STATE OF MICHIGAN

COURT OF APPEALS

CHAD MCWILLIAMS, Minor, by his Next Friend KEVIN GLENN MCWILLIAMS, and KENNETH MCWILLIAMS,

Plaintiffs-Appellants,

v

ANDREA RHEA RAISON,

Defendant-Appellee.

UNPUBLISHED
June 14, 2002

No. 231347
Genesee Circuit Court
LC No. 00-068063-NI

Before: Holbrook, Jr., P.J., and Gage and Meter, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendant summary disposition of plaintiff's negligence claim pursuant to MCR 2.116(C)(10). We reverse and remand for further proceedings.

I

Plaintiffs brought this action after the vehicle in which they were riding collided with a vehicle driven by defendant, as both vehicles proceeded southbound on Interstate 75. As defendant drove in the far right lane, an unknown driver merged onto the freeway in front of her and then crossed into the freeway's center lane. In an apparent effort to avoid a collision with the merging vehicle, defendant braked and crossed into the center lane, striking a vehicle that had been adjacent to her and sending it across the freeway's far left lane and into a guardrail. Plaintiffs' vehicle, which had been traveling in the center lane behind the vehicle with which defendant collided when she changed lanes, crashed into the rear of defendant's vehicle, unable to avoid defendant after she had braked in front of it.

The parties do not dispute these basic facts, which are reflected within police reports regarding the accident, but each side attributes the collision to the other and characterizes the other's conduct as the negligent cause of the accident. Plaintiffs' complaint alleged that defendant drove inattentively in congested traffic, failed to reasonably anticipate or watch for passing vehicles, including the vehicle that merged in front of her, and drove at an excessive speed.

Within approximately 1-1/2 months of filing her answer, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Defendant argued that the application of Michigan law, which (1) places on a merging vehicle (i.e., the unknown vehicle) the obligation to yield to freeway traffic, (2) demands that a following vehicle (i.e., plaintiffs' vehicle) maintain an assured clear distance in which to stop, and (3) presumes the liability of the following vehicle in the event of a rear end collision, shielded her from liability. Defendant argued that plaintiffs had produced no facts beyond the police reports, which did not attribute the accident to her or the driver of the vehicle in which plaintiffs rode. In support of her motion, defendant attached a copy of plaintiffs' answers to interrogatories, which responded to defendant's requests for "the full factual basis to support your allegations" by referring to the police reports, and attached copies of the police reports themselves.[1]

Plaintiffs responded to defendant's motion for summary disposition by arguing that an expert witness affidavit supported their claims that defendant drove negligently and that defendant's negligent driving qualified as a sudden emergency that forced their vehicle to collide with defendant. Plaintiffs attached the affidavit of James Dockery, an accident investigator who worked for the Detroit Police Department. Dockery, who averred that he had investigated more than 2000 motor vehicle accidents in his career, opined on the basis of the police reports that defendant "was at fault for the accident," "failed to maintain the assured clear distance to avoid a collision with" the merging vehicle, "failed to anticipate traffic merging onto the expressway and varied the course of travel without safe observation," and should have received traffic citations for her driving. Dockery further opined that defendant was negligent and that the driver of plaintiffs' vehicle bore no responsibility for the accident. At the summary disposition hearing, defendant countered that Dockery's affidavit impermissibly made legal conclusions regarding the ultimate issue in the case, specifically the parties' negligence, and introduced no new facts tending to show defendant's negligence because Dockery did not inspect the scene or speak to witnesses of the accident.

The trial court granted defendant's motion for summary disposition, explaining that the merging vehicle "in effect forced the defendant over into the next lane where ultimately the plaintiff rear ended the defendant." The court reasoned that plaintiffs' vehicle's failure to anticipate a sudden stop "in a heavy traffic situation on the expressway" and its consequent collision with the rear of defendant's vehicle entitled defendant to judgment as a matter of law, citing *Hill v Wilson*, 209 Mich App 356, 361; 531 NW2d 744 (1995), for the proposition that any motorist in heavy traffic should anticipate that unexpected events might cause drivers ahead to slow down or stop.

II

Plaintiff now raises several challenges to the trial court's decision. This Court reviews de novo the trial court's summary disposition ruling. In considering a motion made pursuant to MCR 2.116(C)(10), which tests the factual support of a plaintiff's claim, we consider in the light

[1] While plaintiffs correctly argue on appeal that the police reports are hearsay, we note that we do not rely on these reports in reaching our decision in this case, but on the basic facts of the accident that the parties do not dispute.

most favorable to the plaintiff the pleadings, affidavits and other documentary evidence filed in the action to determine whether a genuine issue of any material fact exists to warrant a trial. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The party moving for summary disposition may submit affirmative evidence negating an essential element of the plaintiff's claim, or may demonstrate that the plaintiff's evidence is insufficient to establish an essential element of his claim. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). In response to the motion, the plaintiff must produce documentary evidence setting forth specific facts showing a genuine issue for trial. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999).

The trial court apparently relied on several Michigan statutes addressing the operation of motor vehicles, which defendant cited in her brief in support of summary disposition and which this Court discussed in *Hill*, *supra*. Among the relevant provisions is MCL 257.627(1), which provides as follows:

> A person driving a vehicle on a highway shall drive at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface, and width of the highway and of any other condition then existing. A person shall not drive a vehicle upon a highway at a speed greater than that which will permit a stop within the assured, clear distance ahead.

Another section similarly addressing the appropriate distance between vehicles states as follows:

> The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of the vehicles and the traffic upon, and the condition of, the highway. [MCL 257.643(1).]

Central to defendant's argument of entitlement to judgment as a matter of law was MCL 257.402, which provides in relevant part as follows:

> (a) In any action, in any court in this state when it is shown by competent evidence, that a vehicle traveling in a certain direction, overtook and struck the rear end of another vehicle proceeding in the same direction, . . . the driver of operator of such first mentioned vehicle shall be deemed prima facie guilty of negligence. This section shall apply, in appropriate cases, to the owner of such first mentioned vehicle and to the employer of its driver or operator.

In *Hill*, *supra*, this Court concluded that the presumption of negligence within subsection 402(a) entitled the defendant driver to summary disposition of the action brought by the plaintiff, who had crashed into the rear of the defendant's vehicle. *Hill*, *supra* at 359-361. The Court reasoned "that it is a 'proper activity' of a motorist to slow down or brake for objects that enter the roadway ahead," and that the plaintiff bore responsibility for the accident because "[a]ny motorist in heavy traffic should anticipate that unexpected events may cause drivers ahead to slow down or stop." *Id*. at 361.

We find that the trial court erred in granting defendant summary disposition because the undisputed underlying facts regarding the instant accident, unlike the facts in *Hill*, *supra*, raise a

reasonable inference of defendant's negligence. The parties do not dispute that in response to a merging vehicle defendant moved into the freeway's center lane and struck an adjacent vehicle. Plaintiffs' vehicle[2] in the center lane then struck the rear of defendant's braking vehicle. Viewing these facts in the light most favorable to plaintiffs, we find a reasonable inference that defendant's apparently sudden move from the right to the center lane in front of plaintiffs' vehicle, while applying her brakes, resulted in a sudden emergency that rebuts the presumption of negligence arising from plaintiffs' vehicle's collision with the rear of defendant's vehicle. See *Vander Laan v Miedema*, 385 Mich 226, 231-232; 188 NW2d 564 (1971) (including within the scope of a sudden emergency an "unsuspected" situation, defined as "a potential peril within the everyday movement of traffic. . . . that . . . had not been in clear view for any significant length of time, and was totally unexpected"); *Wilson v Phillips*, 12 Mich App 58, 59-60; 162 NW2d 296 (1968) (upholding a jury verdict for the defendant, whose vehicle struck the rear of the plaintiff's vehicle, where the defendant alleged "that she was in the extreme right lane of the 3-lane expressway and that the plaintiff attempted to cut over from the middle lane in order to leave, causing the collision when defendant was unable to avoid hitting plaintiff's vehicle"). Defendant's sudden movement into plaintiffs' lane of travel distinguishes the instant case from the facts of *Hill*, *supra*, in which this Court found no sudden emergency when the plaintiff, who had been following *directly behind the defendant in the same lane of travel*, crashed into the rear of the defendant's vehicle when the defendant stopped suddenly in rush hour traffic.[3]

Because the limited record does not support a conclusion as a matter of law that either the driver of plaintiffs' vehicle or defendant negligently caused the accident, the trial court erred in granting defendant summary disposition pursuant to MCR 2.116(C)(10).

III

Plaintiffs also contend that the trial court erred in failing to consider Dockery's affidavit when granting defendant summary disposition. Our review of the trial court's brief oral analysis at the hearing reveals that the trial court failed to acknowledge the existence of the affidavit. Defendant suggests that "the trial court did not abuse its discretion when it chose not to rely upon the affidavit of . . . Plaintiffs' expert witness, who relied solely upon the facts as presented in the police reports and never conducted a separate investigation."

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[2] Plaintiffs argue on appeal that the trial court incorrectly attributed the negligence of the driver of their vehicle to plaintiffs themselves. We find it clear, however, that the trial court properly considered the statutory presumption of negligence attributable to the vehicle in which plaintiffs rode only for the purpose of determining whether to attribute any negligence to defendant. Although we conclude that the trial court erred in its ultimate finding that no inference of defendant's negligence exists, we do not believe that the trial court attributed to plaintiffs the negligence of their driver. For the sake of brevity, we refer to the vehicle in which plaintiffs rode as "plaintiffs' vehicle."

[3] With respect to the trial court's finding that the instant accident occurred "in a heavy traffic situation on the expressway," we note that nothing within the limited record supports any characterization of the freeway traffic volume at the time of the accident. We further note that no evidence exists regarding the exact distances between the parties' vehicles or the speeds of the vehicles at the time of the accident.

We find that the trial court plainly erred in failing to even consider Dockery's affidavit in the context of the motion for summary disposition. The requirements for admitting expert testimony are (1) the witness must be an expert, (2) facts must exist in evidence which require or are subject to examination and analysis by a competent expert, and (3) there must be knowledge in a particular area that belongs more to an expert than to the common man. The critical inquiry with regard to expert testimony is whether such testimony will aid the factfinder in making the ultimate decision in the case. *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 215; 457 NW2d 42 (1990), citing MRE 702.[4]

This Court has long recognized that the testimony of an accident reconstructionist witness, who possesses adequate training, may provide assistance in determining the facts surrounding an accident. See *Jones v Sanilac Co Rd Comm*, 128 Mich App 569, 577-578; 342 NW2d 532 (1983). According to Dockery's affidavit, he possessed abundant experience in accident investigation.[5] Defendant correctly suggests that in an ordinary negligence action expert testimony is inadmissible with respect to the ultimate, legal conclusion regarding a party's negligence. MRE 704; *Koenig v City of South Haven*, 221 Mich App 711, 725-726; 562 NW2d 509 (1997) (explaining that while an expert's testimony may encompass an ultimate question for the factfinder, MRE 704 does not allow an expert to invade the province of the jury, and no witness is permitted to tell the jury how to decide a case), rev'd on other grounds 460 Mich 667; 597 NW2d 99 (1999). Dockery's opinions regarding the parties' negligence or non negligence therefore would not have been admissible. However, Dockery's additional opinions that defendant failed to anticipate merging traffic, failed to maintain an assured clear distance to avoid colliding with the merging vehicle, and varied her "course of travel without safe observation" constituted appropriate areas of expert opinion.[6] Although Dockery based his opinions exclusively on the police reports, contrary to defendant's argument, "an expert may base an opinion on hearsay information." *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 73; 577 NW2d 150 (1998).

We conclude that the trial court erred in failing to exercise its discretion regarding the admissibility of the expert's affidavit before granting defendant summary disposition on the basis that no genuine issue of material fact existed to warrant a trial. *Franzel v Kerr Mfg Co*, 234 Mich App 600, 620; 600 NW2d 66 (1999).

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[4] Pursuant to MCL 600.2955(1), "[i]n an action for . . . injury to a person or property," the trial court must determine "that the [scientific] opinion is reliable and will assist the trier of fact."

[5] We note that defendant does not challenge Dockery's expert qualification in accident investigation.

[6] See *Jenkins v Raleigh Trucking Services, Inc*, 187 Mich App 424, 429-430; 468 NW2d 64 (1991) (finding no error in the trial court's admission of police officer testimony that a truck involved in an accident was improperly loaded); *Edwards v Kreps*, 17 Mich App 182, 186; 169 NW2d 156 (1969) (finding no error in a police officer's testimony that the defendant was driving too fast for conditions); *LaFave v Kroger Co*, 5 Mich App 446, 448-450; 146 NW2d 850 (1966) (concluding that the trial court erred in failing to admit a police officer's testimony regarding the area of impact that resulted in the accident, a factual conclusion, despite that the testimony would have "embraced" the ultimate issue of causation).

IV

We further observe that the trial court granted summary disposition without considering whether any additional evidence might be obtained through discovery to support plaintiffs' negligence claim. The record indicates that at the time the court granted defendant summary disposition, approximately four months after the filing of the complaint and three months after defendant filed her answer, the court had not entered a scheduling order providing for discovery. Beyond the interrogatories defendant attached to her brief in support of summary disposition, the record contained no hint that any further form of discovery had occurred or had been scheduled. Accordingly, the trial court's determination that no issue of material fact existed appears premature. *CMI Int'l, Inc v Intermet Int'l Corp*, ___ Mich App ___; ___ NW2d ___ (Docket No. 225585, issued April 30, 2002), slip op. at 5 (explaining that "it is usually inappropriate for a circuit court to grant summary disposition before the parties complete discovery," unless "there is no fair chance that further discovery will allow the party opposing the motion to present sufficient support for its allegations").[7]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage
/s/ Patrick M. Meter

[7] We lastly note that we do not address plaintiffs' additional, unpreserved contention that defendant "waived the defenses of MCL 257.402, 627, 643, and 649," which plaintiffs failed to raise before the trial court. *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993).