STATE OF MICHIGAN

COURT OF APPEALS

GARY WEIS and HEIDI WEIS, Personal Representatives of the Estate of KATIE WEIS, Plaintiffs-Appellants, v BRENDA ELLIOTT and JEFFREY ELLIOTT, Defendants-Appellees.	UNPUBLISHED September 16, 2008 No. 279821 Branch Circuit Court LC No. 06-007403-NI

Before: Meter, P.J., and Hoekstra and Servitto, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition pursuant to MCR 2.116(C)(10) to defendants. Plaintiffs also appeal the trial court's order denying their motion to compel defendants to produce their counseling, psychological, and psychiatric records. Because the trial court did not abuse its discretion it denying plaintiffs' motion to compel or consider evidence of defendants' mental or physical conditions in violation of MCR 2.314(B)(2), and because plaintiffs' argument fails to establish that defendant Brenda Elliott had any duty to take steps to avoid an impending collision when she first observed the tire of the motorbike driven by Katie Weis, we affirm.

I. Basic Facts

Plaintiffs Gary and Heidi Weis, along with their two daughters, Kelsie and Katie, lived at 363 East Fenn Road. On September 25, 2004, at approximately 3:00 p.m., the family returned home from the local fair, and nine-year-old Katie decided to ride the family's MX 80 motorcycle (the motorbike). Katie asked Gary if she could ride the motorbike to her grandpa and grandma's house. Gary answered in the negative, and told Katie to stay in the yard. The yard did not include the tree-lined driveway.

At approximately the same time, defendants Jeffrey and Brenda Elliott, along with Brenda's two sons, were on their way to a grocery store. Brenda was driving Jeffrey's Plymouth Voyager (the minivan) east on Fenn Road. As the minivan approached the Weis driveway,

Brenda saw movement in the bushes near the driveway. Not knowing the cause of the movement, Brenda removed her foot from the minivan's accelerator and placed her foot over the brake. She then saw just a portion—"not even half"—of a tire.[1] Brenda estimated the speed of the tire to be "fast," but she could not tell what type of tire it was. Brenda then saw a motorbike emerge from the driveway. When she realized the motorbike was not slowing down and was moving onto Fenn Road, Brenda applied the minivan's brakes with "full force" and whipped the minivan to the left.[2] Nonetheless, the minivan hit the motorbike, and Katie died as a result of the collision.

At her deposition, Brenda testified that approximately three to four seconds passed between when she first saw a portion of the tire and when the minivan collided with the motorbike. While she admitted that she may have told someone that five to seven seconds elapsed, rather than three to four seconds,[3] she stated, "I don't know how long it had been [since her first sight of the tire] before the impact. It was so fast I could not tell you."

The trial court granted summary disposition to defendants.[4] It found that whether Brenda first observed the tire three to four seconds or five to seven seconds before the impact occurred was without consequence because, under the circumstances, there was nothing that Brenda could have done to avoid the collision.

II. Motion to Compel

Plaintiffs first claim the trial court erred in denying their motion to compel defendants to produce their counseling, psychological, and psychiatric records. According to plaintiffs, because Brenda suffers from depression and bipolar disorder for which she takes medication, Brenda's medical condition or the medication may have affected her ability to perceive and to react to the events on Fenn Road. In addition, plaintiffs claim that, because both Jeffrey and Brenda sought counseling after the accident, the records are discoverable because the defendants may have discussed with their counselors the specifics of the accident and their mental or physical condition on September 25, 2004.

A trial court's decision to deny discovery is reviewed for an abuse of discretion. *Koster v June's Trucking, Inc*, 244 Mich App 162, 166; 625 NW2d 82 (2000). However, the applicability

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[1] Brenda knew the tire was on a driveway that intersected Fenn Road. She admitted that nothing prevented her from applying the minivan's brakes when she first saw the tire, and she had no explanation for why she did not apply the brakes then.

[2] An accident investigator estimated that the minivan was traveling at a speed of 52 miles per hour when Brenda slammed on the minivan's brakes. The speed limit on Fenn Road was 55 miles per hour.

[3] On February 15, 2005, Brenda told C.H. Clatterbuck, an investigator, that five to seven seconds passed between when she first saw the tire and when the minivan hit the motorbike.

[4] Plaintiffs had asserted a negligence claim against Brenda and an ownership liability claim against Jeffrey.

of a privilege is a question of law reviewed de novo. See *id.*; *Baker v Oakwood Hosp Corp*, 239 Mich App 461, 468; 608 NW2d 823 (2000).

