STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH A. BONDARENOK,

Plaintiff-Appellant,

v

KATHERINE A. NUSSBAUM and FORD MOTOR COMPANY,

Defendants-Appellees.

UNPUBLISHED
August 3, 2010

No. 290557
Wayne Circuit Court
LC No. 08-111729-NI

Before: TALBOT, P.J., and FITZGERALD and M. J. KELLY, JJ.

PER CURIAM.

In this negligence action, plaintiff Joseph A. Bondarenok appeals as of right the trial court's order granting summary disposition in favor of defendants Katherine A. Nussbaum and Ford Motor Co. The only issue on appeal is whether the trial court erred when it determined that there was no evidence that Nussbaum caused Bondarenok's injuries. Because we conclude that Bondarenok presented sufficient evidence to establish a question of fact as to whether Nussbaum was speeding and whether and to what extent her speeding caused his injuries, we reverse. We have decided this case without oral argument under MCR 7.214(E).

I. BASIC FACTS AND PROCEDURAL HISTORY

The present suit arises out of a June 2006 accident involving an automobile and a bicycle in Southgate, Michigan.

Bondarenok testified at his deposition that he was riding his bicycle home from his father's house on the day of the incident. He stated that he was riding south on the sidewalk on the west side of Front Street when he decided to cross Front Street to visit a restaurant on the opposite side. At that point along Front Street there was no crosswalk. Bondarenok said he crossed over the southbound lanes of Front Street and traversed the grassy median that separated the southbound lanes from the northbound lanes. He then entered the turn-around lane and stopped at the stop sign. He looked to his right—towards the northbound lanes—and saw that it was clear. However, before proceeding to cross the northbound lanes he looked behind him to "make sure nobody was flying up on me." Bondarenok then checked to the right again, determined that the northbound lanes were clear enough to get across to the restaurant, and proceeded to cross. He stated that he does not remember anything after that except that he "heard the tires."

At her deposition, Nussbaum testified that she was driving northbound on Front Street when Bondarenok "jolted" in front of her car. She said she slammed on the brakes but did not have enough distance to stop.

An off-duty police officer, Anthony Neal, testified at his deposition that he saw Bondarenok on the median and thought that it was obvious that he was not going to stop for the northbound traffic. Neal said Bondarenok did not look either way and proceeded to ride directly in front of Nussbaum. Neal stated that Nussbaum slammed on her breaks and that the nose of her car "dove down sharply," but that she nevertheless struck Bondarenok because there was "nowhere near enough time to stop."

In May 2008, Bondarenok sued Nussbaum and Ford. In his complaint, Bondarenok alleged that Nussbaum operated her car in a careless and reckless manner and that her acts proximately caused his injuries. Bondarenok alleged that Ford was also liable as the owner of the car under MCL 257.401.[1]

In December 2008, Nussbaum and Ford moved for summary disposition under MCR 2.116(C)(10) on the grounds that there was no evidence that Nussbaum negligently drove her car. Instead, they argued, the evidence showed that Bondarenok was drunk, rode his bicycle unexpectedly out into traffic, and, because the evidence showed that Bondarenok was the sole cause of his own injuries, Nussbaum and Ford argued that they were entitled to have Bondarenok's suit dismissed.

The trial court heard oral argument on the motion in February 2009. At the hearing, the trial court stated that Bondarenok had failed to present evidence sufficient to establish a question of fact as to whether Nussbaum acted negligently. For that reason, the trial court determined that Nussbaum and Ford's motion should be granted. The trial court entered an order dismissing Bondarenok's complaint with prejudice on February 10, 2009.

This appeal followed.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to grant a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009).

[1] Nussbaum's father worked for Ford and leased the car from Ford as part of a program for product testing and evaluation.

B. ANALYSIS

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A party may be entitled to summary disposition under MCR 2.116(C)(10) if, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact . . . ." In making its motion for summary disposition, the moving party must specifically identify "the issues as to which the moving party believes there is no genuine issue of material fact," MCR 2.116(G)(4), and must support its motion with affidavits, depositions, admissions, or other documentary evidence, MCR 2.116(G)(3). See *Barnard Mfg*, 285 Mich App at 369-370.

