

STATE OF MICHIGAN
COURT OF APPEALS

KENNETH R. MASCIA,

Plaintiff-Appellee,

v

IDS PROPERTY CASUALTY INSURANCE
COMPANY,

Defendant-Appellant.

UNPUBLISHED

October 2, 2012

No. 304607

Oakland Circuit Court

LC No. 2009-106218-CK

Before: MURPHY, C.J., and MARKEY and WHITBECK, JJ.

PER CURIAM.

Defendant appeals by right a judgment entered for plaintiff following a jury trial on plaintiff's first-party insurance claim for property damage to his 1998 Dodge Viper. The jury rejected both of defendant's policy defenses, finding that the Viper was not damaged as a result of a prearranged race or speed contest and that plaintiff did not make fraudulent statements in his examination under oath in support of his insurance claim. Defendant contends on appeal that the trial court erred by not granting its pretrial motion for summary disposition based on the undisputed facts applied to its two policy defenses. Alternatively, defendant argues that the judgment should be set aside and a new trial court ordered because the trial court abused its discretion precluding Pontiac police sergeant Kevin Harris from testifying that in his opinion plaintiff was engaged in a prearranged—as Harris understood that term—drag race. We affirm.

I. BASIC FACTS AND PROCEEDINGS

Defendant insured plaintiff's 1998 Dodge Viper, a high-performance, limited-edition, sports car that the parties agree was worth \$80,500.00. Close to midnight on the evening of Friday, August 14, 2009, plaintiff drove the Viper southbound on Woodward Avenue approaching the intersection of Orchard Lake Road in Pontiac, Michigan. The annual Woodward Dream Cruise was the next day, and hundreds of people were in the area watching cars cruising. Plaintiff testified at an examination under oath in support of his insurance claim that before the accident he was stopped at a red traffic light at the intersection of Woodward Avenue and Orchard Lake Road, headed southbound about one-quarter mile north of where the accident occurred. Plaintiff testified he was in the far left lane and when the traffic light turned green, the vehicles to plaintiff's right accelerated rapidly in an apparent race. Plaintiff also accelerated but not as fast as the other two cars to his right. Plaintiff testified the street was lined

with pedestrians, and as he drove south he realized his lane ended because it was for left turns only. Because there was a car to his right he continued straight until jumping the curb at the end of his lane, went airborne, struck a utility pole and other objects that totaled the Viper. Plaintiff denied that anyone in the street signaled by hand to start a race, and also specifically denied being involved in a speed contest. He admitted that the drivers of the cars to his right appeared to be racing using the green light as the starting signal. Plaintiff also admitted that the police issued him a ticket for drag racing or reckless driving.

The accident was witnessed by Pontiac police officer Sergeant Kevin Harris who was in his police Tahoe headed west on Whittemore Street stopped at Woodward Avenue two blocks south of Orchard Lake Road. Harris testified in his pretrial deposition that there was a large crowd lining Woodward Avenue still watching vehicles apparently participating in the Dream Cruise. Harris looked to his right and saw two vehicles stopped on Woodward with a person in the street between the cars. The vehicles were not at a stop sign or traffic light and the person in the road raised and lowered his hands as an apparent signal to start a race as the adjacent cars sped away at high rate of speed driving past him going south on Woodward Avenue. Harris was not sure which lane the Viper was in, but he witnessed it hit the curb, spin around, go across three lanes of traffic, strike a pole, and come to rest against a railroad tie. He believed the cars were drag racing and issued plaintiff a ticket for that offense, which was later reduced to impeding traffic. Harris could not say how or why traffic was backed up before the race because it was dark and there were no street lights; all he could see were shadows and cars. He also could not describe the other vehicle other than it was a sports car. In addition, Harris could not say whether the person he saw in the street was male or female, or whether the person raised one arm or two. Harris stated racing on Woodward was common during the Dream Cruise.

Harris testified to his understanding of the word “prearranged” being “something that is already planned, arranged, scheduled.” Based on that definition, Harris opined that what he witnessed was “prearranged” but qualified his answer by stating that he was “not saying it was prearranged a day, a hour, two weeks before, maybe minutes. But it [the race] was arranged in my mind.” On cross-examination, Harris explained his definition of “prearranged” would extend to any drag race where a signal to start the race was understood by the participants.

Before the accident, Jakub Ruchula was standing on the west side of Woodward across from where Judson forms a “T” intersection with Woodward Avenue, with the intersection of Orchard Lake Road and Woodward Avenue immediately to the north and Whittemore Street immediately to the south. Ruchula saw the Viper headed south on Woodward and a BMW adjacent to it. He could not tell if the cars were stopped at the light at Orchard Lake Road or north of the intersection. Ruchula testified that the Viper and BMW accelerated south on Woodward and started weaving when they came up to slower traffic. The Viper hit the curb, hit the light pole, and slide out into a field. Because of the distance and darkness, Ruchula testified that he could not “confirm” the drivers of the BMW and Viper were racing, nor could he “confirm” a person between the cars started a race.

Defendant denied plaintiff’s property damage claim because it believed plaintiff used the Viper in violation of the prearranged racing exclusion the insurance policy, and because defendant believed plaintiff made fraudulent statements in connection with his claim, thereby voiding coverage. The insurance policy defendant issued to plaintiff covering the Viper

excluded property damage to the Viper if it is “used in preparation for any prearranged or organized racing, speed, demolition or stunting contest or activity, or used in the event itself.” The policy’s general anti-fraud provision states: “We do not provide coverage for any insured who has made fraudulent statements or engaged in fraudulent conduct in connection with any accident or loss for which coverage is sought under this policy.”

In response to defendant’s denial of his claim, plaintiff brought the present action. After the witnesses noted were deposed, plaintiff moved for summary disposition. In his brief and oral argument in support of the motion, plaintiff conceded for the purposes of the motion that “he was engaged in drag racing at the time he lost control of his vehicle.” Plaintiff argued, however, that defendant had produced no evidence that the race was “prearranged” or “organized” as required for application of the policy exclusion for “prearranged or organized racing” or speed contests. Plaintiff relied on *Detroit Auto Inter-Ins Exch v Bishop*, 24 Mich App 90; 180 NW2d 35 (1970), which addressed a similar exclusion in a liability insurance policy. That case held that for the exclusion to apply the insurer was required to show that the “race or speed contest” was “more elaborately planned than [an] impulsive, spur-of-the-moment race.” *Id.* at 94. As for the fraud exclusion, plaintiff argued that even if he made a false statement denying being in a drag race, the statement was not material to coverage because only prearranged or organized races are excluded from coverage, and defendant had produced no proof of those requirements.

Defendant pounced on plaintiff’s concession for purposes of argument and filed a countermotion for summary disposition pursuant to MCR 2.116(I)(2) and MCR 2.116(C)(10). Defendant argued that based on plaintiff’s admission for purposes of argument, and the “uncontested” testimony of Sgt. Harris, there was no factual dispute that both of its policy exclusions applied. Defendant asserted Sgt. Harris’s testimony established that the race was “prearranged” because an inference of prior agreement arose based on (1) the race cars were stopped away from a traffic control device; (2) a signalman was between the cars; (3) other traffic was stopped, and (4) a crowd had gathered to watch the event. Regarding its fraud exclusion, defendant argued plaintiff’s admission for purposes of arguing his motion established defendant was entitled to summary disposition because defendant was not required to show plaintiff’s statements were material, only that they were false. Moreover, even if proof of materiality were required, defendant argued that plaintiff’s denial of being in a drag race was material because it directly impacted defendant’s investigation of plaintiff’s claim.

The trial court, after hearing the parties’ arguments, tersely denied both motions, finding that material questions of fact existed as to all claims.

