiff argued in his memorandum that the case for negligence could be established by calling the adjusters and the agents who submitted claims or viewed and paid property damage, and that defendant had waived the application of the Dead-Man's Act by eliciting testimony about the accident in a deposition of plaintiff. Plaintiff further argued that documentation of Fitzpatrick filing a claim with State Farm and naming plaintiff as the claimant would not be barred by the Dead-Man's Act. Finally, plaintiff argued that the payment made to plaintiff by State Farm was an admission against interest and would therefore be admissible against the defendant as evidence of negligence.

¶ 11 The plaintiff attached exhibits to the motion to reconsider, including correspondence to the plaintiff from State Farm. One document from State Farm was a property damage estimate and the other document was a letter indicating State Farm's payment of the property damage claim. Portions of plaintiff's deposition testimony were attached. Plaintiff's affidavit in support of the motion to reconsider was also provided. The affidavit included a statement by plaintiff that he was travelling on the square in Benton, Illinois, in his Dodge pickup during daylight hours and that there was no damage to the bed of his truck prior to the accident. Plaintiff swears in the affidavit that the man driving the vehicle that collided with him struck plaintiff's vehicle and did not wait for police. Plaintiff alleges that he did nothing to cause an accident. Plaintiff claims that he

and Fitzpatrick went to the office of Fitzpatrick’s insurance agent, Hugh Frailey, with State Farm. Plaintiff spoke with Hugh Frailey at length, but the content of that conversation was not provided. Fitzpatrick filed a claim about the accident with Hugh Frailey. State Farm paid the property damage claim and part of plaintiff’s physical therapy bill on behalf of Fitzpatrick. Plaintiff further alleged that he was offered \$4000 for his personal injury by “one adjuster.”

¶ 12 The trial court denied the motion to reconsider after a hearing held on August 13, 2018. Plaintiff appeals from the trial court’s order granting summary judgment, presenting the following questions for review: (1) whether the Dead-Man’s Act was properly applied to the facts of this case; (2) whether the trial court should have granted summary judgment on the basis that the plaintiff could not have presented evidence to prove the elements of his case; (3) whether there exists in the record adequate evidence of proof of fault, which could be shown by collateral sources, or by pleadings or depositions, through testimony of insurance agents and adjusters, allowing plaintiff to prove his case; and (4) whether the payment of the property damage claim in this case was sufficient evidence and indication of liability, or admission of fault, so as to present this case to the trier of fact.

¶ 13 II. Analysis

¶ 14 A. The Dead-Man’s Act

¶ 15 1. Whether the Circuit Court Correctly Applied the Dead-Man’s Act to Preclude Plaintiff’s Testimony About the Accident

¶ 16 The first issue raised by plaintiff is whether the trial court correctly applied the Dead-Man's Act. The Dead-Man's Act provides: "[i]n the trial of any action in which any party sues or defends as the representative of a deceased person ***, no adverse party or person directly interested in the action shall be allowed to testify on his or her own behalf to any conversation with the deceased *** or to any event which took place in the presence of the deceased ***." 735 ILCS 5/8-201 (West 2012). "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 Dead-Man's Act protects a decedent's estate from fraudulent claims and equalizes the parties' positions regarding testimony. *Id.* at 237-38. The decision whether to admit evidence rests within the sound discretion of the trial court, and a reviewing court will not reverse the trial court unless that discretion was clearly abused. *Calloway v. Bovis Lend Lease, Inc.*, 2013 IL App (1st) 112746, ¶ 82. We review evidentiary rulings for abuse of discretion (*In re Estate of Hoover*, 155 Ill. 2d 402, 420 (1993)), but the construction of a statute presents a question of law, which we review *de novo*. *Gunn v. Sobucki*, 216 Ill. 2d 602, 609 (2005) (citing *Quad Cities Open, Inc. v. City of Silvis*, 208 Ill. 2d 498, 515 (2004)).

¶ 17 For a witness to be rendered incompetent under the Dead-Man's Act: (1) the witness must be an adverse party or a person directly interested in the action, (2) the witness must seek to testify on his own behalf, and (3) the witness must seek to testify to:

(a) a conversation with a deceased person, or (b) an event that took place in the presence of the deceased. 735 ILCS 5/8-201 (West 2012).

¶ 18 In the present case the plaintiff is a person directly interested in the action, who seeks to testify on his own behalf about a conversation with the deceased and about events that took place in the presence of the deceased. The accident is the event to which the Dead-Man's Act applies. *Rerack v. Lally*, 241 Ill. App. 3d 692, 695 (1992). Any testimony by the plaintiff, as an interested party to the action, about the circumstances of the accident which occurred in the presence of Fitzpatrick and any conversations which occurred in the presence of only Fitzpatrick and the plaintiff would be properly excluded under the Dead-Man's Act. There were no independent witnesses to the accident. Any testimony concerning the circumstances of the accident which would have occurred in the presence of Fitzpatrick was properly excluded pursuant to the Dead-Man's Act.

¶ 19 In *Peacock v. Waldeck*, a rear-end collision case, the court affirmed summary judgment for the defendant's special representative who argued that the plaintiff could not establish the decedent's negligence without testimony that would be barred by the Dead-Man's Act. *Peacock v. Waldeck*, 2016 IL App (2d) 151043, ¶ 9. In *Peacock*, decedent admitted that her vehicle struck plaintiff's vehicle. There were no admissions to any other facts of the accident and the court found that the only evidence of negligence, the decedent's admissions, might lead the trier of fact to base its verdict on conjecture, and such a verdict could not stand. *Id.*

¶ 20 In the present case, Fitzpatrick made no such admission prior to his death. Plaintiff alleges only that he was travelling in the lawful and proper direction at approximately 10

miles per hour. In his deposition testimony regarding Fitzpatrick's location prior to the accident he stated: "I assume that he was parked along the square." He further testified: "As I entered the square, I turned right in the traffic. All of a sudden my truck was hit and spun into the intersection, and it shut the truck off." This evidence and plaintiff's additional testimony about the accident and conversations about the accident was properly excluded under the Dead-Man's Act.

¶ 21 2. Whether Any Exceptions to the Application of the Dead-Man's Act Apply

¶ 22 The plaintiff claims that his testimony should have been admissible under the statutory exceptions to the application of the Dead-Man's Act. The plaintiff asserts that defendant waived his right to the application of the Dead-Man's Act because (a) State Farm paid the property damage claim of plaintiff, and (b) defendant, by his authorized representative, deposed the plaintiff and elicited statements about the accident. The Dead-Man's Act carves out several exceptions to the rule. These exceptions follow:

"(a) If any person testifies on behalf of the representative to any conversation with the deceased *** or to any event which took place in the presence of the deceased ***, any adverse party or interested person, if otherwise competent, may testify concerning the same conversation or event.

(b) If the deposition of the deceased *** is admitted in evidence on behalf of the representative, any adverse party or interested person, if otherwise competent, may testify concerning the same matters admitted in evidence.

(c) Any testimony competent under Section 8-401 of this Act [] is not barred by this Section.

(d) No person shall be barred from testifying as to any fact relating to the heirship of a decedent.” 735 ILCS 5/8-201 (West 2012).

¶ 23 This court acknowledges that the plaintiff did not raise the issue of waiver of the application of the Dead-Man’s Act by defendant at the trial level until he filed his memorandum in support of his motion to reconsider. A motion to reconsider has the limited purpose to bring to the trial court’s attention: (1) newly discovered evidence, (2) changes in the law, or (3) errors in the trial court’s prior application of existing law. *Emrikson v. Morfin*, 2012 IL App (1st) 111687, ¶ 29. The grant or denial of a motion to reconsider lies within the discretion of the lower court and will not be reversed absent abuse of discretion. *American National Trust Co. v. Kentucky Fried Chicken of Southern California, Inc.*, 308 Ill. App. 3d 106, 120 (1999). Whether a court’s discretion has been abused in denying a party’s motion to reconsider requires consideration of whether the refusal violated the moving party’s right to fundamental justice and manifested an improper application of discretion. *In re Marriage of Wilson*, 193 Ill. App. 3d 473, 478 (1990).

