

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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RICHARD HILL, as Next Friend of STEPHANIE  
HILL, a Minor,

UNPUBLISHED  
January 31, 2003

Plaintiff-Appellant,

v

REMA ANNE ELIAN and GHASSAN N. ELIAN,

No. 235216  
Wayne Circuit Court  
LC No. 00-000541-NH

Defendants-Appellees,

and

SAEEDA MALIK,

Defendant.

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Before: White, P.J., and Kelly and R. S. Gribbs , JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's grant of summary disposition to defendants under MCR 2.116(C)(10) in this third-party automobile negligence action. We reverse.

This action arose out of a two-car accident on the afternoon of May 18, 1999, in Grosse Pointe Woods. At about 3:50 p.m., former defendant Saeeda Malik was driving a Ford Windstar minivan southbound on Mack Avenue, and turned left (east) on Lennon Street, destined for Parcels Middle School. Eleven-year-old Stephanie Hill was a passenger in the rear seat of Malik's minivan. The posted speed limit is 35 miles per hour. Traffic on Mack Avenue was heavy, and as Malik waited to cross northbound Mack Avenue to enter the school parking lot, a northbound vehicle driven by former defendant Patricia Kwiatkowski paused, creating a break in the line of traffic on Mack Avenue. Malik asserts that the traffic in the second northbound travel lane also stopped. Malik turned left into the school parking lot, but as the front of her minivan entered the driveway, a 1992 Volkswagen Jetta driven by twenty-year-old defendant Rema Elian struck the minivan broadside, behind the van's passenger door. The impact caused the minivan to flip in the air and roll over. Stephanie Hill suffered permanent severe injuries as a result of the accident.

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Plaintiff brought suit alleging negligence against Rema Elian, Malik and Kwiatkowski, and negligent entrustment by defendant Ghassan Elian, Rema's father and the Jetta's registered owner.

The Elian defendants moved for summary disposition under MCR 2.116(C)(8) and (C)(10). The circuit court granted the motion under MCR 2.116(C)(10). The court denied plaintiff's motion for reconsideration. We reverse.

A motion under MCR 2.116(C)(10) tests the factual support for a claim, and is reviewed de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. . . .

In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. . . . If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. [*Smith, supra* at 454-455, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996). Citations omitted.]

Defendants' summary disposition motion argued that Rema Elian breached no duties to Stephanie Hill, that the police crash report reflected that Rema Elian had the right of way when Malik drove into her path, that numerous witnesses gave statements to the police that Malik pulled into Elian's path and caused the accident, and that no witnesses observed activity on Rema Elian's part that could be said to be negligent or the proximate cause of the accident. In support of their motion, defendants submitted 1) four witness statements gathered by the police, two of which stated that the minivan failed to yield; 2) a private investigator's report of a telephonic interview with witness Donald Northey; 3) several pages of Northey's deposition testimony; and 4) two pages of deposition testimony of an unidentified witness, apparently Kwiatkowski, who testified that to the best of her recollection the Elian vehicle was in lane two of northbound Mack Avenue, i.e., a travel lane, when it struck Malik's minivan. Defendants' motion maintained that Northey's deposition testimony was inconsistent with the statements Northey made to the private investigator, and that the only proof of negligence plaintiff could offer was from plaintiff's expert, who had to date submitted no reports. As discussed below, soon after defendants filed their summary disposition motion, plaintiff filed a motion to adjourn trial which explained that his expert had suffered a heart attack, had been hospitalized, and was confined to bed rest for ninety days. The circuit court granted plaintiff's motion to adjourn trial.

In response to defendants' motion, plaintiff argued that Rema Elian was driving in a third, parking lane on northbound Mack Avenue, not in a travel lane, and speeding when she struck Malik's van. In support, plaintiff submitted documentary evidence including 1) Saeeda Malik's deposition testimony that Rema Elian was in the far right lane, a parking lane, when the accident occurred; 2) Ghassan Elian's deposition testimony that his daughter Rema had told him

that she was in the far right, parking lane when her vehicle struck the minivan; and 3) witness Donald Northey's<sup>1</sup> deposition testimony that Malik's van had just entered the school driveway when Rema Elian's Jetta went from lane two of northbound Mack Avenue into a third, parking lane, when it struck Malik's van, and that the Jetta was speeding at the time, going 40 or 45 mph.

The record contains only one diagram of the accident location; a drawing in the police traffic crash report, which does not indicate whether there is a parking lane. There seemed to be no dispute, however, that Mack Avenue has two travel lanes in each direction in the accident area, separated by an island/berm, which contains turn-arounds. Malik and Northey testified that on a portion of Mack Avenue's northbound side (from which you enter Parcels Middle School) there is a third lane, for parking and not for travel, and that that parking lane turns into a travel right-turn-only lane further north. Defendants did not dispute below that there was a parking lane on northbound Mack Avenue, but rather, maintained steadfastly that Rema Elian was in the second northbound travel lane when the accident occurred, and not in the parking lane.

The documentary evidence plaintiff submitted below raised a genuine issue of fact regarding whether Elian was improperly driving in a parking lane when she struck Malik's vehicle, and whether she was speeding at the time. This is so even if Northey's deposition testimony is interpreted as conflicting with (unsworn) statements he made to a private investigator in a phone conversation, as Malik's deposition testimony clearly supports that Rema Elian was driving in the parking lane when she struck Malik's vehicle. Summary disposition was inappropriately granted.

Plaintiffs also note that defendants disposed of the Elian vehicle despite plaintiffs' specific request that it be preserved for examination by plaintiff's accident reconstructionist, Dr. Lee, and that the circuit court thus allowed defendants to profit from their own wrongdoing, and abused its discretion in not imposing a sanction for spoliation of evidence.

Plaintiff attached to his response to defendants' summary disposition motion a letter from counsel to defendants' insurer, dated May 29, 1999, requesting that the Elian vehicle be preserved. Plaintiff's counsel argued at the motion hearing that he would request the standard jury instruction on spoliation of evidence, however, plaintiff did not request sanctions below. The issue of sanctions was not before the court and thus there is no abuse of discretion in that regard. This question remains open on remand.

Plaintiff also argues that although the circuit court's ruling is unclear, it appears that the court completely discounted the anticipated testimony of Dr. Lee, plaintiff's liability expert, who was unable to provide an affidavit in support of plaintiff's response to defendants' motion because he had had quadruple bypass surgery and was under medical orders to do no work. Plaintiff notes that once Dr. Lee was well enough to do so, he did provide an affidavit, and plaintiff submitted it to the circuit court in its motion for reconsideration.

Defendants filed their summary disposition motion on February 28, 2001. On March 5, 2001, plaintiff's counsel filed a motion to adjourn trial, then set for April 9, 2001, and supported

<sup>1</sup> Northey, a high school coach, testified that he was outside coaching at the time of the accident, facing Mack Avenue, and witnessed the accident or its immediate aftermath.

its motion with an affidavit. The affidavit stated that plaintiff's counsel had just learned that plaintiff's liability expert, Dr. Lee, an accident reconstructionist, had suffered a severe heart attack, undergone quadruple bypass surgery on February 27, 2001, was discharged on March 7, 2001 from the hospital, and was under medical orders to have complete bed rest for ninety days. Plaintiff's counsel stated that Dr. Lee's wife assured him that Dr. Lee intended to testify in this case after his recuperation period. The circuit court entered an order adjourning trial, and a subsequent order setting a new trial date of June 25, 2001.

In his motion to adjourn trial, plaintiff notified the circuit court of Dr. Lee's serious illness immediately on learning of Dr. Lee's quadruple bypass surgery and his being confined to bed rest for ninety days after his March 7, 2001 discharge from the hospital. The circuit court granted the motion to adjourn trial, until June 2001. At the time the court heard defendants' summary disposition motion in May 2001, it made no reference to disallowing an affidavit when Dr. Lee recovered, yet that was the effect of the court's dismissal of the case. With trial having been adjourned until late June, 2001, and Dr. Lee's ninety day recuperation period presumably terminating around June 7, 2001, plaintiff would have been able to secure an affidavit in time for defendants to depose Dr. Lee before trial.

Plaintiff did, in fact, secure an affidavit from Dr. Lee, and submitted it in support of his motion for reconsideration. Dr. Lee's affidavit stated that as a member of MSU's faculty, he had developed and taught more than twenty courses in accident investigation and reconstruction; that he had been qualified on numerous occasions to testify as an accident reconstruction expert; and that pursuant to his review of the accident location, the minivan's measurements, and analyses thereof, and of depositions and witness statements, he would testify to the following conclusions:

- a. Malik's speed of travel before impact was approximately 11 MPH.
- b. Elian's speed of travel before impact was approximately 40 MPH.
- c. Traffic was congested, the reasonable rate of speed at the time of day in an intersection and this location would be at least 5 to 10 MPH below the speed limit [35 mph].
- d. Elian did not make any attempt to brake before impact.
- e. Elian had attended Parcell's Middle School and was aware that vehicles may on occasion cross over northbound Mack at the intersection of Lennon to enter the parking lot.
- f. When Malik interfered with the path of travel of Elian's vehicle, it is apparent Elian did not exercise any defensive driving strategies when traveling toward the parking lot entrance of Parcell's before the impact.
- g. While Elian did observe a large SUV stopped in the left lane, she did not take any reasonable precautions in the event a vehicle were to travel in front of the SUV and into the parking lot.

h. Accordingly, it is my opinion that a certain degree of liability would be apportioned to Defendant Elian given that she was traveling in excess of the speed limit and aware of vehicles entering the parking lot and her actions do not reflect any reasonable precautions taken at the time and therefore, proximately caused Stephanie Hill's injuries.

i. The actions of Defendant Rema Elian constituted negligence.

j. The excessive speed of the Jetta caused the Windstar to flip over.

k. If Elian's speed was 25 MPH the collision could have been avoided.

The circuit court denied plaintiff's motion for reconsideration on the basis that no palpable error had been shown. This Court reviews the circuit court's denial of plaintiff's motion for reconsideration for an abuse of discretion. *In re Berlinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997). We conclude that the circuit court abused its discretion in not granting plaintiff's motion for reconsideration. Dr. Lee's affidavit raised genuine issues of fact whether Rema Elian was speeding at the time of the accident, and was a proximate cause of Hill's injuries. The effect of the circuit court's grant of summary disposition was to strike plaintiff's expert. The circuit court should have reconsidered its dismissal and reversed itself in light of Dr. Lee's affidavit.

Reversed and remanded. We do not retain jurisdiction.

/s/ Helene N. White  
/s/ Kirsten Frank Kelly  
/s/ Roman S. Gribbs