

STATE OF MICHIGAN
COURT OF APPEALS

DOREEN BINT and ROBERT BINT,

Plaintiffs-Appellants/Cross-
Appellees,

UNPUBLISHED
August 7, 2001

v

No. 220309
Huron Circuit Court
LC No. 97-000256-NI

ROGER DOE and USF HOLLAND, INC.,

Defendants-Appellees,

and

CITIZENS INSURANCE COMPANY

Defendant-Appellee/Cross-
Appellant.

Before: K.F. Kelly, P.J., and O’Connell and Cooper, JJ.

PER CURIAM.

Plaintiffs Doreen and Robert Bint appeal as of right from the order granting summary disposition in favor of defendants on their negligence claim. Plaintiffs also appeal the trial court’s denial of their motion to amend the complaint to add additional defendants. We reverse and remand for further proceedings.

I. Basic Facts and Procedural History

Plaintiff¹ and her mother were driving on M-25 when whiteout conditions and poor visibility forced her to pull over to the side of the road and wait for the conditions to improve.

¹ Plaintiff Robert Bint seeks damages in conjunction with his derivative claim for loss of consortium. The term “plaintiff” employed in the singular refers to Doreen Bint’s unless otherwise specified.

After five or six minutes elapsed, plaintiff looked in her mirror and saw, “as plain as day” a white truck with “TNT” in orange letters inside black frames on its wind deflector coming up fast behind her. Shortly after plaintiff saw the truck in the mirror, the truck careened into the back of plaintiff’s vehicle thus causing plaintiff’s extensive injuries.

Plaintiff’s mother, Viola Cook, owned the vehicle that plaintiff was driving when the accident occurred. Both testified that after the accident, a man approached their vehicle wearing a work shirt sporting the name “Roger.” Both assumed that he was the driver of the truck. However, neither plaintiff nor Cook actually saw “Roger” alight from the truck or reenter the truck after he spoke briefly with plaintiff and her mother. Further, because of the inclement weather, plaintiff and Cook admitted that they did not actually see where the truck was parked.

Defendant USF Holland, Inc. (“USF Holland”) is a trucking company with a terminal in Birch Run and operates in the area where the accident occurred. USF Holland trucks utilize the same TNT logo and coloring as the truck striking plaintiff’s vehicle. Believing a USF Holland truck had struck her, plaintiffs filed a negligence claim against the company and “Roger Doe,” the alleged driver.

USF Holland moved for summary disposition arguing that its truck was not involved in the accident. In support, it relied on the affidavit of Robert Daenzer, USF Holland’s terminal manager, stating that: 1) USF Holland did not have an employee named “Roger” working at the Birch Run terminal; 2) none of his drivers reported any accident at the Birch Run terminal; 3) he identified four local drivers who could have been in the area of the accident on the relevant date; 4) he “thoroughly questioned” these drivers and each of them denied any knowledge of, or involvement in, the accident. USF Holland relied upon this affidavit in its motion for summary disposition and argued that the evidence was “unequivocal” that its trucks were not involved in the accident.

Before the trial court heard the motion, plaintiff took Daenzer’s deposition. This subsequent deposition testimony seriously compromised the statements contained in his affidavit. Daenzer testified that at the time of the accident he had forty-two trucks operating in that area and further stated that he could not completely rule out the possibility that his trucks were indeed present in the area where the accident occurred. He also agreed that aside from the four trucks that he ruled out in his affidavit, one of the other thirty-eight trucks could have been in area where the accident occurred. While Daenzer testified that he could not account for his drivers’ whereabouts on the day of the accident, he also stated that business records or “bid sheets,” would tell him where his drivers were on that particular date. However, USF Holland was unable to use the records to show that the drivers were *not* in the area because they were destroyed one year after the accident pursuant to the company’s one-year record retention policy. Finally, he identified several trucking companies other than USF Holland that use the TNT name, logo and markings, as well as the same orange and white color scheme.² Plaintiffs sought to add these potential defendants.

² Thomas Nationwide Transportation, an Australian firm, previously owned TNT Overland and TNT Holland. TNT Solutions, Inc., located in Flint, also uses the TNT logo, markings and color scheme.

The trial court agreed with defendants' position that "no reasonable person could conclude" that a USF Holland truck was involved. The trial court found that there was no genuine issue of material fact and granted summary disposition pursuant to MCR 2.116(C)(10). The trial court also denied plaintiff's motion to amend her complaint to add the other trucking companies identified through discovery.

