STATE OF MICHIGAN

COURT OF APPEALS

CECIL RAY HENDERSON, Plaintiff-Appellant,	UNPUBLISHED March 1, 2005
v	No. 251224
MICHIGAN CONSOLIDATED GAS COMPANY and EDWARD LEE AUTRY, Defendants-Appellees.	Wayne Circuit Court LC No. 02-223817-NI

Before: Talbot, P.J., Whitbeck, C.J., and Jansen, J.

PER CURIAM.

Plaintiff Cecil Henderson appeals as of right from a circuit court order granting defendants' motion for summary disposition in this automobile negligence action. We reverse and remand. We decide this appeal without oral argument pursuant to MCR 7.214(E).

I. Basic Facts And Procedural History

Henderson filed this automobile negligence action in July 2002. The complaint alleged that he was injured during a collision with a vehicle owned by defendant Michigan Consolidated Gas Company (Mich Con) and driven by defendant, Mich Con employee Edward Autry. Specifically, the complaint alleged that while driving on northbound Sorrento, Autry ignored a traffic control device and hit Henderson, who was driving on eastbound Chalfonte.

The evidence presented to the trial court included Autry's deposition. In that deposition, Autry testified that on July 3, 2001, he was driving to lunch on northbound Sorrento at 20 to 25 miles an hour in a company van when the accident occurred. According to Autry, as he was about to enter the intersection at Chalfonte, he saw Henderson approaching "at a super fast rate of speed" from 40 to 50 feet away. Autry said that he accelerated to try to avoid a collision, but he did not have enough time and Henderson never slowed down. Consequently, Autry stated, Henderson ran into Mich Con's van. Autry stated that there were no traffic control devices posted on Chalfonte or on northbound Sorrento, but there was a yield sign posted on southbound Sorrento. Photos taken at the scene show a big dent in the driver's side of the van and the crumpled front end of Henderson's car. Autry prepared an accident report for Mich Con that was consistent with his deposition testimony.

Anthony Johnson, a witness, submitted an affidavit on November 2, 2002. He stated that he was outside his parents' house "facing Chalfonte when I seen a Michon [sic] van going up Sorrento going 40 miles per hour. The Michon [sic] van went through the intersection without yielding to traffic stricking [sic] a gray vehicle that was going east on Chalfonte." Johnson stated that the van was speeding, going forty in a twenty-five zone.

Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(10), asserting that there was no evidence that Autry was negligent. According to defendants, Autry was driving with due caution and did not ignore any traffic control devices because there was no such device posted for traffic on northbound Sorrento.

Henderson responded that Autry was negligent. According to Henderson, both his own testimony and Johnson's affidavit showed that Autry was speeding at the time of the collision. Moreover, Henderson asserted, Autry "knew a stop sign exited [sic] and actually noticed the yield sign" on southbound Sorrento. Henderson further asserted that even if there were not a traffic control device for northbound Sorrento, defendants could not blame the city because it did not have a duty to install such a device. Henderson claimed that based on the evidence, he was entitled to judgment.

The trial court heard argument on June 20, 2003. Henderson argued that because Autry saw the yield sign for southbound Sorrento, he should have known that there should have been one for northbound Sorrento and should have yielded to Henderson. The trial court disagreed because there was no evidence that Autry noticed the yield sign across the street before the accident. Moreover, according to the trial court, the absence of a sign on Chalfonte did not give Henderson "a right to blast through the intersection." The trial court ruled that Henderson "was out of order" and the case was "a bunch of junk" and granted defendants' motion.

II. Summary Disposition

A. Standard Of Review

We review de novo a trial court's ruling on a motion for summary disposition.[1]

B. Legal Standards

In evaluating a motion under MCR 2.116(C)(10), the trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, in the light most favorable to the party opposing the motion.[2] The trial court may only consider "the substantively admissible evidence actually proffered in opposition to the motion," and may not deny the motion on "the mere possibility that the claim might be supported by evidence

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[1] *Kefgen v Davidson,* 241 Mich App 611, 616; 617 NW2d 351 (2000).

[2] MCR 2.116(G)(5); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

produced at trial."[3] If the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law.[4]

C. Genuine Issues Of Fact

Based on our review of the record, we find that genuine issues of fact existed that precluded entry of judgment for either party. Because neither driver was affected by a traffic control device, Autry had the right of way.[5] However, that did not absolve him of the duty to exercise due care for the safety of others,[6] and once he realized, or a reasonable person under the circumstances would have realized, the danger posed by Henderson rapidly approaching the intersection, he had a duty to try to avoid a collision.[7] Moreover, there was evidence that Autry was speeding, in which case he would have forfeited the right of way.[8] The fact that Henderson may have been at fault does not entitle defendants to judgment but simply limits Henderson's recovery of damages.[9]

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

/s/ Michael J. Talbot
/s/ William C. Whitbeck
/s/ Kathleen Jansen

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[3] *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

[4] MCR 2.116(C)(10), (G)(4); *Quinto*, *supra* at 362.

[5] MCL 257.649(2).

[6] See *Placek v Sterling Heights*, 405 Mich 638, 670; 275 NW2d 511 (1979).

[7] See *McGuire v Rabaut*, 354 Mich 230, 236; 92 NW2d 299 (1958); *Berk v Blaha,* 21 Mich App 83, 86; 174 NW2d 870 (1969).

[8] MCL 257.649(5).

[9] MCL 500.3135(2)(b); MCL 600.2958; MCL 600.2959.