In this case, Nussbaum and Ford moved for summary disposition on the grounds that there was no evidence that Nussbaum breached a duty owed to Bondarenok that resulted in injury—that is, they argued that there was no evidence that Nussbaum engaged in any negligent conduct that might have caused the accident. In support of their motion, Nussbaum and Ford noted that Bondarenok stated at his deposition that he had no personal knowledge of Nussbaum's speed. They also presented evidence that the officer who prepared the accident report did not calculate Nussbaum's speed, or otherwise offer an opinion about her speed, and that Nussbaum testified at her deposition that it was her habit to drive the speed limit and that she believed she was going the speed limit of 45 miles per hour. Nussbaum and Ford also cited evidence that various witnesses stated that Bondarenok caused the accident when he proceeded into traffic without warning and attached a medical report that showed that Bondarenok had a high level of alcohol in his blood at the time of the accident.

Nussbaum and Ford adequately alleged that there was no genuine issue as to a material fact—namely, whether Nussbaum's actions or omission amounted to a breach of a duty owed to Bondarenok that caused his injuries. Further, they supported their motion by presenting evidence, which—if left unrebutted—established that Nussbaum's actions or omissions did not amount to a breach of duty and did not cause Bondarenok's injuries. Once Nussbaum and Ford made their properly supported motion, the burden shifted to Bondarenok to establish that a genuine issue of disputed fact existed as to whether Nussbaum breached her duty of care and caused the injuries at issue. *Barnard Mfg*, 285 Mich App at 370.

In response to this motion, Bondarenok cited his own deposition testimony that he stopped after crossing the median and did not proceed into the northbound lanes until after he determined that they were sufficiently clear for him to make it across to the restaurant. He also attached and cited an affidavit by Gary Mattiacci.[2]

In his affidavit, Mattiacci averred that he was certified as an advanced accident reconstruction specialist and that he has been recognized as an expert in accident reconstruction for over 12 years. He also stated that he examined the evidence and determined that Nussbaum was exceeding the speed limit at the time of the accident:

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[2] None of the parties deposed Mattiacci.

> 6. I have personally investigated the roadway. I have reviewed photos of the [skid marks] and bicycle damage to determine the rate of speed [Nussbaum] was driving at the time of the auto collision.
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> 7. I have determined that [Nussbaum's] vehicle's skid marks measured approximately 125 feet thus leading to the determination that [Nussbaum's] speed was in excess of the posted speed limit [of] 45 mph.

Mattiacci also stated that he calculated Bondarenok's velocity and determined that he needed less than a quarter of a second to clear the point where the accident occurred. He also opined that, had Nussbaum been traveling at the speed limit, she would have had a minimum of sixteen more feet within which to stop. On the basis of these calculations, Mattiacci indicated that had Nussbaum "driven at the posted speed limit, the impact would not have occurred . . . ." This affidavit, along with Bondarenok's testimony, was sufficient to establish a question of fact as to whether Nussbaum breached her duty of care and whether that breach proximately caused Bondarenok's injuries.

Contrary to Nussbaum and Ford's contention on appeal, the averments in the affidavit were not speculative or conclusory. See *Skinner v Square D Co*, 445 Mich 153, 164, 174; 516 NW2d 475 (1994) (stating that a causal theory is speculative if it is consistent with the known facts but is otherwise not deducible from them as a reasonable inference). Mattiacci averred that he examined the roadway, photos of the accident scene, and photos of the damaged bicycle. From this evidence, he averred that he could calculate the point of impact, Bondarenok's velocity, and whether Nussbaum was driving at the speed limit. Further, he stated that his calculations indicated that Nussbaum was exceeding the speed limit and, if she had not been exceeding the speed limit, she would not have hit Bondarenok. These averments were unequivocal and were not based on assumed or hypothetical facts; Mattiacci clearly stated that he could reconstruct the accident on the basis of the relevant facts and offer the opinion that Nussbaum was in fact speeding and that, but for her speeding, the accident would not have occurred. See *Id.* at 164-165 (stating that a plaintiff must present evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred). Because Mattiacci made his calculations from substantively admissible evidence rather than on assumptions about the evidence, this case is distinguishable from those cases where an expert merely assumes facts to be true—even though the facts are contradicted by undisputed evidence—and then offers an opinion based on those assumptions. See *Badalamenti v Beaumont Hosp*, 237 Mich App 278; 602 NW2d 854 (1999); *Green v Jerome-Duncan Ford, Inc*, 195 Mich App 493; 491 NW2d 243 (1992); *Thornhill v Detroit*, 142 Mich App 656; 369 NW2d 871 (1985). Instead, the present case deals with two different measurement techniques that resulted in two different measurements—that is, Mattiacci has not made an assumption about the length of the skid mark, he asserted that he measured the skid mark and that his measurement was different than the officer's measurement. See *Robins v Garg (On Remand)*, 276 Mich App 351; 741 NW2d 49 (2007) (distinguishing *Badalamenti* on the grounds that an expert's disagreement with the interpretation of the evidence does not render the expert's opinion speculative). Although one might be tempted to question the integrity of his measurement given the differences between Mattiacci and the officer's apparent ability to accurately measure the skid mark, such questions go to the weight and credibility of the

witnesses, which cannot be assessed on a motion for summary disposition.[3] See *Skinner*, 445 Mich at 161.

We also do not agree that Mattiacci's affidavit was deficient because he failed to explain the methodology underlying his calculations and proposed opinion.[4] The trial court could only consider substantively admissible evidence in considering the motion. *Barnard Mfg*, 285 Mich App at 373. However, the evidence does not need to be in admissible form; rather, the content of the submission must be admissible. *Id.* And, as this Court recently explained, an expert's qualifications and methodology are foundational requirements that do not apply to affidavits submitted on summary disposition:

> [T]here is no requirement that an expert's qualifications and methods be incorporated into an affidavit submitted in support of, or opposition to, a motion for summary disposition. Rather, the *content* of the affidavits must be admissible in *substance*, not form. And the requirements of MRE 702 are foundational to admission of the expert's testimony at trial. Thus, it is significant that defendants here do not attack the admissibility of the content of . . . [the] affidavit, only its foundation. As MCR 2.119(B)(1)(c) provides, the affidavit need only show that the affiant, *if sworn as a witness*, can testify competently to the facts stated in the affidavit. Whether [the expert] will ultimately meet the MRE 702 requirements to be sworn as a witness is a matter reserved for trial. [*Dextrom v Wexford County*, ___ Mich App ___, slip op at 13; ___ NW2d ___ (released March 9, 2010) (emphases in original).]

Mattiacci's proposed testimony concerning whether Nussbaum was speeding at the time of the accident, Bondarenok's velocity, and whether Nussbaum would have struck Bondarenok had she not been speeding would be substantively admissible provided that his testimony meets the requirements of MRE 702 and MRE 703. Therefore, Mattiacci's proposed opinions on these matters must be considered on the motion for summary disposition. *Barnard Mfg*, 285 Mich App at 377.

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[3] We note that neither Mattiacci nor the police officer witnessed the accident. Mattiacci calculated the length of the skid mark from photos and from physical observations at the accident site long after the accident. Similarly, the officer calculated the length of the skid mark while visiting the site—albeit right after the accident. And, although Mattiacci did not disclose the methodology he used to calculate the length of the skid mark, there does not appear to be detailed evidence concerning the officer's methodology either.

[4] Nussbaum and Ford criticize Mattiacci's calculations because he examined the site of the accident long after it occurred and because he might have relied on photos from the scene of the accident in calculating the length of Nussbaum's skid marks. We note that it is not impossible to make measurements from a photo; Mattiacci may very well have made the measurements by comparing the skid marks to the distance between known landmarks that also appear in the photo. In any event, such criticisms involve matters of foundation, weight, and credibility, which should play no role in a court's decision concerning whether to grant a motion for summary disposition.

Finally, we do not agree with Nussbaum and Ford's belief that the evidence is so one-sided that no reasonable finder of fact could find in favor of Bondarenok. Nussbaum relies heavily on her own testimony that she was not speeding and the testimony of four police officers who each opined that Nussbaum was not at fault for the accident. However, three of the four officers were investigating officers who had no first-hand knowledge of the accident and offered their opinions based solely on inadmissible hearsay evidence—specifically, witness statements and the accident report. See MCL 257.624(1); MRE 801; MRE 802. In any event, whether these officers believed that Nussbaum was at fault for the accident is entirely irrelevant. See MRE 401; MRE 402. Thus, we do not consider this evidence.[5] *Barnard Mfg*, 285 Mich App at 373. Moreover, although officer Neal actually witnessed the accident, his testimony does not unequivocally favor Nussbaum. Neal testified that he thought Nussbaum was not speeding, but then admitted that "[t]here's no way to tell you how fast she was going." Indeed, his testimony could even support an inference that Nussbaum was speeding. Neal testified that he "drive[s] too fast" and that he was "catching up" to Nussbaum immediately before the accident. He also said that Nussbaum slammed on her brakes and the nose of her car "dove down sharply." From this testimony a reasonable jury could conclude that Nussbaum was in fact speeding and that Neal was only catching up to her because he was driving even faster.

We agree that there is evidence from which a reasonable finder of fact could conclude that Bondarenok was more—if not entirely—at fault for his own injuries. Nevertheless, this Court, like the trial court, is not permitted to weigh the evidence or make credibility determinations in deciding a motion for summary disposition. *Skinner*, 445 Mich at 161. Rather, when determining whether there is a genuine issue as to any material fact, the courts must consider the evidence presented by the parties in the light most favorable to the party opposing the motion. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). When the evidence proffered by the parties is considered in this light, reasonable minds might differ as to whether Nussbaum was exceeding the speed limit at the time of the accident and as to whether and what extent her speeding caused the accident at issue.

III. CONCLUSION

There were questions of material fact as to whether Nussbaum was exceeding the speed limit at the time of the accident and as to whether and what extent her speeding might have caused the accident. Accordingly, the trial court erred when it granted summary disposition in

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[5] We also note that this Court is bound to consider only the admissible evidence that the parties *actually* proffered to the trial court in their briefs on the motion for summary disposition. See *Barnard Mfg*, 285 Mich App at 380-381. Therefore, we are not at liberty to expand the record by considering evidence that the parties did not proffer or address—such as whether and to what extent Mattiacci's affidavit should have addressed such things as the drag factor for the road surface and the braking efficiency of Nussbaum's car. We also decline to evaluate Mattiacci's affidavit in the present case by deficiencies that may have been present in affidavits that he signed in other cases; each affidavit must be evaluated on its own merits and not by reference to the affiant's purported propensity for signing deficient affidavits.

favor of Nussbaum and Ford. MCR 2.116(C)(10). For this reason, we reverse the trial court's order dismissing Bondarenok's suit with prejudice and remand for further proceedings.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, Bondarenok may tax costs. MCR 7.219(A).

/s/ E. Thomas Fitzgerald
/s/ Michael J. Kelly

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TALBOT, P.J. (*dissenting).*

I respectfully dissent from the majority opinion reversing the trial court's grant of summary disposition in favor of defendants. Specifically, I disagree with the majority's conclusion that the affidavit of plaintiff's expert, Gary Mattiacci, created a genuine issue of fact.

This cause of action involves a motor vehicle driven by defendant Katherine Nussbaum that collided with a bicycle ridden by plaintiff on June 8, 2006. At the time of the collision, road conditions were dry and it was still daylight. Defendant was driving northbound on Fort Street in the far left lane. All of the witnesses to the accident concur that plaintiff failed to yield to oncoming traffic and, despite her efforts to swerve, brake and avoid the collision, defendant's vehicle struck plaintiff. According to the police report, the front left side of defendant's vehicle impacted with plaintiff. At the point of collision, defendant's vehicle had swerved into the second lane from the left curb. Plaintiff received a citation from police for failure to yield. Defendant was not cited for the accident.

Contrary to all the witness statements, plaintiff contends that he stopped at the stop sign located in the median turn around and checked traffic before attempting to cross the northbound lanes of Fort Street. He asserted in his deposition that he had just entered northbound Fort Street when the accident occurred. It is undisputed that plaintiff was not wearing a helmet and tested positive for cocaine and had a blood alcohol level of .20 immediately following the accident.

Anthony Neal was a witness to the accident. Neal, an off-duty police officer, was driving behind defendant on northbound Fort Street. He contradicted plaintiff's version of events stating in relevant part:

> The white male on the bike continued to ride unsteadily. Looked like the bike, itself, was kind of wobbling back and forth from east to west. . . . He never looked to his left or to his right. . . . He just continued to ride straight into traffic.
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> * * *
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> He looked very unsteady on the bike. I could see him wobbling back and forth on the bike unsteadily, and obviously, you know, without talking to the person, I couldn't tell if it's because he's riding through the grass . . . or if it was because he was intoxicated . . . but it was very clear that he was unsteadily riding through the median without looking to his north or south.

