

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UNPUBLISHED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.

JANSEN P.J. (*dissenting*).

I respectfully dissent from the majority's determination that the trial court erred by granting summary disposition in favor of defendant Weaver. Although plaintiff included excerpted portions of the state trooper's deposition testimony in its brief in response to defendant's motion for summary disposition, this was not sufficient to create a genuine issue of material fact concerning the causation of the accident. The transcripts of the deposition testimony, themselves, were never submitted to the trial court. Under MCR 2.116(G)(5), the trial court is required to consider only the affidavits, depositions, admissions, and other documentary evidence "then filed in the action or submitted by the parties." However, it is beyond dispute that the transcripts of the deposition relied on by plaintiff in this case were neither "filed in the action" nor "submitted by the parties." Thus, there was necessarily no deposition for the trial court to consider within the meaning of MCR 2.116(G)(5). Moreover, plaintiff's inclusion of excerpted portions of the deposition testimony in its brief did not serve as a substitute for the actual deposition transcripts. *Reeves v Kmart Corp*, 229 Mich App 466, 481 n 7; 582 NW2d 841 (1998). The trial court correctly determined that plaintiff had failed to present sufficient documentary evidence to create a genuine issue of material fact concerning the causation of the accident. Accordingly, I would affirm.

/s/ Kathleen Jansen