¶ 24 Plaintiff argues the Dead-Man’s Act was waived when the defendant deposed the plaintiff in this matter. Plaintiff supplies no authority for the proposition that the discovery deposition of plaintiff falls into the exception carved out by section 8-201(a) of the Dead-Man’s Act (735 ILCS 5/8-201(a) (West 2012)). The argument proposed by plaintiff is that the adverse party has called the witness on his behalf and thereby removed the incompetency of the plaintiff. This court considered the issue of waiver in *Pink v. Dempsey* and held disqualification is not waived by a pretrial examination. *Pink v.*

Dempsey, 350 Ill. App. 405, 410 (1953). Further, “the taking of a deposition before trial does not constitute ‘calling’ the party as a witness, within the meaning of the ‘deadman’s’ statute.” *Id.* Pretrial discovery is designed to permit exploration and to avoid surprise. *Id.* at 410. It is directed toward making the judicial process one of determining the facts pertaining to the issue and rendering a just decision thereon, rather than the promotion of a battle of wits between counsels. *Id.* at 411. In actual practice, it is often taken for granted that there will be discovery depositions by both sides, and the broadest range of examination is permitted, very often without objection and on a quite informal basis. *Id.* The parties rest, secure in the belief that neither side will lose any rights and that the deposition will not be presented in evidence, except as an admission or by way of impeachment. *Id.* The taking by the defendant of the deposition testimony of the plaintiff did not act as a waiver of plaintiff’s incompetence under the Dead-Man’s Act.

¶ 25 Plaintiff further claims that the documents supplied by State Farm showing the plaintiff was a claimant and that his property damage was paid for by State Farm on behalf of Fitzpatrick should not be barred by the Dead-Man’s Act. The documents do not contain admissions by Fitzpatrick, summaries of Fitzpatrick’s statements, nor a description of events that occurred in Fitzpatrick’s presence. The documents do not fall under the provisions of the Dead-Man’s Act and there is nothing in the trial court’s order to indicate it found they were inadmissible under the same. Absent their disqualification under the Dead-Man’s Act, the documents themselves do not contain any admission on the part of Fitzpatrick and therefore do not create an issue of material fact such that the trial court should not have granted summary judgment.

¶ 26

B. Summary Judgment

¶ 27 1. Whether There is Adequate Evidence in the Record to Create a Genuine Issue of Material Fact

¶ 28 Summary judgment is proper where “the pleadings, depositions, 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.” 735 ILCS 5/2-1005(c) (West 2016). The trial court’s ruling on a motion for summary judgment is subject to *de novo* review. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). Although the plaintiff need not prove his entire case at the summary judgment stage, he must introduce evidence that would support a finding in his favor. *Argueta v. Krivickas*, 2011 IL App (1st) 102166, ¶ 10. A party opposing a motion for summary judgment may not rely on evidence barred by the Dead-Man’s Act to establish the existence of a question of material fact. *Peacock*, 2016 IL App (2d) 151043, ¶ 4 (citing *Rerack*, 241 Ill. App. 3d at 694-95).

¶ 29 In the present case, the trial court held: “summary judgment is appropriate under the particular circumstances of this case for the reasons outlined in defendant’s motion. Accordingly, defednat’s [*sic*] motion for summary judgment is granted.” We have examined all of the pleadings and evidentiary material on file at the time of the entry of the order appealed from in the light most favorable to the plaintiff. *Kolakowski v. Voris*, 83 Ill. 2d 388, 398 (1980).

¶ 30 Having determined the only evidence regarding the details of the accident, the plaintiff’s testimony, was properly barred by the Dead-Man’s Act, there are no facts

presented to the trial court that would allow plaintiff to prove negligence on the part of Fitzpatrick.

¶ 31 In *Rerack v. Lally*, another rear-end collision case, the defendant admitted to rear-ending plaintiff in his answer to plaintiff's complaint prior to his death. *Rerack v. Lally*, 241 Ill. App. 3d 692, 696 (1992). The plaintiff was barred by the trial court from testifying about certain details of the collision based on the application of the Dead-Man's Act; however, the trial court's application of the Dead-Man's Act was overly broad. The court found the plaintiff could testify to the overall mechanical condition of his car, the weather conditions, and that his vehicle was stopped for two minutes with his foot continually on the brake prior to the accident. *Id.* at 695. Where such evidence reasonably implied negligence from the facts and circumstances shown to exist prior to and at the time of the accident, the plaintiff would be allowed to testify to the evidence. *Id.* at 696.

¶ 32 The facts in the present case are distinguishable. The plaintiff in *Rerack* was capable of showing negligence on the part of defendant through circumstantial evidence when paired with the defendant's admission prior to his death that he rear-ended the plaintiff. Here, there were no such admissions by Fitzpatrick. While plaintiff may have been allowed to properly introduce his actions before the accident and the condition of his vehicle prior to the accident, any other facts of the accident would be appropriately barred by the Dead-Man's Act. Without the details of the accident, qualified witnesses, or admissions by the defendant, there is no way for a jury to assess liability. The rule concerning the use of circumstantial evidence to establish negligence is that "[a] fact

cannot be established by circumstantial evidence unless the circumstances are of a nature and so related to each other that it is the only conclusion that can be drawn therefrom, and mere conjecture, guess or suspicion is insufficient.” (Internal quotation marks omitted.) *Fabschitz v. King*, 10 Ill. App. 3d 43, 45 (1973).