Neal further indicated that he was "catching up" to defendant's vehicle and opined that she was not exceeding the speed limit. Neal specifically testified that he had "no doubt that the cause of the accident was this person failing to yield to traffic and riding directly in front of a car." Two other witnesses, Robert Gauvin and Patricia O'Neill, provided similar accounts of the incident to police, indicating that plaintiff failed to yield to oncoming traffic and proceeded into the roadway without looking. An investigating police officer reported that Gauvin stated that he "was south on Fort Street across from the White Castle's [sic] and saw a white male on a bicycle trying to cross Fort Street from west to east. . . . [T]he man on the bike drove right out in front of the car that hit him. He failed to yield for the northbound Fort Street traffic." Police officer David Grodin recounted the statements he obtained from these witnesses and indicated:

> I thought Mr. Gauvin said that it appeared the guy was intoxicated. . . . It just appeared that he purposely drove out in front of everybody on southbound traffic and didn't get hit, then drove through the median and got hit on the northbound side.

In addition, police officer Roy Bruce was at the accident scene and conducted various measurements pertaining to the location of defendant's vehicle, plaintiff's bicycle and their relationship to pertinent landmarks. Bruce determined that the entire width of the roadway at the location of the collision was 47 feet, with the individual lanes being 12 feet in width. The skid mark from defendant's vehicle was physically measured and determined to be 98 feet, six inches in length. While Bruce did not calculate the speed of defendant's vehicle, he determined plaintiff to be at fault for the accident because of his failure to yield to oncoming traffic.

In contradiction to the testimony of eyewitnesses to the accident, the police officers on the scene investigating the incident, and the undisputed physical evidence plaintiff's accident reconstruction expert, Gary Mattiacci, states in an affidavit his conclusions, which are in relevant part:

> 6. I have personally investigated the roadway. I have reviewed photos of the skidmarks and bicycle damage to determine the rate of speed of Defendant driver was driving at the time of the auto collision.
>
> 7. I have determined that Defendant's *vehicle's skid marks measured approximately 125 feet* thus leading to the determination that Defendant's speed was in excess of the posted speed limit 45 mph.

> 8. I have determined that Plaintiff's bicycle *using constant velocity traveled past the stop sign to the point of impact at 28 feet at an average of 11.76 to 14.47 feet per second* and that Plaintiff needed approximately 3 feet to clear or approximately .2 to .25 seconds to clear.
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> 9. I have determined that Defendant's vehicle would have been *approximately* a minimum of 16.08 feet further back from the point of onset of skidding had Defendant complied with the posted speed limit of 45 m.p.h.
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> 10. I have determined in my findings throughout my investigation of the collision scene that had Plaintiff had [sic] driven at the posted speed limit, the impact would not have occurred based on my *review of the road conditions, bicycle damage and skid marks*. [Emphasis added.]

The majority asserts that the content of this affidavit is sufficient to establish a genuine issue of fact precluding the grant of summary disposition. I disagree based on the failure of several assertions within the affidavit to comport with established facts in evidence or to comprise substantively admissible evidence.

Defendants sought summary disposition pursuant to MCR 2.116(C)(10), which provides: "Except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." In accordance with MCR 2.116(G):

> (4) A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.
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> * * *
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> (6) *Affidavits*, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)-(7) or (10) *shall only be considered to the extent that the content or substance would be admissible as evidence* to establish or deny the grounds stated in the motion. [Emphasis added.]

In accordance with MCR 2.119(B):

> (1) If an affidavit is filed in support of or in opposition to a motion, it must:
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> (a) be made on personal knowledge;

(b) *state with particularity facts admissible as evidence* establishing or denying the grounds stated in the motion; and

(c) show affirmatively that the affiant, if sworn as a witness, *can testify competently to the facts stated in the affidavit*. [Emphasis added.]

The mere production of a supporting expert does not prevent the grant of summary disposition. *Amorello v Monsanto Corp*, 186 Mich App 324, 331; 463 NW2d 487 (1990). To preclude the grant of summary disposition, it is necessary for plaintiff to establish the existence of a disputed fact by *admissible evidence*, MCR 2.116(G)(6) (emphasis added); *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002). "Speculation and conjecture are insufficient to create an issue of material fact." *Ghaffari v Turner Construction Co (On Remand)*, 268 Mich App 460, 464; 708 NW2d 448 (2005).

I would note that Mattiacci's affidavit was signed and sworn to on January 21, 2009, more than 30 months after the collision occurred. In making his averments, Mattiacci indicates he viewed the roadway, but fails to indicate when that observation occurred and whether he can attest that the roadway and surrounding area/landmarks when inspected were unchanged from the date of the accident. In addition, Mattiacci does not indicate that he actually reviewed the file or physical evidence in this case, including the police reports, depositions, witness statements, etc. While Mattiacci attests that he "investigated the roadway," in determining the speed of defendant's car he indicates merely that he reviewed photographs depicting the skid marks and the bicycle damage. However, this is insufficient to determine speed, as the formula for estimating speed based on skid marks also requires the inclusion of the drag factor for the road surface and the braking efficiency of the vehicle.

The proffered affidavit is improperly conclusive. Mattiacci merely states he determined the skid marks to be 125 feet in length from a photograph we must assume was taken by someone else at a time closer to the accident's occurrence. Hence, it is not based on personal knowledge, is in direct contradiction of the physical evidence obtained at the time of the accident by the police officer having actually measured the skid mark and determining it was 98 feet and six inches in length, and provides absolutely no factual basis in support of his conclusion.

The affidavit contradicts plaintiff's deposition testimony. Plaintiff contends that he stopped at the stop sign before proceeding and was struck by defendant's vehicle almost immediately upon entering into the northbound lanes of the roadway. Yet, plaintiff's expert indicates that he used a "constant velocity" for plaintiff's bicycle in determining defendant's speed. This is not possible if plaintiff was stopped before entering the roadway and into the path of defendant's vehicle.[1] "[P]arties may not contrive factual issues merely by asserting the

[1] I would further note that the statements by eyewitnesses contradicting plaintiff's assertion of having stopped and looked before proceeding into the roadway does not alleviate the problem. While the eyewitnesses contend plaintiff did not stop, he was not traveling at a "constant velocity" based on the observation that he was "riding unsteadily" and was "wobbling back and forth."

contrary in an affidavit after having given damaging testimony in a deposition." *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480; 633 NW2d 440 (2001) (citations omitted). Plaintiff's expert also indicates that plaintiff's bicycle traveled "past the stop sign to the point of impact at 28 feet." The uncontroverted evidence, based on the police officer's actual measurement of relevant distances and relationships to stationary landmarks at the accident scene, showed that each lane of traffic was 12 feet in width and that defendant's vehicle struck plaintiff's bicycle in the second lane of traffic at the left side of the lane. Given the measured distance of 12 feet in width for each lane, a distance of 28 feet to the point of impact as indicated by the expert's affidavit is inexplicably at odds with the evidence.

Contrary to the claims of the majority, the basis for my dissent is not focused on the format of the affidavit of plaintiff's expert, but rather on its questionable content and admissibility. Plaintiff's expert makes blatant and unsupported statements, which are contrary to the undisputed physical evidence. A party cannot simply submit an expert's affidavit based on fabrication in an effort to preclude summary disposition. Irrespective of the format of presentation, the bottom line remains that "[t]he expert's opinion must be admissible." *Amorello*, 186 Mich App 331. In order to "be admissible, the court must determine whether the opinion will assist the trier of fact to understand the evidence or to determine a fact in issue, and the opinion must not tend to mislead or confuse." *Id.* at 331-332. "The facts and data upon which the expert relies . . . must be reliable." *Id.* at 332.

The affidavit of plaintiff's expert lacks any indicia of reliability as it is in direct contradiction of the facts and data in evidence and is even contrary to plaintiff's own testimony. Based solely on photographs of unknown origin, and a viewing of the roadway 30 months after the incident, Mattiacci has opined that defendant was speeding and, therefore, at fault for this accident. In stating this conclusion, Mattiacci's affidavit is devoid of any, let alone sufficient, factual support. As such, his averments cannot be construed to comprise anything other than rank conjecture and speculation.[2] It is well recognized that the provision of mere conclusory allegations that are devoid of detail is insufficient to demonstrate the existence of a genuine issue of material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 371-372; 547 NW2d 314 (1996). As a result, the affidavit of plaintiff's expert was insufficient to create a genuine issue of material fact regarding causation.

/s/ Michael J. Talbot

[2] I would note that I am not the first to find an affidavit submitted by this particular expert to be lacking and based on "pure speculation." See *Davis v Williams*, unpublished opinion per curiam of the Court of Appeals, issued December 4, 2008 (Docket No. 278713).