STATE OF MICHIGAN

COURT OF APPEALS

DAVID J. LITTLE, minor, by his next friend, LISA SHOCKEY, conservator of the estate of DAVID J. LITTLE, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED October 11, 2011
v	No. 298023 Muskegon Circuit Court
ROBERT E. LANG, Defendant-Appellee/Cross-Appellant.	LC No. 08-046353-NI

Before: O'CONNELL, P.J., and METER and BECKERING, JJ.

PER CURIAM.

In this tort action, plaintiff appeals by leave from the trial court's grant of defendant's motion in limine excluding certain statements from the affidavit of a child witness. After granting the motion, the trial court determined there was no genuine issue of material fact regarding comparative fault and granted summary disposition in favor of defendant. Plaintiff appeals the grant of summary disposition. Because we find the trial court erred by granting the motion in limine, we vacate the grant of summary disposition.

Defendant cross-appeals the trial court's denial of defendant's prior motion for summary disposition. The trial court denied defendant's motion upon finding there were factual issues as to whether defendant was negligent, and as to whether defendant's conduct was the proximate cause of the injuries at issue. We affirm this denial of summary disposition.

I. FACTS AND PROCEDURAL HISTORY

On a Saturday afternoon in December 2005, ten-year-old D.J. Little attempted to cross Muskegon's South Brooks Road on foot. At the same time, defendant was driving his pickup truck down the same road, approximately a quarter of a mile from defendant's home. Defendant's truck collided with Little, who sustained severe injuries.

The speed limit on South Brooks Road is 45 miles an hour. The road is straight, with drainage ditches on the sides. Defendant testified in deposition that he was familiar with South Brooks Road, that children lived in residences on the road, and that he knew children played in the yards. He testified that visibility was clear on the day of the accident. He further testified

that he saw Little approaching the road, but that he expected Little to stop before entering the roadway. He testified that Little ran full stride into the road.

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10), along with supporting documentary evidence.[1] In the motion, defendant contended that there was no evidence of any negligence on his part. He relied in part on the deposition testimony of Bruce Kenney, who witnessed the accident while driving on South Brooks Road. Kenney testified that Little ran from a driveway into the road without stopping. According to Kenney, defendant had no chance to avoid Little.

In response, plaintiff filed the affidavit of Ashton Sower, who was aged eight or nine at the time of the accident. Sower stated in the affidavit that he was currently aged 13, that he lived across South Brooks Road from Little, and that he remembered the accident clearly. In paragraph 17 of his affidavit, he stated that nothing obstructed the view from the direction of defendant's truck. Sower also made several statements concerning the speed of defendant's truck: in paragraph 18 he stated, "The truck came very fast;" in paragraph 20, "The truck was very loud and sounded like it was going fast;" paragraph 29, "The way D.J. was walking, I thought the truck could have avoided hitting D.J.;" and paragraph 30, "I thought the truck was going too fast when it hit D.J."

The trial court determined that the record contained conflicting evidence with regard to whether Little was walking or running toward the road, and with regard to whether defendant slowed his truck before colliding with Little. The court concluded, "there is sufficient documentary evidence which could permit a jury to find that defendant was negligent in failing to anticipate and take precautions against sudden actions of the child, and that such negligence was a proximate cause of the child's injuries."

Defendant subsequently filed a motion in limine to exclude, among other things, paragraphs 17, 18, 20, 29, and 30 of Sower's affidavit. Defendant argued that these paragraphs lacked the proper foundation for opinion testimony under MRE 701. The trial court denied the motion with regard to paragraph 17 (regarding an unobstructed view), but granted the motion on the paragraphs concerning the speed of defendant's truck. The court stated, "the court finds that an eight or nine-year-old child lacks sufficient life experiences to permit making such judgments."

Defendant filed a second motion for summary disposition on the ground that the undisputed facts demonstrated that Little was more than 50% at fault for the accident. The trial court agreed, and wrote,

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[1] Among defendant's documentary evidence was a Traffic Crash Report (MSP Form UD-10). Plaintiff objected to the use of the report, arguing that MCL 257.624 precludes the use of these reports in a court action. The trial court properly sustained the objection.

> reasonable jurors could not differ that a ten-year old child of average mental ability, and who lives on a street with at [sic] 45 mph speed limit, has the capability of understanding the necessity of stopping at the edge of the road, and looking both ways to see that traffic has cleared, before crossing the street. While it is certainly possible for the jury to find from the record that defendant was partially negligent at the time of the accident, no reasonable juror could conclude that defendant was even 50% at fault, much less more than 50% at fault. By far the greater fault was in plaintiff, who darted out in front of defendant's vehicle without either stopping and/or looking for oncoming traffic.

These appeals followed.

II. ANALYSIS

A. DEFENDANT'S MOTION IN LIMINE

We review the trial court's ruling on the motion in limine for an abuse of discretion. See *Elezovic v Ford Motor Co*, 472 Mich 408, 431; 697 NW2d 851 (2005). We will reverse a trial court's evidentiary ruling when the ruling falls outside the range of reasonable and principled outcomes. See *People v Yost*, 278 Mich App 341, 360; 749 NW2d 753 (2008).

The trial court based its ruling on MRE 701, which governs opinion testimony by non-expert witnesses. According to MRE 701, a non-expert may present an opinion on matters such as a car's speed if the opinion is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding to the witness' testimony or the determination of a fact in issue." MRE 701; see also *Cole v Eckstein*, 202 Mich App 111, 114; 507 NW2d 792 (1993). Here, the trial court ruled that Sower was incapable of forming a rational opinion about the truck's speed.

