STATE OF MICHIGAN

COURT OF APPEALS

GRADY GOSSETT, JR,

Plaintiff-Appellant,

v

KENNETH LESCHINGER and GLENCORP, INC,

Defendants-Appellees.

UNPUBLISHED
February 9, 2010

No. 288854
Genesee Circuit Court
LC No. 07-087560-NI

Before: Donofrio, P.J., and Meter and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(10). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This is an automobile negligence case. Plaintiff was traveling in a Jeep southbound on undivided, four-lane Dort Highway but stopped at Reid Road so he could turn left (east) onto Reid Road. At that intersection, there are no traffic control devices for the vehicles traveling on Dort Highway. At the same time, there were two vehicles on the northbound side waiting to turn left (west) onto Reid Road. When plaintiff thought the outer northbound lane was clear of oncoming traffic, he began his left turn onto Reid Road. Defendant[1], traveling northbound on Dort and operating a pick-up truck, collided with the front corner of plaintiff's vehicle.

Plaintiff testified that he did not see defendant's vehicle until it hit him. Defendant told the reporting officer that he did not see plaintiff's vehicle until it was too late to stop. There were two witnesses who had been driving northbound on Dort Highway; one was waiting to turn left, behind an unidentified vehicle, and one was driving in the right-hand lane behind defendant. Neither of the two witnesses could identify at what speed defendant was traveling, but there was no evidence that he was driving negligently. One witness said that although she did not see defendant's vehicle coming up behind her until it was beside the vehicle in front of her, "I just

[1] The singular "defendant" in this opinion refers to defendant Leschinger, who was driving a vehicle owned by Glencorp, Inc.

remember thinking to myself that he didn't have very much time. There was no time to put on brakes." The other said that at the time he wondered

> why is this Jeep turning, because they were too close in proximity. Especially for that stretch of roadway, if it's 55 miles an hour, to make the assumption that the truck was, you know, doing its posted speed limit the proximity was too close for that Jeep to be making that turn.

Plaintiff sued on the theory that defendant violated the right-of-way statute and that this created a question of fact regarding whether defendant was negligent. The statute reads, in relevant part:

> The driver of a vehicle within an intersection intending to turn to the left shall yield the right of way to a vehicle approaching from the opposite direction which is within the intersection or so close to the intersection as to constitute an immediate hazard; but the driver, having so yielded and having given a signal when and as required by this chapter, may make the left turn and the drivers of all other vehicles approaching the intersection from the opposite direction shall yield the right of way to the vehicle making the left turn. [MCL 257.650(1).]

Defendants moved for summary disposition, arguing that the eyewitness testimony consistently showed that plaintiff failed to keep a proper lookout and that there was no evidence that defendant drove negligently. Plaintiff responded by supporting his claim with the affidavit of an expert witness, accident reconstructionist Dr. Daniel Lee. Dr. Lee stated that he reviewed the traffic accident report, the complaint, the deposition testimony of the parties and the two witnesses, and the scene itself, and concluded from these materials that defendant should have had plenty of time to stop his vehicle had he been keeping a proper lookout. Dr. Lee calculated the amount of time defendant had to stop based on how far plaintiff's vehicle traveled from the point it had been stopped waiting to turn to the point of impact, divided by the "average rate of acceleration of a vehicle making a turn from a stopped position," identified as "0.13 to 0.15 mph." Given these figures, it would have taken five or six seconds from the time plaintiff started the turn until the time defendant struck him; assuming defendant was traveling at the legal speed limit, he would have been about 400 feet south of the intersection when plaintiff entered the northbound lanes. Even if it took him a second or two to react, he would have had plenty of time to stop the vehicle, according to Dr. Lee.

The trial court found that Dr. Lee's affidavit did not create a question of fact. Although the court stated that it was not deciding whether the affidavit was admissible, it said that Dr. Lee's "conclusion is without proper foundation so as to make it acceptable . . . to defeat a motion for summary disposition."

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party, to survive the motion, must come forward with at least some evidentiary proof – some statement of specific fact upon which to base his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

The trial court correctly found that plaintiff did not adequately counter defendants' motion with facts in support of his argument. Dr. Lee's calculations as identified in his affidavit were not sufficient. The "average acceleration" figure, "0.13 to 0.15 mph," upon which all of his calculations are based, appears to be fictitious or at least erroneous. Acceleration cannot be measured in miles per hour – that is the unit for measuring *speed*. Acceleration is more typically measured in meters or feet per second squared, or "g" force for serious acceleration. What Dr. Lee has done is akin to expressing speed by using just miles. It is impossible to determine if his conclusions are accurate because we simply cannot know if he meant meters per second squared, miles per hour squared, miles per hour per second, feet per second squared, or some other unit of measurement. In short, "average acceleration" could never be "0.13 to 0.15 mph." Dr. Lee's affidavit lacks the requisite base of reliable data. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779; 685 NW2d 391 (2004). While the trial court did not articulate completely its reason for finding that plaintiff failed to sufficiently counter defendants' motion, it correctly concluded that Dr. Lee's figures did not seem to add up.

Moreover, even assuming that Dr. Lee correctly calculated that defendant was 400 feet from the intersection when plaintiff started his turn, the affidavit did not take into account the other northbound vehicles waiting to turn. Plaintiff told the police he did not see defendant because his view was blocked by those waiting vehicles. Dr. Lee's affidavit makes no mention of the waiting vehicles and whether defendant's view of plaintiff would likewise have been blocked, preventing him from seeing plaintiff's vehicle until its nose entered the outside northbound lane. Instead, Dr. Lee stated, "Thus, had [defendant] been keeping a proper lookout *and observed [plaintiff] initiate his left hand turn,* he could have brought his truck to a complete stop well short of the point of impact . . ." (emphasis added). Dr. Lee does not state that defendant *should* have seen plaintiff initiate his turn. The other evidence indicates that there was no reason defendant should have seen plaintiff and reacted when plaintiff not just intruded into the inner lane that was blocked by the left-turning, northbound vehicles, but continued his turn into the outer lane, of which he apparently did not have a clear view.

Plaintiff states that if this Court treats defendants' motion as a hearing on the admissibility of Dr. Lee's testimony, then plaintiff should be granted an evidentiary hearing in the trial court. However, the trial court did not decide whether plaintiff's expert was qualified but instead decided whether plaintiff adequately supported his response to defendants' motion. He did not. Our review is limited to the evidence that was presented to the trial court at the time the motion was decided. *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). "If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Quinto v Cross & Peters Co*, 451 Mich 358, 363; 547 NW2d 314 (1996).

Affirmed.

/s/ Pat M. Donofrio
/s/ Patrick M. Meter