

STATE OF MICHIGAN
COURT OF APPEALS

KEVIN MICHAELS,

Plaintiff-Appellant,

V

EVELYN CARSON,

Defendant,

and

SAMUEL THOMAS AIUTO,

Defendant-Appellee.

UNPUBLISHED

June 29, 2004

No. 244341

Wayne Circuit Court

LC No. 00-025084-NI

Before: Neff, P.J., and Wilder and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right an order of dismissal in this third party automobile negligence action. We affirm.

Plaintiff argues that the trial court erred when it concluded, based on plaintiff's deposition testimony that he believed Aiuto did everything he humanly could do and that he could not have avoided the accident, that there was no genuine issue of material fact that Aiuto had not breached any duty to plaintiff and that summary disposition was appropriate. We disagree.

A trial court's decision on a motion for summary disposition is reviewed de novo on appeal. *Dressel v Ameribank*, 468 Mich 557, 516; 664 NW2d 151 (2003). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests whether there is sufficient factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In deciding a motion for summary disposition under this section of the court rule, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the non-moving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). A motion for summary disposition pursuant to MCR 2.116(C)(10) may be granted when the moving party is entitled to judgment as a matter of law, or the affidavits or other proofs show that there is no genuine issue of material fact. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998).

To establish a prima facie case of negligence, a plaintiff must demonstrate four elements: (a) a duty owed by defendant to plaintiff; (b) a breach of that duty; (c) causation; and (d) damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Duty is defined as the legal obligation to conform to a particular standard of conduct toward another. *Burnett v Bruner*, 247 Mich App 365, 368; 636 NW2d 773 (2001). Michigan law imposes on all motorists a general duty to operate their vehicles in a reasonably prudent manner. *Zarzecki v. Hatch*, 347 Mich 138, 141; 79 NW2d 605 (1956). However, a driver is not required “to guard against every conceivable result, to take extravagant precautions, to exercise undue care,” and is “entitled to assume that others using the highway . . . would under the circumstances at the time use reasonable care themselves, and take proper steps to avoid the risk of injury.” *Hale v Cooper*, 271 Mich 348, 354; 261 NW 54 (1935), *aff’d on rehearing* 271 Mich 357 (1935). See also *Berry v J & D Auto Dismantlers, Inc*, 195 Mich App 476, 484; 491 NW2d 585 (1992).

We agree with the trial court that plaintiff’s deposition testimony that Aiuto did everything he could to avoid the accident is a judicial admission that is binding on plaintiff. MRE 801(d)(2); *Ortega v Lenderink*, 382 Mich 218; 169 NW2d 470 (1969). Plaintiff contends that defendant Carson’s testimony, that she believed Aiuto was speeding, is sufficient to preclude summary disposition. However, a witness’ lay opinion testimony must be based on rational perceptions, MRE 701; *Lamson v Martin (After Remand)*, 216 Mich App 452, 459; 549 NW2d 878 (1996). Here, given the circumstances, including the vantage point from which plaintiff observed Aiuto’s vehicle as it approached, plaintiff’s testimony that Aiuto was speeding at 50-60 MPH was mere speculation that failed to rebut plaintiff’s testimony that Aiuto did not breach his duty to plaintiff. See *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994).

Affirmed.

/s/ Janet T. Neff
/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly