STATE OF MICHIGAN

COURT OF APPEALS

MARIBETH DEHAAN and MICHAEL JOHN DEHAAN,

Plaintiffs-Appellants,

v

ROBERT LEE NORTHROP, a/k/a ROBERT LEE NORTHUP, JR.,

Defendant-Appellee,

and

KENT COUNTY ROAD COMMISSION,

Defendant.

UNPUBLISHED
June 11, 1999

No. 205718
Kent Circuit Court
LC No. 96-003844 NI

Before: Hoekstra, P.J., Saad and R.B. Burns,* JJ.

PER CURIAM.

Plaintiffs appeal as of right from a circuit court order granting summary disposition in favor of defendant Robert Lee Northrop only. We affirm.

The trial court granted defendant Northrop's motion for summary disposition pursuant to MCR 2.116(C)(10), because there was no evidence of any negligence on Mr. Northrop's part. We agree. On appeal, we review the evidence de novo, drawing all inferences in the plaintiffs' favor and giving the plaintiffs the benefit of any reasonable doubt. *Paul v Lee,* 455 Mich 204, 210; 568 NW2d 510 (1997).

The occurrence of an accident is not, by itself, evidence of negligence. The plaintiff must present some facts which either directly or circumstantially establish negligence. *Whitmore v Sears, Roebuck & Co,* 89 Mich App 3, 9; 279 NW2d 318 (1979). To prove negligence, the plaintiff must

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

prove the existence of a legal duty owed by the defendant, a breach of that duty, and damages proximately resulting from such breach. *Young v Barker*, 158 Mich App 709, 718-719; 405 NW2d 395 (1987). The duty imposed on a driver is to exercise that degree of care which an ordinarily careful and prudent person would have exercised under the same or similar circumstances. *People v Paulen*, 327 Mich 94, 98; 41 NW2d 488 (1950).

Because plaintiff, Maribeth DeHaan, not defendant, had the stop sign, she was required to both stop and "yield the right of way to a vehicle which has entered the intersection from another highway or which is approaching so closely on the highway as to constitute an immediate hazard during the time when the driver would be moving across or within the intersection." MCL 257.649(6); MSA 9.2349(6). Because defendant ran into plaintiff within seconds of her entering the intersection, it is clear that he was "approaching so closely . . . as to constitute an immediate hazard" and therefore plaintiff was negligent for failing to yield the right of way. Defendant was not required to anticipate plaintiff's negligence or to have his vehicle under such control as to be able to avoid a collision with the subordinate driver coming illegally into his path. *McGuire v Rabaut*, 354 Mich 230, 234, 236; 92 NW2d 299 (1958). However, this does not absolve defendant from his duty to exercise reasonable care under the circumstances. *Id.* at 235. The question here is did plaintiffs present sufficient evidence to create an issue of fact regarding defendant's alleged failure to exercise reasonable care under the circumstances?

Plaintiffs allege that defendant was negligent in driving at an excessive speed and in failing to use his car's headlights. With respect to excessive speed, the trial court properly ruled that it could not consider the contents of Bereza's letter, because it constituted a hearsay statement of opinion, *SSC Associates Ltd Partnership v General Retirement Sys of Detroit*, 192 Mich App 360, 367; 480 NW2d 275 (1991), and plaintiffs did not show by affidavit that they were unable to procure an affidavit or deposition testimony from Bereza. MCR 2.116(H)(1). Because this was the only evidence plaintiffs produced on the issue, the exclusion of this evidence effectively eliminates plaintiffs' claim that defendant's speed was excessive.

This leaves the issue of the headlights. The accident occurred before sunset, when defendant was not required to use headlights. Although plaintiff testified (contrary to the testimony of all other witnesses) that it was "dark enough" to require headlights, and that she would have seen defendant if his headlights had been on, her speculation is not fact and does not create a question of fact. Furthermore, plaintiff's counsel admitted at oral argument that there was no evidence of record to establish that defendant's headlights were, in fact, off. Plaintiff's belief that defendant was driving without headlights is thus further speculation. Because plaintiff's case is based entirely upon speculation on top of speculation, defendant is entitled to judgment as a matter of law.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Henry William Saad
/s/ Robert B. Burns