Subsequently, plaintiff filed a motion in limine to preclude defendant from offering at trial opinion testimony from Sgt. Harris that what he observed was a “prearranged” drag race. Plaintiff asserted Sgt. Harris’s opinion was not rationally based his own perceptions but instead based on Harris’s own definition of “prearranged” under which essentially any drag race must be prearranged. Further, plaintiff argued, Harris’s definition of “prearranged” conflicted with *Bishop*. Consequently, plaintiff argued Harris should not be permitted to opine that what he observed was “prearranged” and that the jury should be instructed that “prearranged” for purposes of the insurance exclusion requires more than impulsive, spur-of-the-moment activity.

Defendant filed a response to the motion, arguing that Sgt. Harris should be permitted to offer a lay opinion, MRE 701, and that his opinion was not excludable because it embraced an ultimate issue of fact, MRE 704. Defendant noted Harris's opinion was rationally based on his perceptions and was analogous to permitting an officer to opine that a vehicle was speeding or testifying as to the cause of a crash based on physical evidence at an accident scene.

After hearing the parties' arguments, the trial court ruled Sgt. Harris would not be allowed to opine that what he observed was prearranged. The court reasoned that while Sgt. Harris could testify about what he observed it would be for the jury to determine whether the event was prearranged. The trial court also agreed with plaintiff's counsel that the jury would be instructed consistent with *Bishop* that "prearranged" could not be a spur of the moment or impulsive event.

The case was tried in May 2011. Although we assume that the witness testimony already summarized was presented at trial, a complete transcript of the trial proceedings has not been filed. Ryan Carter was the only additional witness whose trial testimony has been transcribed. He testified that the race started at the intersection of Woodward Avenue and Orchard Lake Road when the traffic light changed from red to green and no person in the road gave a signal to begin a race. Carter testified that "he did not see any communication between either [of the racing] car[s]," and "there's no way that there was anyone that had signaled that race."

The trial court gave the jury pertinent standard jury instructions and consistent with its pretrial ruling instructed the jury regarding defendant's exclusion for prearranged races:

A prearranged race or speed contest involves more planning than an impulsive, spur of the moment action by the Plaintiff, Kenneth Mascia. Before you can conclude that the Defendant's policy exclusion for participation in a prearranged race or speed contest applies, the Defendant, IDS Property Casualty Insurance Company, must prove that it is more likely than not that the Plaintiff was involved in a race that involved more than impulsive, spur of the moment planning by the Plaintiff.

The jury returned its verdict that plaintiff's vehicle was not damaged as a result of a prearranged race or speed contest. And, the jury also found that plaintiff did not make fraudulent statements or engage in fraudulent conduct of a material nature in connection with his claim submitted to defendant. The jury awarded plaintiff the stipulated value of the Viper, \$80,500. Reduced by plaintiff's \$500 deductible, but adding costs and interest, judgment was entered for plaintiff in the amount of \$83,810.12. Defendant appeals by right as noted above.

II. SUMMARY DISPOSITION ISSUES

A. STANDARD OF REVIEW

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Jaguar Trading Ltd Partnership v Presler*, 289 Mich App 319, 322-323; 808 NW2d 495 (2010). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *1300 Lafayette East Cooperative, Inc v Savoy*, 284 Mich App 522, 525; 773 NW2d 57 (2009). The moving party has the initial burden to identify and support with evidence

the claim for which it contends there is no genuine issue as to any material fact and that entitles it to judgment as a matter of law. MCR 2.116(G)(4); *White v Taylor Distributing Co*, 275 Mich App 615, 620 n 2; 739 NW2d 132 (2007). If the moving party satisfies this initial burden, then the burden shifts to the adverse party to show the existence of a genuine issue of disputed fact. *Id.* The trial court may only consider substantively admissible evidence actually submitted, viewed in the light most favorable to the nonmoving party, to determine whether the parties have satisfied their respective burdens. MCR 2.116(G)(6); *Savoy*, 284 Mich App at 526; *Taylor v Modern Engineering Inc*, 252 Mich App 655, 658; 653 NW2d 625 (2002). When the submitted evidence viewed in the light most favorable to the nonmoving party leaves open a material issue of fact on which reasonable minds could differ, summary disposition may not be granted. *Johnson v Detroit Edison Co*, 288 Mich App 688, 695; 795 NW2d 161 (2010).