II. Summary Disposition

Plaintiff argues that the lower court erred by granting defendants' motion for summary disposition. We agree. The trial court's ruling on a motion for summary disposition is reviewed de novo. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). "A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim." *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 485; 502 NW2d 742 (1993). Affidavits, pleadings, depositions, admissions, and documentary evidence are considered in reviewing a motion for summary disposition pursuant to MCR 2.116(C)(10), and the evidence is viewed "in the light most favorable to the party opposing the motion." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The trial court may not make findings of fact or weigh credibility in deciding a motion for summary disposition as those decisions lay within the sole province of the finder of fact. *Phillips v Jordan*, 241 Mich App 17, 28; 614 NW2d 183 (2000).

Viewing the evidence in the light most favorable to plaintiff, we conclude that plaintiff presented sufficient evidence establishing a genuine issue of material fact. In response to defendant's motion, plaintiff submitted her own testimony wherein she adamantly identified a USF Holland truck as the truck that struck her vehicle. Plaintiff further submitted evidence that corroborated this identification. The trial court however, completely disregarded plaintiff's evidence and wholly relied upon the evidence submitted by USF Holland. However, despite USF Holland's claim to the contrary, the evidence was conflicting. Mr. Daenzer's deposition testimony seriously compromised the statements contained in his prior affidavit. In fact, Daenzer even admitted that the USF Holland trucks looked *exactly* like the truck both plaintiff and her mother identified. Upon careful review of the record, we find that plaintiff's evidence created a genuine factual issue sufficient to preclude summary disposition. By granting summary disposition to USF Holland despite this conflicting evidence, the trial court erroneously resolved disputed questions of fact and thus committed error requiring reversal.

III. Motion to Amend

Plaintiff also argues that the trial court erred by denying her motion to amend her complaint to add newly identified trucking companies. We agree. Decisions on motions for leave to amend are reviewed for abuse of discretion. *Knauff v Oscoda County Drain Comm'r*, 240 Mich App 485, 493; 618 NW2d 6 (2000). Although "[t]he grant or denial of leave to amend is within the sole discretion of the trial court," the trial court must grant the requested leave "freely" when the principles of justice so demand. *Id.* Indeed, "[t]he rules pertaining to amendment of pleadings are liberally construed and are designed to facilitate amendment except when prejudice would result to the opposing party" and effectively deprive that party of a fair trial. *Id.* MCR 2.118(A)(2) governs amendment of pleadings and provides that, "[l]eave [to amend] shall be freely given when justice so requires." [Emphasis added.]

Here, plaintiff timely requested leave to amend her complaint to add additional trucking companies as defendants. Plaintiff presented evidence that several trucking companies used the TNT logo, markings, and color schemes on their trucks and that they operated in the area where the accident occurred.³ Since these trucking companies were reasonably identified as appropriate defendants, the trial court abused its discretion by not giving plaintiff the opportunity to amend her complaint. See *Kaminsky v Hertz Corp*, 94 Mich App 356; 288 NW2d 426 (1979).

The trial court's orders granting summary disposition to defendants and the order denying leave to amend the complaint are reversed. Because of our resolution in favor of the plaintiffs on these grounds, we need not address the other issues raised by the parties.⁴ The case is remanded for proceedings consistent with this opinion.

/s/ Kirsten Frank Kelly
/s/ Peter D. O'Connell
/s/ Jessica R. Cooper

³ For example, plaintiff provided the court with a photograph of a TNT Overland truck with the TNT logo on the windfoil. TNT Overland is one of the prospective defendants that plaintiff sought to add.

⁴ Plaintiffs also appeal the trial court's decision granting summary disposition in favor of defendant Citizens Insurance Company's ("Citizens") on its uninsured motorist insurance claim. Defendant Citizens cross-appeals the denial of its summary disposition motion on the ground that plaintiff failed to show that she was hit by an "uninsured motor vehicle." The alternative uninsured motorist claim sought by plaintiff against Citizens will most likely not be necessary, depending on the ultimate identification of the truck at issue. However, at this stage of the proceedings, plaintiff certainly has the right, as expressly authorized by MCR 2.111(A)(2), to plead inconsistent and alternative facts and claims. See e.g. *H J Tucker & Associates v Allied Chucker Co*, 234 Mich App 550, 573-574; 595 NW2d 176 (1999).