

STATE OF MICHIGAN
COURT OF APPEALS

GERALD M. MILLER, as Administrator of the
Estate of JOEL CAROL MILLER, Deceased,

UNPUBLISHED
June 26, 2001

Plaintiff-Appellant,

v

No. 220374
Monroe Circuit Court
LC No. 98-008194-NI

OWNERS INSURANCE COMPANY and SCOTT
EDWARD DENNIS,

Defendants-Appellees,

and

THE OHIO CASUALTY INSURANCE
COMPANY,

Defendant.¹

Before: K. F. Kelly, P.J., and O'Connell and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's grant of summary disposition in favor of defendants. We affirm in part, reverse in part, and remand.

I. Basic Facts and Procedural History

Plaintiff filed suit against defendants arising out of a fatal automobile accident involving vehicles driven by Joel Miller, plaintiff's decedent², and defendant Scott Edward Dennis. Dennis was driving westbound on Albain Road when he stopped his vehicle and prepared to turn south onto Strasburg Road. When he came to a stop, he looked to his right and waved to a neighbor. When the collision occurred, Dennis was not watching the vehicle driven by Miller.

¹ The Ohio Casualty Insurance Company was dismissed pursuant to stipulation of the parties on May 4, 1999, and is not a party to this appeal.

² For purposes of clarity, we use the word "Miller" to refer to plaintiff's decedent.

Nevertheless, Dennis surmised that Miller crossed the centerline and hit his vehicle. Dennis stated that his vehicle was stopped in the middle of the westbound lane and the wheels were straight. Following the collision, the vehicle driven by Miller struck a light pole. Miller was transported to the hospital where she died as a result of the injuries sustained in the accident.

Dennis moved for summary disposition³, pursuant to MCR 2.116(C)(10), arguing that plaintiff could not establish a breach of duty or a causal link between Miller's injuries and Dennis' conduct. Dennis contended that his vehicle was at a complete stop as he prepared to turn left onto Strasberg Road when Miller's vehicle crossed the centerline and struck his vehicle. Dennis maintained that there was no evidence indicating that he was negligent or that his vehicle otherwise crossed the centerline. Thus, he claimed that plaintiff could not establish the requisite breach of duty and proximate cause as a matter of law, without resorting to pure speculation or conjecture.

Plaintiff opposed defendants' motion for summary disposition relying on Sergeant Larry Richardson's deposition testimony. Sgt. Richardson reconstructed the accident scene and testified that he studied the damage on both vehicles, analyzed photographs of the scene, examined markings in the grass made by Miller's vehicle, and considered the place where Miller's vehicle came to a final halt. Sgt. Richardson considered all of the potential causes for the accident, including the possibility that Miller's vehicle crossed the centerline. Sgt. Richardson however, did not consider this a very likely possibility because in that event, the contact would have occurred on the left front corner of Dennis' vehicle rather than on the left front tire. Sgt. Richardson determined that Dennis' vehicle was in motion and traveled into the path of the vehicle driven by Miller but he could not state exactly where the point of impact occurred. He could only determine that the accident occurred near the centerline. Sgt. Richardson did not dispute that it was possible that Miller's vehicle was near the centerline and stated that if the vehicles were located more to the northwest at the time of impact, then Dennis' vehicle would have been within the proper lane when the impact occurred. Nevertheless, Sgt. Richardson surmised that this was a remote possibility at best. Thus, Sgt. Richardson concluded that based on his examination of the damage to the vehicles and the place where Miller's vehicle ultimately came to a final halt, the accident occurred as a result of Dennis' vehicle crossing the centerline.

Plaintiff also presented Douglas Brown's affidavit, an expert who reconstructed the accident scene and prepared an accident reconstruction report for Ohio Casualty by a company called S.E.A., Inc.⁴ Defendant Owners moved to strike the affidavit on the grounds that SEA was jointly retained by Owners and Ohio Casualty to investigate the accident scene and that SEA and Brown, who was SEA's agent, were listed as witnesses for Owners. Owners maintained that plaintiff's ex parte communication with Brown was in direct violation of MCR 2.302(B)(4) and that as such, the affidavit should be stricken.

³ Defendant Owner's Insurance Company filed a concurrence in this motion.

⁴ Hereinafter referred to as "SEA."

The lower court agreed that the Brown affidavit should not be considered and thereafter granted summary disposition in favor of Dennis and defendant Owners Insurance Company, the company that insured Miller's vehicle stating:

“Well, first of all the Court would note that there is all of the evidence that I find would be admissible is – speculates on where the vehicle was, except one witness and that's the defendant himself who testifies that the vehicle was – that he was in his own lane of travel waiting to make a turn.

Whether his wheels were turned or not, he might think they were straight. Maybe they were turned. Who knows? But he is the only witness who can say, I was in that lane. *Everybody else speculates as to where he may be . . .*” (Emphasis added).

Accordingly, the court entered an order dismissing plaintiff's case. Plaintiff appealed as of right.

II. The Brown Affidavit

First, plaintiff argues that the lower court erroneously concluded that MCR 2.304(B)(4)(b) precluded consideration of Douglas Brown's affidavit, an expert retained to reconstruct the accident. We disagree. The lower court's application of MCR 2.302 involves a question of law that is reviewed de novo. See *Grzesick v Cepela*, 237 Mich App 554, 559; 603 NW2d 809 (1999).