When a party files a motion for summary disposition, a trial court may instead grant summary disposition to the opposing party under MCR 2.116(I)(2) if it determines that the opposing party, rather than the moving party, is entitled to judgment. *Presler*, 289 Mich App at 322. Here, the trial court could have properly granted defendant summary disposition under MCR 2.116(I)(2) only if there was no genuine issue of material fact and defendant was entitled to judgment as a matter of law. *Savoy*, 284 Mich App at 525.

B. ANALYSIS

To avoid liability for property damage to plaintiff's Dodge Viper, defendant had the burden of proving that the accidental damage resulted from plaintiff engaging in a drag race and that the race was prearranged or organized. See *Auto Club Group Ins Co v Booth*, 289 Mich App 606, 610; 797 NW2d 695 (2010). The trial court properly denied defendant's motion for summary disposition because the submitted evidence at the time the motion was decided, viewed in the light most favorable to plaintiff, established material fact disputes whether plaintiff participated in a drag race and if so, whether the race was prearranged.

Defendant's argument is based on an erroneous premise: that the concession of plaintiff's counsel's for purposes of argument at plaintiff's motion for summary disposition was an admission binding on plaintiff. But defendant cites no authority for such a proposition. "This Court will not search for authority to sustain or reject a party's position." *Hughes v Almena Twp*, 284 Mich App 50, 71; 771 NW2d 453 (2009). A party's failure to cite sufficient authority to support its position results in its abandonment on appeal. *Id.* at 72. Moreover, authority indicates that counsel's concession was legal argument, not a binding admission by plaintiff. "Statements made by counsel are not to be considered as evidence." *Papke v Tribbey*, 68 Mich App 130, 137; 242 NW2d 38 (1976). An exception to this rule exists when an attorney makes a "judicial" admission for the purposes of dispensing with the necessity for proof of some fact at trial. *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 420; 551 NW2d 698 (1996); *Ortega v Lenderink*, 382 Mich 218, 222-223; 169 NW2d 470 (1969). "Judicial" admissions "are formal concessions in the pleadings in the case or stipulations by a party or its counsel that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." *Radtke*, 453 Mich at 420, quoting 2 McCormick, Evidence (4th ed), § 254, p 142.

In this case, the concession that plaintiff's counsel made was not in a pleading, see MCR 2.110(A), but in a brief and oral argument in support of plaintiff's motion for summary

disposition. Counsel's concession was not "a distinct, formal, solemn admission made for the express purpose of . . . dispensing with the formal proof of some fact at trial." *Ortega*, 382 Mich at 222-223. Rather, the concession was for the limited purpose for making a legal argument that a disputed fact, whether plaintiff was drag racing, was not material to plaintiff's claim against defendant and that plaintiff was entitled to judgment as matter of law. Consequently, counsel's concession for purposes of legal argument was neither an admission of a party opponent, MRE 801(d)(2), nor a judicial admission binding on plaintiff. *Radtke*, 453 Mich at 420; *Ortega*, 382 Mich at 222-223. Therefore, plaintiff's testimony at the examination under oath in which he denied participating in a drag race was sufficient to raise a genuine dispute regarding a material fact whether plaintiff participated in a drag race so as to preclude summary disposition to defendant. *Johnson*, 288 Mich App at 695; *Savoy*, 284 Mich App at 525. Similarly, plaintiff's testimony created a disputed material issue of fact regarding whether the event leading to the accident was "prearranged" even if plaintiff participated in a race or speed contest.

Additionally, defendant was not entitled to summary disposition because defendant's argument depended on accepting that Sgt. Harris's testimony was accurate, which was drawn into question by his own acknowledgement that distance and darkness limited his view to shadows and to vehicles that he could not describe. Further, Sgt. Harris's claim that a person was between the vehicles and that the vehicles were stopped away from a traffic light was called into question by the testimony of Ruchula. A trial court "is not permitted to assess credibility, or to determine facts on a motion for summary judgment." *White*, 275 Mich App at 625, quoting *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). In this situation, it would be inappropriate for the trial court to accept the accuracy of Sgt. Harris's testimony for the purposes of rendering judgment as a matter of law. *Id.* at 625-626.

Finally, even if Sgt. Harris's testimony was accurate, to find that the race was "prearranged" required drawing inferences from the testimony, including that plaintiff and another driver arranged a person to give a race-starting signal. But all inferences from the evidence on defendant's motion for summary disposition must be drawn in favor of plaintiff as the nonmoving party. *Id.* at 620 n 2; *Johnson*, 288 Mich App at 695. In this case, with various cars "cruising" Woodward Avenue, a reasonable juror might not draw these inferences. So, even accepting Sgt. Harris's testimony regarding a person in the road was accurate, a reasonable juror might conclude a spectator acting on his or own was simply waiving at the cars in the road. "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 might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

For the same reasons the trial court properly denied defendant's motion for s summary disposition regarding its anti-fraud provision. Without relying on plaintiff's concession, defendant can point to no substantively admissible evidence to establish as an undisputed fact that plaintiff made a false statement in his examination under oath in support of his insurance claim. Defendant's countermotion for summary disposition under MCR 2.116(I)(2) was its own motion for summary disposition under MCR 2.116(C)(10). Only if the evidence established no genuine issue of material fact existed regarding its anti-fraud provision would defendant be entitled to judgment as a matter of law. *Savoy*, 284 Mich App at 525. Although the parties' motions were heard by the trial court at the same time, each party bore the burden of showing that no material issue of fact remained and entitlement to judgment as a matter of law with

respect to its own motion. MCR 2.116(G)(4); *White*, 275 Mich App at 620 n 2. So, even assuming Sgt. Harris's testimony satisfied defendant's initial burden, plaintiff's testimony created questions of fact regarding falsity, materiality, and intent to defraud. See *West v Farm Bureau Mutual Ins Co*, 402 Mich 67, 69; 259 NW2d 556 (1997), holding that "[w]here an insurance policy provides that an insured's concealment, misrepresentation, fraud, or false swearing voids the policy, the insured must have actually intended to defraud the insurer."

Consequently, the trial court correctly denied defendant's motion for summary disposition. The evidence at the time the motion was decided, viewed in the light most favorable to plaintiff, established material issues of fact regarding whether plaintiff participated in a race, and if so, whether the race was prearranged. Additionally, with respect to the anti-fraud provision, plaintiff's testimony created material questions of fact whether false statements were made, whether the false statements were material, and whether plaintiff intended to defraud.

III. LAY OPINION TESTIMONY

A. STANDARD OF REVIEW

This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Id.* But the granting of relief on the basis of an error in the admission or exclusion of evidence at trial will not be warranted "unless refusal to take this action appears . . . inconsistent with substantial justice," MCR 2.613(A), or the error affects "a substantial right of the party," MRE 103(a). See *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004); *Miller v Hensley*, 244 Mich App 528, 531; 624 NW2d 582 (2001). In general, an evidentiary error under this standard will not warrant relief unless it affected the outcome of the trial. See *Shaw v Ecorse*, 283 Mich App 1, 27-28; 770 NW2d 31 (2009), and *Lewis v LeGrow*, 258 Mich App 175, 202, 208; 670 NW2d 675 (2003).

B. ANALYSIS

Defendant is not entitled to relief on this issue for two reasons. First, the trial court did not abuse its discretion by ruling that Sgt. Harris could not testify that in his opinion what he observed was a "prearranged" race. Second, defendant cannot show the alleged evidentiary error affected its substantial rights, or that refusing to grant relief is inconsistent with substantial justice. MRE 103(a); MCR 2.613(A); *Miller*, 244 Mich App at 531. In other words, defendant cannot show that the exclusion of Sgt. Harris's opinion affected the outcome of the trial.

MRE 701 controls the admissibility of lay opinion testimony. *Miller*, 244 Mich App at 530. To be admitted in evidence, a lay opinion must be "(a) rationally based on the perception of the witness," and "(b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." MRE 701(emphasis added); *Van Dike v AMF, Inc*, 146 Mich App 176, 181; 379 NW2d 412 (1985). Regarding part (a), Sgt. Harris's opinion was rationally based on his perceptions, even if other witnesses disputed those perceptions. Also, Sgt. Harris's opinion was based on his own understanding of the meaning of the term "prearranged." Sgt. Harris's opinion was therefore not solely an expression of what he observed but also included his

own understanding of the meaning of the term “prearranged.” Thus, Sgt. Harris’s lay opinion did not fully qualify under MRE 701 part (a).

Moreover, regarding part (b), Sgt. Harris’s lay opinion was not “helpful to a clear understanding of the witness’ testimony.” Sgt. Harris’s testimony regarding where he saw the cars, the person in the road, and any of his other perceptions before the accident needed no explanation of his understanding of the meaning of “prearranged” to be understood by the jury. Nor would Sgt. Harris’s opinion help the jury decide whether what occurred was a “prearranged” race. See, e.g., *Bank of Lansing v Stein, Hinkle, Dawe & Assoc Architects, Inc*, 100 Mich App 719, 726; 300 NW2d 383 (1980) (“When a question is asked as to whether a witness believes a legal standard has been met, the court must deny the answer and instruct the jury as to the law, and the jury must draw its conclusion from the evidence.”).

Here, the trial court instructed the jury, consistent with *Bishop*, 24 Mich App at 94, regarding the meaning of the term “prearranged” as used in defendant’s policy exclusion, and the jury was able to apply its findings of the facts within the framework of the court’s instruction. Although MRE 704 permits opinions on ultimate fact issues, Harris’s opinion could have led to confusion of the issue, or even misled the jury. So, even if admissible under MRE 701 and MRE 704, the trial court could have properly excluded Sgt. Harris’s opinion under MRE 403. Therefore, the trial court’s ruling was not “outside the range of principled outcomes.” *Edry*, 486 Mich at 639.

Finally, even if the trial court erred, defendant has not supplied a record of the trial proceedings to support an argument that the error affected its substantial rights, or that refusing to grant relief is inconsistent with substantial justice. It was defendant’s responsibility to file a complete transcript of the lower court proceedings relating to its claim of appeal. MCR 7.210(B)(1)(a); *Nye v Gable, Nelson & Murphy*, 169 Mich App 411, 414; 425 NW2d 797 (1988). Having failed to do so, defendant has waived appellate review. See *Reed v Reed*, 265 Mich App 131, 160-161; 693 NW2d 825 (2005). Moreover, based on the record that was provided to this Court, it is not reasonably likely that the trial court’s evidentiary ruling affected the outcome of the trial. Consequently, defendant has not established that the trial court’s ruling affected its substantial rights, or that refusing to grant relief is inconsistent with substantial justice. MRE 103(a); MCR 2.613(A); *Craig*, 471 Mich at 76.

In sum, we conclude that the trial court did not abuse its discretion by precluding Sgt. Harris from offering his lay opinion. Further, defendant has not established that the alleged error affected his substantial rights or that refusing to grant relief is inconsistent with substantial justice.

We affirm. As the prevailing party, plaintiff may tax costs pursuant to MCR 7.219.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ William C. Whitbeck