Defendants objected to plaintiffs' discovery request for their counseling, psychological, and psychiatric records on the basis that such records were privileged from disclosure under MCL 600.2157, the physician-patient privilege, or MCL 333.18237, the psychologist-patient privilege. Plaintiffs do not argue that the requested records were not subject to either privilege. Accordingly, the only issue before us is whether the trial court abused its discretion in denying the motion to compel. A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Plaintiffs assert the trial court abused its discretion in denying their motion to compel for no reason other than the requested records were relevant. However, even if relevant, privileged matters are generally not subject to discovery. MCR 2.302(B)(1); *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 36-37; 594 NW2d 455 (1999). Accordingly, plaintiffs have provided us with no basis to conclude that the trial court's decision to deny their motion to compel was outside the range of reasonable and principled outcomes. *Maldonado, supra*. The trial court did not abuse its discretion in denying plaintiffs' motion to compel.

We also reject plaintiffs' argument that the trial court failed to enforce MCR 2.314(B)(2) when it considered evidence offered by defendants regarding their physical and mental conditions.[5] Initially, we note that plaintiffs' claim that Brenda suffers from depression and bipolar disorder for which she takes medication is unsupported by the record, as is their claim that Jeffrey, rather than Brenda, was driving the minivan at the time of the collision. Consequently, plaintiffs' theories that Brenda's ability to perceive and react to the events on Fenn Road was impacted by a medical condition or medications and that Jeffrey was driving the minivan while intoxicated are nothing but speculation. Moreover, the documentary evidence submitted by defendants contained no evidence relating to defendants' medical histories or mental or physical conditions.

III. Motion for Summary Disposition

Plaintiffs claim that the trial court erred in granting summary disposition to defendants. According to plaintiffs, the evidence, when viewed in the light most favorable to them, would permit a trier of fact to find that Brenda was negligent when she failed to apply the minivan's

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[5] MCR 2.314(B)(2) provides:

> Unless the court orders otherwise, if a party asserts that the medical information is subject to a privilege and the assertion has the effect of preventing discovery of medical information otherwise discoverable under MCR 2.302(B), the party may not thereafter present or introduce any physical, documentary, or testimonial evidence relating to the party's medical history or mental or physical condition.

brakes and bring the vehicle to a stop after she first observed the motorbike approaching Fenn Road. We disagree.

We review a trial court's grant of summary disposition de novo. *King v Reed*, 278 Mich App 504, 512; 751 NW2d 525 (2008). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence, viewed in the light most favorable to the nonmoving party, shows there is no genuine issue of a material fact and the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

MCL 257.652(1) provides:

> The driver of a vehicle about to enter or cross a highway from an alley, private road, or driveway shall come to a full stop before entering the highway and shall yield right of way to vehicles approaching on the highway.

A driver on an arterial highway is entitled to assume that subordinate drivers will yield the right of way. *McGuire v Rabaut*, 354 Mich 230, 234; 92 NW2d 299 (1958). "He is not bound to anticipate unlawful or negligent acts on their part." *Id.* Only when it becomes obvious to the driver on the arterial highway, or when it should become obvious to a reasonably prudent driver, that the subordinate driver is going to contest the right of way does he have a duty to take steps to avoid an impending collision. *DePriest v Kooiman*, 379 Mich 44, 46; 149 NW2d 449 (1967); *McGuire, supra* at 236. "It is from this point onward, and not before, with respect to a crossing subordinate driver appearing in his path, that [a court will] scrutinize his acts to determine whether or not he is guilty of negligence for failure to act as a reasonably prudent person . . . ." *McGuire, supra* at 236.

Plaintiffs claim that Brenda was negligent because she failed to apply the minivan's brakes and bring the vehicle to a stop when she first observed the motorbike's tire. However, Brenda was entitled to assume that Katie, the driver of the motorbike, would yield the right of way, *id.* at 234, and Brenda was under no duty to take steps to avoid an impending collision unless it was obvious to her, or would have been obvious to a reasonable prudent driver, that Katie would fail to yield the right of way, *DePriest, supra* at 46. Plaintiffs do not cite any evidence which suggests that, upon first observing the motorbike's tire, Brenda knew, or should have known, that Katie would contest the right of way. Mere knowledge that a motorbike is approaching a highway from a driveway, without more, does not lead to a conclusion that the driver of the motorbike will fail to yield the right of way. Accordingly, plaintiffs' claim that Brenda acted negligently when she failed to apply the minivan's brakes and bring the vehicle to a stop after first observing the motorbike's tire is without merit. The trial court did not err in granting summary disposition to defendants.[6]

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[6] Based on our resolution of this issue, we decline to address defendants' argument that summary disposition was proper on the alternative ground that Katie was more than 50 percent at fault for the accident.

Affirmed.

/s/ Patrick M. Meter
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto