STATE OF MICHIGAN

COURT OF APPEALS

CINCINNATI INSURANCE COMPANY,

Plaintiff-Appellant,

V

JOSEPH D. WEAVER,

Defendant-Appellee,

and

PIONEER STATE MUTUAL INSURANCE COMPANY,

Defendant.

UNPUBLISHED
February 15, 2011

No. 294814
Lenawee Circuit Court
LC No. 09-003214-NI

Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

This case arises out of an automobile accident on February 12, 2007. David Rahm and Joseph Weaver were driving vehicles in opposite directions on US-223 in icy conditions. One of the vehicles crossed the centerline of the two-lane highway and they collided. Rahm's insurer, plaintiff Cincinnati Insurance Company, paid him benefits under his underinsured motorist coverage and Rahm assigned his rights of recovery against Weaver to Cincinnati which then brought a third-party auto liability case against Weaver.

Weaver moved for summary disposition pursuant to MCR 2.116(C)(10) asserting that there was no question of material fact as to fault. Weaver submitted affidavits from himself and his passenger averring that Rahm's car was weaving and ultimately crossed the centerline causing the crash. In addition, defendant asserted that the physical evidence at the scene supported his assertion concerning Rahm's fault, and attached a photograph of the accident scene showing that both vehicles came to rest on Weaver's side of the road.

Rahm, due to his injuries, has no memory of the accident. In response to the motion, plaintiff argued that there was a question of fact given that at the accident scene Rahm told a state trooper that Weaver had crossed the centerline; and because the trooper, who observed the

debris and the post-accident positions of the vehicles, reached the conclusion that it was Weaver, not Rahm, who had crossed the centerline.

We reverse the grant of summary disposition and remand for further proceedings.[1]

We review a grant of summary disposition pursuant to MCR 2.116(C)(10) de novo. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475; 776 NW2d 398 (2009). "Summary disposition is proper under MCR 2.116(C)(10) if the affidavits and other documentary evidence show that there is no genuine issue concerning any material fact and that the moving party is entitled to judgment as a matter of law." *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003).

The partial head-on collision between a car driven by Weaver and a truck driven by Rahm occurred on February 12, 2007, during icy conditions. The parties dispute whether it was Weaver or Rahm who crossed the centerline and caused the accident. After the accident, a Michigan State Police trooper interviewed both drivers. She prepared an accident report. Among other information, the report indicated that each driver blamed the other for crossing the center line of the highway and causing the accident. It further contained a statement, "Due to the resting point of both vehicles it appears [the vehicle driven by Weaver] crossed center line."

Plaintiff responded that Rahm's statement at the scene that Weaver crossed the centerline, as well as the responding trooper's written opinion that Weaver crossed the centerline supported its assertion that a factual question existed as to the cause of the accident. Plaintiff's brief contained excerpted testimony from the trooper's deposition in which she testified that Rahm told her at the scene that defendant had crossed the centerline and crashed into him. It also contained her statement that "to the best of [her] knowledge," it was defendant who crossed the centerline. Plaintiff also attached the accident report which contained the same information, i.e., Rahm's statement at the scene and the opinion of the trooper regarding fault.

During the hearing on defendant's motion, the parties presented arguments concerning the trooper's ability to testify concerning her opinion and whether Rahm's statements to her would be admissible pursuant to a hearsay exception. However, the trial court appeared to disregard much of the parties' arguments and stated that it was granting the motion pursuant to

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[1] This appeal has been decided without oral argument pursuant to MCR 7.214(E).

MCR 2.116(C)(10) because plaintiff had failed to attach a copy of quoted deposition to its brief. [2] The court also did not indicate whether the substance of the police report was admissible and granted the motion without further explanation.

We conclude that the trial court erred by not considering the quoted excerpts of the deposition provided in plaintiff's brief. There was no dispute at the trial court, nor is there in the briefing to this court, that the transcript excerpts included in the plaintiff's trial court brief were accurate. While the better practice is surely to attach the relevant deposition pages to the brief, where there is no challenge to the accuracy of the excerpt, we see no basis for the court to refuse to consider it as it constitutes recitation of evidence, "the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." MCR 2.116(G)(6).

We similarly conclude that the trial court's apparent refusal to consider the substance of the police report was error. Pursuant to our Supreme Court's holding in *Maiden v Rozwood*, 461 Mich 109, 123; 597 NW2d 817 (1999), the existence of a disputed fact must be established by "evidence whose content or substance is admissible" although the evidence need not be in admissible form. See also MCR 2.116(G)(6). Thus, by failing to address the substance of the documentary evidence submitted by plaintiff, the trial court erred when it found that it did not have anything in front of it to support plaintiff's position. Indeed, even "affidavits are ordinarily not admissible evidence at a trial." *Id*. at 123 n 5, quoting *Winskunas v Birnbaum*, 23 F3d 1264, 1267-1268 (CA 7, 1994). The pertinent underlying question is whether the contents of the report, i.e., Rahm's statement to the trooper that Weaver crossed the centerline and crashed into Rahm's truck, and the trooper's conclusion that "due to the resting point of both vehicles it appears vehicle #1 crossed [the] center line" are admissible and create a question of fact.

As to Rahm's statement, we note that plaintiff maintains on appeal, as it did below, that Rahm's statement to the trooper was admissible under a hearsay exception. As the trial court did not reach this issue, we remand for a determination whether Rahm's statement was admissible pursuant to any hearsay exception since, if it is admissible, it would create a question of fact. In making such a determination, the trial court may consider the trooper's deposition or any other relevant evidence presented by the parties after remand.

However, as to the opinion testimony of the trooper concerning who caused the accident, we conclude that plaintiff has failed to show that this evidence is substantively admissible. Plaintiff did not and does not argue that the trooper's opinion testimony would be admissible as expert opinion testimony, but only as lay opinion testimony under MRE 701. The trooper did not witness the accident itself, only the aftermath, and neither her report nor the deposition excerpts provide a foundation for an opinion based upon those observations. The trooper may of

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[2] Plaintiff has attached the deposition in its appellate materials. However, our review is limited to the evidence that had been presented to the circuit 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).

course testify to her observations, and plaintiff could presumably argue that those observations support a finding that Weaver crossed the centerline. However, plaintiff has not demonstrated that the lay opinion testimony of someone who came to the scene after the accident was concluded would be any more "helpful to a clear understanding to the . . . determination of a fact at issue" than having the jury reach its own conclusions after receiving testimony about the physical accident scene. Indeed, we note that the police report and the photo of the accident scene show the vehicles coming to rest on the defendant's side of the road. While this may not exclude the possibility of an accident scenario that began with defendant, rather than Rahm, crossing the centerline, such a conclusion would have to fall into the realm of expert testimony given the accident reconstruction involved.

At the time the trial court granted summary disposition, defendant had another motion pending relying upon the fact that plaintiff's responses to requests for admission were filed late. Plaintiff responded with a brief setting forth the reasons why the responses were late and asking that the trial court permit late filing as permitted by MCR 2.312(D)(1). See *Medbury v Walsh*, 190 Mich App 554, 556; 476 NW2d 470 (1991). Such a ruling is discretionary with the trial court and given its ruling on the summary disposition motion, the trial court did not reach the issue. Accordingly, we decline to address it at this time. *AG v PowerPick Players' Club of Mich, LLC*, 287 Mich App 13, 53; 783 NW2d 515 (2010).

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

/s/ Donald S. Owens
/s/ Douglas B. Shapiro