

STATE OF MICHIGAN
COURT OF APPEALS

JEFFREY GROSS,

Plaintiff-Appellant,

v

PHILIP GARY LANDIN and WEST
BLOOMFIELD TOWNSHIP WATER & SEWER
DEPARTMENT,

Defendants-Appellees.

UNPUBLISHED

October 25, 2007

No. 275077

Oakland Circuit Court

LC No. 2002-038836-NI

Before: Owens, P.J., and Bandstra and Davis, JJ.

PER CURIAM.

Plaintiff appeals by right from the circuit court's order granting summary disposition to defendants on plaintiff's claim for personal injury damages. We reverse and remand.

This action stems from a traffic accident. On March 9, 1999, defendant Philip Gary Landin was on duty and driving a truck owned by his employer, defendant West Bloomfield Township Water & Sewer Department. It was snowing and the roads were icy. According to Landin, after passing a slight right curve and upgrade, he saw the truck driven by plaintiff Jeffrey Gross begin to spin and swerve to the center of the road. Landin took his foot off the gas, started to brake, slowing the truck to avoid a slide, and turned his wheels to the guardrail. Gross's truck swerved back to the edge of the road and then "shot straight across . . . right in front of me." Landin's truck then collided with Gross's vehicle. Gross has no recollection of the accident. He only remembers waking up in the hospital five days later and being paralyzed. The police concluded the accident occurred because Gross was driving too fast for the conditions. Gross was issued a citation for hazardous driving.

Three legal actions arose out of this accident. In 2001, Landin sued Gross for personal injury damages, alleging negligence based on Gross losing control of his truck, crossing the center line, colliding with the truck driven by Landin, and causing Landin serious injuries. Landin's suit against Gross was dismissed pursuant to an agreement between the parties for binding arbitration. Gross subsequently sued his attorney in Landin's suit, assigned by the insurer, and his attorney's firm for legal malpractice. On March 5, 2002, Gross sued Landin and West Bloomfield in the present action, alleging that Landin had time to avoid the collision but was driving too fast to do so. Defendants moved to dismiss the present action based on prior

adjudication, which the circuit court granted. However, this Court reversed and remanded the case for further proceedings.¹

Following remand, and after discovery closed, defendants moved for summary disposition under MCR 2.116(C)(7), (8) and (10). Gross did not dispute that he lost control of his vehicle and swerved into Landin's lane. Instead, Gross argued that a genuine issue of material fact existed with regard to whether Landin was negligent or grossly negligent in failing to avoid the collision. Witness James Kuntz had been deposed twice in litigation relating to this accident. He was deposed on December 10, 2003, in Gross's legal malpractice action and again on September 27, 2005 in the present negligence action. Gross asserted that Kuntz's December 10, 2003 deposition in the legal malpractice action established that Landin's truck crested a hill several seconds after Gross's truck crossed the center line and had stopped in Landin's lane. Based on the affidavit of James D. Madden, P.E., Gross contended that the hill was 400 feet from the point of collision and that Landin could have "easily stopped" within that distance, even on the snow covered roadway, and avoided the collision.

At oral argument on the motion, the circuit court noted that Gross relied on Kuntz's December 10, 2003 deposition taken in the legal malpractice action, not Kuntz's September 27, 2005 deposition taken in this action. Gross's counsel examined Kuntz at the 2005 deposition but did not question Kuntz regarding when and where he saw Landin's truck before the collision. After oral argument, Gross's attorney filed his own affidavit stating that he was "confident" that he could obtain an affidavit from Kuntz reflecting Kuntz's testimony in his December 10, 2003 deposition, which differed from Kuntz's 2005 deposition. Gross's counsel stated that he had attempted to obtain an affidavit from Kuntz, but he had been unable to locate him. Defendants objected to the attorney's affidavit and to the admission of Kuntz's deposition in the legal malpractice action, arguing that both were inadmissible hearsay and that defense counsel was not able to cross-examine because they were not parties to the legal malpractice action.

The circuit court granted summary disposition to defendants, reasoning that Kuntz's deposition testimony from the malpractice suit was hearsay in this action, pursuant to MRE 801(c), because it was given outside the trial or hearing in this case and "offered in evidence to prove the truth of the matter asserted." After refusing to consider Kuntz's first deposition, the court held that the record supported defendants' version of events and that plaintiff had offered no other evidence to support his version. The court concluded that the evidence could not establish that defendants' conduct was negligent, much less grossly negligent, and granted summary disposition to defendants. Gross moved for reconsideration, arguing that because hearsay evidence, such as an affidavit, may be used to either support or oppose a summary disposition motion, sworn deposition testimony taken in another case also should be allowed to support or oppose summary disposition. The circuit court denied the motion, noting that while a party can create a question of fact with an affidavit, it may not do so if the affidavit conflicts with

¹ *Gross v Landin*, unpublished opinion per curiam of the Court of Appeals, decided August 26, 2004 (Docket No. 246282).

sworn testimony given in the case at hand, which was the case here where Kuntz's testimony from the malpractice case conflicted with the testimony he gave in this case.

In this appeal, plaintiff Gross essentially argues that hearsay evidence, such as an affidavit, may be considered in deciding a motion for summary disposition if the substance and content of the evidence would be admissible at trial. We agree. This court reviews de novo the grant or a denial of a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999); *Spiek v Dept of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

In deciding a motion for summary disposition under MCR 2.116(C)(7) and (10), a trial court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion. However, MCR 2.116(G)(2), (3), (4), and (5) do not require the admissibility of the actual documentary evidence. Rather, MCR 2.116(G)(6) states that the documentary evidence may be considered only "to the extent that the *content* or *substance* would be admissible as evidence to establish or deny the grounds stated in the motion." (Emphasis added.) The content and substance of Kuntz's first deposition relating to when he saw Gross's truck cross the centerline and when he saw Landin's truck appear over the crest of the hill would be admissible because it is Kuntz's statement based on his personal observation of the events and is not otherwise challenged as privileged or excludable. Therefore, the circuit court's determination that Kuntz's December 10, 2003 deposition taken in the legal malpractice action is inadmissible hearsay under MRE 801(c) is irrelevant for deciding defendants' motion for summary disposition.

The circuit court's analysis is also flawed because it analogizes Kuntz's previously sworn deposition testimony in the malpractice action to a subsequent affidavit offered to create a factual issue by contradicting the affiant's previous deposition testimony. The well-established, common-law evidentiary rule on which the circuit court presumably based its ruling is that a party or a witness may not create an issue of material fact merely by contradicting his or her own deposition testimony in a subsequent affidavit. See, e.g., *Klein v Kik*, 264 Mich App 682, 688; 692 NW2d 854 (2005). However, the circuit court erroneously inverted this well-established rule by analogizing Kuntz's previous deposition to a subsequent affidavit. Gross did not submit a subsequent affidavit from Kuntz that contradicted Kuntz's September 27, 2005 deposition; rather, Gross submitted Kuntz's earlier December 10, 2003 deposition in the legal malpractice action. It is Kuntz's prior deposition, not a subsequent affidavit, that creates a genuine issue of material fact regarding how much time Landin had to avoid the collision with Gross's truck.

Accordingly, we reverse the circuit court's grant of summary disposition because the substance and content of Kuntz's previous deposition based on his personal knowledge is presumably admissible and because Kuntz's previous December 10, 2003 deposition cannot be reasonably characterized as a subsequent affidavit submitted to manufacture a factual issue by contradicting Kuntz's September 27, 2005 deposition.

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

/s/ Donald S. Owens
/s/ Richard A. Bandstra
/s/ Alton T. Davis