

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JEAN REED MILLS,

Plaintiff–Appellant,

v

PROFESSIONAL BREATHING ASSOCIATES,  
INC., and MICHAEL KENNETH EMKE,

Defendants–Appellees.

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UNPUBLISHED  
November 1, 1996

No. 182454  
LC No. 94-471438

Before: Young, P.J., and Taylor and R. C. Livo,\* JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10), in this automobile negligence action. We reverse and remand.

A trial court tests the factual support of a plaintiff’s claim when it rules upon a motion for summary disposition filed under MCR 2.116(C)(10). *Lichon v American Universal Ins Co*, 435 Mich 408, 414; 459 NW2d 288 (1990). The court must consider the affidavits, pleadings, depositions, admissions, and documentary evidence submitted or filed in the action. The court is not permitted to assess credibility or to determine facts on a motion for summary disposition. Instead, the court’s task is to review the record evidence, and all reasonable inferences therefrom, and decide whether a genuine issue of any material fact exists to warrant a trial. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

Defendant Michael Emke, while driving a van owned by his employer, defendant Professional Breathing Associates, was involved in an automobile accident with plaintiff at the intersection of Joslyn and North Perry in Pontiac, Michigan. The accident occurred after plaintiff attempted to complete a left

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\* Circuit judge, sitting on the Court of Appeals by assignment.

turn onto Perry. Plaintiff admitted that traffic on Joslyn had the right of way and that she was required to stop.

Defendants moved for summary disposition, arguing there was no genuine issue of material fact that Emke had the right of way and had not been negligent. Defendants filed deposition transcripts in support of their motion and cited Emke's deposition testimony that he had been driving at the posted speed limit of 35 m.p.h. at the time of the accident. Plaintiff opposed the motion for summary disposition, arguing there was a genuine issue of material fact regarding whether Emke had been comparatively negligent, and cited an accident reconstruction report produced by Sammie Hall that concluded that Emke had been speeding at the time of the accident. Plaintiff also cited an accident incident report Emke had filled out for his employer where Emke had indicated that he had been traveling at approximately 40 m.p.h. at the time of the accident. Plaintiff claimed that she could have seen Emke before entering the intersection had he not been speeding and could have avoided the accident. At oral argument, defense counsel argued that the report of the so-called expert manufactured some evidence and ignored other known evidence regarding the accident. The court said it was disregarding the accident reconstruction report because the expert had not been a witness to the accident. The trial court granted defendants' motion for summary disposition, holding that there was no evidence that Emke was negligent since he had the right of way at the time of the collision.

Plaintiff first contends that her expert's report which stated that Emke was traveling at a speed no less than 45 m.p.h., where 35 m.p.h. was the posted speed limit, established the existence of a genuine issue of material fact. We disagree.

The trial court's disregard of the accident reconstruction report because the expert was not an eyewitness to the accident was clearly erroneous. Nevertheless, the expert's opinion did not create a genuine issue of material fact because it was not submitted in a facially admissible form. The report was not in affidavit form. The expert's deposition was never taken. The report does not list the expert's education or experience such that one might reasonably conclude that he was competent to render an opinion. As stated in *Amorello v Monsanto Corp*, 186 Mich App 324, 331-332; 463 NW2d 487 (1990):

Summary disposition is not precluded simply because a party has produced an expert to support its position. The expert's opinion must be admissible. MRE 403; MRE 702.

See also *SSC v Detroit Retirement System*, 192 Mich App 360, 365; 480 NW2d 275 (1991) (expert's unsworn statements and opinion written in a letter were insufficient to support a motion for summary disposition because they were hearsay statements of opinion); *McCallum v Dep't of Corrections*, 197 Mich App 589, 603; 496 NW2d 361 (1992) (inadmissible hearsay does not create a genuine issue of material fact).

Plaintiff also argues that the trial court improperly disregarded Emke's admission that he was traveling approximately 40 m.p.h. and thus speeding at the time of the accident. We agree.

To establish a prima case of negligence, the plaintiff must prove (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach of duty was a proximate cause of the plaintiff's accident; and (4) that the plaintiff suffered damages. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). Regarding automobile negligence, Michigan law imposes upon all motorists a general duty to operate their vehicles in a reasonably prudent manner. *Sponkowski v Ingham Rd Comm*, 152 Mich App 123, 128; 393 NW2d 579 (1986). See also *McGuire v Rabaut*, 354 Mich 230, 237; 92 NW2d 299 (1958). Furthermore, MCL 257.649(5); MSA 9.2349(5) provides that the driver of a vehicle traveling at an unlawful speed forfeits the right that he or she might otherwise have. The admission that Emke was speeding at the time of the accident constitutes the admission of a party opponent. MRE 801(d)(2)(D). The trial court was not free to disregard this admission in favor of Emke's deposition testimony where he claimed to have been driving the posted speed limit. This party admission created a genuine issue of material fact for trial because Emke may have lost his right of way if he was in fact speeding at the time of the accident.

Reversed and remanded for further proceedings.

/s/ Robert P. Young  
/s/ Clifford W. Taylor  
/s/ Robert C. Livo