¶ 33 There is no evidence in the remaining record from which one could reasonably infer an excessive rate of speed, failure to reduce speed to avoid an accident, failure to keep a proper lookout, or improper backing on the part of the defendant’s vehicle as alleged in plaintiff’s complaint. There is no evidence that did not originate from plaintiff, which would support an inference that Fitzpatrick was the only person who could have proximately caused the collision. Given the facts of this case, there are other plausible initial causes for the accident. Plaintiff himself contemplated, during his deposition testimony, that Fitzpatrick’s gas pedal may have been stuck and led to the collision. Based on this record, the cause of the accident cannot be circumstantially inferred from the evidence presented. Therefore, the trial court properly granted defendant’s motion for summary judgment.

¶ 34 2. Whether Plaintiff’s Payment of Property Damage is an Admission of Fault

¶ 35 The plaintiff avers that the payment of property damage by State Farm waived the right to dispute liability and that said payment would be evidence of negligence. “As a general rule under Illinois law, matters relating to offers of settlement are inadmissible.” *Cundiff v. Patel*, 2012 IL App (4th) 120031, ¶ 27; see also Ill. R. Evid. 408 (eff. Jan. 1, 2011). Evidence of settlement or compromises of disputed claims is not admissible if the evidence is offered to prove liability. *Sawicki v. Kim*, 112 Ill. App. 3d 641, 645-46

(1983). The policy behind the rule encompasses two reasons: (1) “negotiations and compromises do not constitute admissions of liability” and are thus irrelevant; and (2) admission of evidence of settlements or attempts to settle would discourage their use, contrary to the public policy which favors settlement. *Barkei v. Delnor Hospital*, 176 Ill. App. 3d 681, 694 (1988). Payment by State Farm of \$1090.92 was made to plaintiff for property damage to his vehicle. The property damage payment by State Farm does not constitute an admission of liability to a claim of negligence in operation of Fitzpatrick’s motor vehicle causing personal injury to the plaintiff.

¶ 36 The plaintiff further argues that the record contains various names of employees of State Farm who worked on the case and decided to make payment. Plaintiff posits that he can prove that Fitzpatrick admitted to third parties that he was in an accident or that the employees of State Farm made a determination of liability. Mere admission to involvement in an accident would not prove negligence. *Rerack*, 241 Ill. App. 3d at 696. While the plaintiff provided a list of witnesses, the record contains no summary or affidavit of the testimony that would be provided by the witnesses. The plaintiff did not provide this court with a transcript or bystander’s report of the hearing on the motion for summary judgment or motion to reconsider. An appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with the law and had a sufficient factual basis. *Foutch v. O’Bryant*, 99 Ill. 2d 389, 391-92 (1984). Doubts which may arise from the incompleteness of the record will be resolved against the appellant. *Block & Co. v. Storm*

Printing Co., 40 Ill. App. 3d 92, 96 (1976). While this court acknowledges that any testimony of State Farm employees may well have been barred under attorney-client privilege, where communication is protected when the insurer is under an obligation to defend the insured, that issue was not litigated. *People v. Ryan*, 30 Ill. 2d 456, 460 (1964). As there are no affidavits from witnesses or transcripts of the hearings on the motion for summary judgment and motion to reconsider, there is no basis for holding that the trial court erred in granting the motion for summary judgment as it related to the potential testimony of witnesses. *Libco Corp. v Roland*, 99 Ill. App. 3d 1140, 1147-48 (1981).

¶ 37

III. Conclusion

¶ 38 Summary judgment was appropriate in this case where all admissible evidence of record does not support an inference that decedent was the only person who could have proximately caused the accident. We cannot say that the circuit court abused its discretion in applying the Dead-Man's Act and, after its application, the order granting summary judgment was proper. The trial court properly granted summary judgment in favor of defendant because the non-barred evidence and the pleadings did not create a genuine issue of material fact.

¶ 39 For the foregoing reasons, the judgment of the circuit court of Franklin County is affirmed.

¶ 40 Affirmed.