The court's ruling was an abuse of discretion, for three reasons. First, our Supreme Court has long held that a child may give opinion testimony. For example, in *Jenks v Ingham Co*, 288 Mich 600; 286 NW 93 (1939), the Court noted that a trial court's exclusion of a 15-year-old's testimony was erroneous. The 15-year-old had observed a car pass him while riding his bicycle; the trial court did not allow him to testify about the speed of the car. Our Supreme Court rejected the trial court's ruling. *Id*. at 607. Similarly, in *People v Fedderson*, 327 Mich 213; 41 NW2d 527 (1950), our Court explained that a minor may testify concerning the speed of a car, and noted, "[w]hile the [minor] may not have been as accurate and reliable a judge of speed as person with more driving experience, he was sufficiently qualified to testify, the weight and credibility of such testimony being left to the jury." *Id*. at 220. Here, the trial court invaded the jury's province by making a preclusive determination of the reliability and credence to be afforded to Sower's opinion.

Second, nothing in MRE 701 bars opinion testimony from children. The determination of whether a child is competent to testify turns instead on MRE 601, which requires that the child have sufficient mental capacity to testify truthfully. *People v Watson*, 245 Mich App 572, 583; 629 NW2d 411 (2001). This Court has specifically stated that "[a]s a general rule an 11-year-old child is competent to testify." *Breneman v Breneman*, 92 Mich App 336, 343; 284 NW2d 804 (1979). Moreover, our Courts have upheld the admission of testimony from children younger

than age eight. *Watson*, 245 Mich App at 583. Absent some indication that the child witness in this case lacked the capacity to testify, the trial court erred by precluding the testimony under MRE 701. See *Kim v Boucher*, 55 SW3d 551, 557 (Tenn App, 2001) (applying Tennessee Rule of Evidence 701, and holding that the trial court erred by precluding the testimony of a child pedestrian regarding speed of the car that hit the child's friend).

Third, as plaintiff points out, the trial court's evidentiary ruling seems inconsistent with its subsequent decision on comparative fault. When the court granted defendant's summary disposition on comparative fault, the court reasoned that a 10-year-old child should understand the dangers involved in crossing the road on which he lives. If this reasoning is correct, then a similarly-aged child living on the same street would presumably understand the same dangers and would be able to describe traffic as he perceived it. It was incongruous for the trial court to have concluded, as matters of law, that Sower was too young to testify, but that Little was old enough to be bound by principles of comparative fault.

In sum, the trial court's ruling on Sower's affidavit was outside the range of principled outcomes. We take no position as to whether, upon receipt of additional evidence, the motion in limine could be renewed or granted. We hold only that the trial court's ruling on the motion in limine was an error requiring reversal.

B. DEFENDANT'S FIRST MOTION FOR SUMMARY DISPOSITION – NEGLIGENCE AND PROXIMATE CAUSE

We review de novo the trial court's summary disposition orders. *King v State*, 488 Mich 208, 212; 793 NW2d 673 (2010). In our review, we consider the record in the light most favorable to the plaintiff, as the nonmoving party. *Johnson v Detroit Edison Co*, 288 Mich App 688, 695; 795 NW2d 161 (2010). If reasonable minds could differ on a material factual issue in the record, summary disposition is inappropriate. *Id*.

To rule on defendant's first summary disposition motion, the trial court had to determine whether the record presented factual issues regarding defendant's compliance with the applicable duty. See *Zarzecki v Hatch*, 347 Mich 138, 141; 79 NW2d 605 (1956) (a driver owes a duty of care); cf. M Civ JI 10.06 (standard of care-children), M Civ JI 10.07 (conduct required for safety of children). The testimony from Sower conflicted with that of defendant and Kenney as to whether defendant was driving at an appropriate speed, whether defendant could have avoided Little, and whether Little was running or walking. The trial court properly determined that these factual issues precluded summary disposition.

C. DEFENDANT'S SECOND MOTION FOR SUMMARY DISPOSITION – COMPARATIVE FAULT

To rule on defendant's second motion for summary disposition, the trial court had to determine whether the record presented factual issues regarding the percentage of fault attributable to Little. MCL 500.3135(2)(b) ("damages shall not be assessed in favor of a party who is more than 50% at fault"). As this Court has explained:

> The standards for determining the comparative negligence of a plaintiff are indistinguishable from the standards for determining the negligence of a

> defendant, and *the question of a plaintiff's own negligence for failure to use due care for his own safety is a jury question unless all reasonable minds could not differ* or because of some ascertainable public policy consideration. [*Rodriguez v Solar of Mich, Inc*, 191 Mich App 483, 488; 478 NW2d 914 (1991) (emphasis added).]

Here, the trial court determined that Little was more than 50% at fault for his injuries. However, at the time the trial court made this determination, the court had excluded the evidence from Sower's affidavit. On the basis of the record, we cannot determine whether the trial court's decision would have been the same if the court had properly considered Sower's affidavit on the comparative fault issue. Accordingly, we must vacate the summary disposition on the comparative fault issue and remand for further proceedings.

The April 5, 2010 denial of summary disposition is affirmed; the April 21, 2010 grant of the motion in limine is reversed; and the May 5, 2010 grant of summary disposition is vacated. The case is remanded for further proceedings consistent with this opinion. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Patrick M. Meter