“[D]iscovery of another party's experts' opinions which were acquired or developed in anticipation of litigation or for trial . . . may be obtained only as provided in MCR 2.302(B)(4).” *Nelson Drainage Dist v Bay*, 188 Mich App 501, 505-507; 470 NW2d 449 (1991).⁵ The parties do not contest that this issue is governed by MCR 2.302(B)(4)(b), which provides that:

A party may not discover the identity of and facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, except

(i) as provided in MCR 2.311,⁶ or

(ii) where an order has been entered on a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. [Footnote added].

⁵ *Nelson, supra*, discusses a prior version of the court rule, which was subsequently amended in 1993. The amended version of MCR 2.302(B)(4)(b) adds discovery of the identity of experts to the information that is not discoverable absent an exception. See Staff Comment to 1993 Amendment.

⁶ MCR 2.311 addresses physical and mental examinations.

This subsection of the discovery rule provides greater protection and is more restrictive than subsection (a), which governs discovery of testimonial experts. The reason for this difference is that discovery of experts functioning solely as consultants or advisors do not assist in narrowing or otherwise sharpening the issues presented during trial, preparing for cross-examination, or eliminating surprise, which are the fundamental purposes for pretrial discovery of testimonial experts. *Nelson Drainage, supra* at 505-507.

Although MCR 2.302(B)(1) provides that parties may discover any relevant matter that is not privileged, the court rules must be read “in the context of the entire rule in order to produce an harmonious whole.” *Colista v Thomas*, 241 Mich App 529, 536; 616 NW2d 249 (2000). Reading the subsections of MCR 2.302 in the context of the entire rule, we conclude that the general rule of subsection (B)(1), which permits discovery of any relevant matter that is not privileged, is limited by (B)(4)(b), which specifically governs discovery of another party’s expert. Therefore, although any relevant matter is generally subject to discovery, discovery relative to an expert not anticipated to testify at trial is not subject to the discovery process unless the proponent satisfies the express exceptions enunciated in MCR 2.302(B)(4)(b).

In this case, plaintiff obtained Brown’s affidavit without complying with the requirements of MCR 2.302(B)(4)(b). Brown’s affidavit does not fall within the physical or mental examination exception and the lower court did not enter an order otherwise allowing discovery into the facts that Brown knew or opinions that Brown formulated. Because discovery of an expert not expected to testify as a witness at trial is limited to the provisions of the court rule and plaintiff did not comply with those provisions, the affidavit contained information that was not discoverable. Accordingly, the lower court correctly concluded that consideration of the affidavit was precluded by MCR 2.302(B)(4)(b).⁷

III. Summary Disposition

Plaintiff’s final argument is that the lower court erred by granting defendants’ motion for summary disposition based on its conclusion that plaintiff’s evidence was speculative. We agree. The trial court’s ruling on a motion for summary disposition is reviewed *de novo*. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). “A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim.” *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 485; 502 NW2d 742 (1993). Affidavits, pleadings, depositions, admissions, and documentary evidence are considered in reviewing a motion for summary disposition pursuant to MCR 2.116(C)(10), and the evidence is viewed “in the light most favorable to the party opposing the motion.” *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine

⁷ Plaintiff also challenges the lower court’s grant of summary disposition on the ground that he had no obligation to present evidence concerning whether Brown’s affidavit was based on speculation because the issue was not raised by defendants. In light of our conclusion that consideration of Brown’s affidavit was precluded by MCR 2.302, any further discussion regarding Brown’s affidavit is unnecessary.

issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; MCR 2.116(C)(10).

Circumstantial evidence can be sufficient to establish a claim of negligence, but the evidence “must facilitate reasonable inferences of causation, not mere speculation.” *Skinner v Square D Co*, 445 Mich 153, 163-164; 516 NW2d 475 (1994); see also *Libralter, supra* at 486. A theory of causation “must have some basis in established fact” and slight evidence or a theory that is “just as possible as another theory” is not sufficient to justify submitting same to the jury for its consideration. *Skinner, supra* at 164-165. Rather, “the plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result.” *Id.* at 165. (Citation omitted).

Viewing the evidence in the light most favorable to plaintiff, we conclude that plaintiff presented evidence establishing a genuine issue of material fact regarding the location of the accident. Although Sgt. Richardson was not able to pinpoint the exact location of the accident and further acknowledged that it was possible that Dennis’ vehicle did not cross the centerline, his analysis of the damage nonetheless compelled him to conclude that Dennis’ vehicle did in fact cross the centerline. This testimonial evidence meets the standard of a reasonable likelihood of probability because it was deduced from examining the damage to the vehicles and the location where Miller’s vehicle ultimately came to rest. See *Skinner, supra* at 166-167. While Sgt. Richardson was not able to negate the possibility that Miller caused the accident by crossing the centerline, the location of the damage on Dennis’ vehicle indicated that such a possibility was remote at best. The chain of circumstances surrounding the accident led Sgt. Richardson to the conclusion that Dennis’ vehicle crossed the centerline and struck Miller’s vehicle which represented a theory that was more probable than the hypothesis suggesting that Miller’s vehicle struck Dennis’ vehicle. See *id.* Therefore, the circumstantial evidence was sufficient to establish a genuine issue of material fact relative to causation and thus, defeat summary disposition. Accordingly, the lower court erred by granting summary disposition in defendants’ favor.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ Peter D. O’Connell

/s/ Jessica R. Cooper