

STATE OF MICHIGAN
COURT OF APPEALS

PASQUALE PERNA and RICKEY PERNA,

Plaintiffs-Appellants,

v

FORD MOTOR COMPANY,

Defendant,

and

MIKE MILLER LINCOLN MERCURY JEEP
EAGLE, a/k/a LANSING TRANSIT, L.L.C.,

Defendant-Appellee.

UNPUBLISHED
September 17, 2002

No. 232064
Ingham Circuit Court
LC No. 98-088791-NP

Before: Whitbeck, C.J., and Sawyer and Kelly, JJ.

MEMORANDUM.

Plaintiffs appeal as of right the order granting defendant's motion for summary disposition under MCR 2.116(C)(10). We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant moved for summary disposition, asserting that there was no evidence to show that plaintiffs' injuries were caused by the accident alleged in the complaint. In response, plaintiffs submitted two depositions that were taken in another case involving an insurance claim. The trial court found that the depositions were not admissible evidence in this action, and granted summary disposition.

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in a light most favorable to the party opposing the motion. Where the evidence fails to establish a genuine issue regarding any material fact, the motion party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 807 (1999).

A reviewing court should evaluate a motion under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. *Id.* A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. *Id.*

MRE 803(18) provides for the admission of deposition testimony of an expert witness without regard to his availability, as long as the deposition is taken in the course of the same proceeding. If a witness is not available, MRE 804(b)(5) provides for the admission of deposition testimony taken in another proceeding if the party against whom the testimony is offered or a predecessor in interest had an opportunity and similar motive to develop the testimony. Neither of these provisions was met in this case.

Plaintiffs have not presented evidence that would be in itself admissible at trial. However, they did present specific facts at the time of the motion that show a genuine issue for trial. *Maiden, supra*, 121. The depositions, like affidavits, identify evidence that would be presented at trial, where there would be no hearsay problem. Plaintiffs have met the requirement of MCR 2.116(G)(4) of setting forth specific facts showing that there is a genuine issue for trial. Reversed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly