STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF LEELANAU

JULIE A. HARDMAN, as Personal Representative of the ESTATE OF JAMES ARTHUR MACKIN, deceased

Plaintiff,

v

File No. 10-8231-NI
HON. PHILIP E. RODGERS, JR.

WILLIAM SUTTON MILLER,

Defendant.
_____/

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DECISION AND ORDER
REGARDING PARTIES' MOTIONS FOR RECONSIDERATION

The Complaint for the above-captioned case was filed on January 29, 2010. On July 30, 2010, the Defendant filed a Motion for Summary Disposition which this Court subsequently denied on September 7, 2010.

The Defendant filed his Motion for Reconsideration, with regard to the earlier denial of summary disposition, on September 29, 2010. The Court issued a Pre-Hearing Order on October 5, 2010, mandating that all responses and replies be filed by October 18, 2010.

Plaintiff filed her separate Motion for Partial Reconsideration pursuant to MCR 2.119(F) on September 30, 2010. The Court issued a second Pre-Hearing Order on October 6, 2010, mandating all responses and replies be filed with the Court on or before October 20, 2010.

Having reviewed the parties' motions, responses and replies, the Court dispenses with oral arguments and now issues the following decision and order.

STANDARDS OF REVIEW

Michigan Court Rule, MCR 2.116(C)(10), provides that summary disposition may be entered on behalf of the moving party when it is established that, "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."

A motion filed under MCR 2.116(C)(10) tests the factual support for a claim, *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003), and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). 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. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id*. When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rely on mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich. 358, 362; 547 NW2d 314 (1996). A genuine issue of material fact exists when the record, viewed in the light most favorable to the nonmoving party, leaves open an issue on which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence filed in the action. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

Michigan Court Rule, MCR 2.119(F), establishes:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate palpable error by which the court and the parties have been misled and must show that a different disposition of the motion must result from correction of the error. MCR 2.119(F)(3).

The party moving for reconsideration "must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result." MCR 2.119(F)(3). To demonstrate evidence of palpable error, the moving party must show that, were it not for the alleged error, a different disposition would have been reached by the court. *McCormick v Carrier*, 485 Mich 851; 770 NW2d 357 (2009).

MOTION FOR SUMMARY DISPOSITION

This case arose out of an accident that occurred September 4, 2009 in Leelanau County. While driving on County Road 641, the Defendant struck a pedestrian, decedent James Mackin, with his vehicle. Mr. Mackin died as a result of injuries he sustained from the accident.

In his Motion for Summary Disposition, the Defendant argued MCL § 600.2955a and MCL § 500.3135(2)(b) as bases for why summary disposition should be granted. The Defendant maintained that the decedent was 50% or more at fault in causing the event which resulted in decedent's death and therefore, Plaintiff should be barred from claiming negligence.

Conversely, Plaintiff argued that the Defendant was negligent and primarily at fault because he failed to see and react to a pedestrian in the roadway, failed to yield the right-of-way to a pedestrian in the roadway and was operating his vehicle in an unreasonable and imprudent manner under the circumstances. Plaintiff's response to the summary disposition motion, filed August 31, 2010, relied primarily on expert Gary McDonald's opinion that Defendant was driving 64 mph prior to the accident. However, McDonald's affidavit was not timely filed under MCR 2.116(G), and it offered conclusions without any factual foundation.

The happening of an accident is not, in and of itself, evidence of negligence. The plaintiff must present some facts that either directly or circumstantially establish negligence. *Whitmore v Sears, Roebuck & Co,* 89 Mich App 3, 9; 279 NW2d 318 (1979). Where the circumstances are such as to take the case out of the realm of conjecture and bring it within the field of legitimate inference from established facts, the plaintiff makes at least a prima facie case. *Clark v Kmart Corp,* 242 Mich App 137, 140-141; 617 NW2d 729 (2000), rev'd on other grounds 465 Mich 416 (2001). If the plaintiff manages to establish a causal link between the accident and any negligence on the part of the defendant, summary disposition is improper. *Pete v Iron Co,* 192 Mich App 687, 689; 481 NW2d 731 (1992).

Pursuant to the legal standard, this Court denied the Defendant's Motion for Summary Disposition because it was premised on questions of fact and not questions of law. When deciding a motion for summary disposition, courts do not make factual findings, weigh the evidence or resolve issues of credibility. *Skinner v Square D Co,* 445 Mich 153, 161; 516 NW2d 475 (1994); *Burkhardt v Bailey*, 260 Mich App 636, 646-647; 680 NW2d 453 (2004). A court must draw all inferences in favor of the nonmoving party, and the motion should be denied unless it is impossible that the claim can be supported by evidence admissible at trial. *Ardt v Titan Ins Co,* 233 Mich App 685, 693; 593 NW2d 215 (1999). It is not within the courts' discretion to rule on factual issues or inferences that may be drawn from such facts. The court is limited to interpreting the law and may not weigh the evidence presented in a case.

In addition, the Order Denying Summary Disposition entered by the Court ruled that the Defendant's speed at the time of the accident is no longer an issue for trial. At the hearing preceding the Court's Order, Defendant represented that the Plaintiff had failed, after repeated requests, to provide expert discovery from her accident reconstructionist, Gary McDonald. Defendant explained that multiple requests were made for Plaintiff's expert reports and moreover, Defendant made several attempts to depose Plaintiff's expert prior to the summary disposition hearing.

The Court held, "the Plaintiff's expert affidavit was late and without any foundation to support a conclusory decision and the foundation for the opinion having been previously requested in discovery and not supplied," in ruling the issue of speed inadmissible. See MCR 2.313 *et seq*; see generally MCR 2.119(A)(1).

Furthermore, the Court ruled that the decedent was legally intoxicated and impaired as a matter of law pursuant to MCL § 600.2955a(2)(b), which clarifies, impaired ability to function due to the influence of intoxicating liquor or a controlled substance means that, as a result of an individual drinking, ingesting, smoking, or otherwise consuming intoxicating liquor or a controlled substance, the individual's senses are impaired to the point that the ability to react is diminished from what it would be had the individual not consumed liquor or a controlled substance.

MOTIONS FOR RECONSIDERATION

The Defendant, through his motion, moves for reconsideration of the Court's September 17, 2010 Order, pursuant to MCR 2.119(F), based on the recent deposition of optometrist Dr. Andrea Becker Seeley, occurring September 16, 2010, which indicates the decedent was blind in his right eye. Defendant argues that Plaintiff misled the Defendant in discovery, intentionally with holding information, which prevented Defendant from effectively arguing his motion for summary disposition. Further, Defendant claims that the decedent's blindness, coupled with the other facts of the case, clearly indicate that the decedent was at least 51% at fault for this accident.

Plaintiff's Motion for Partial Reconsideration argues that the Court committed palpable error and must reconsider its rulings that, as a matter of law, (1) Defendant's speed at the time of the accident is no longer an issue for trial and, (2) that decedent was legally intoxicated and impaired when the accident occurred.

With regard to excluding the issue of speed, Plaintiff maintains she did not provide the Defendant with a report from Gary McDonald because there was no expert report produced prior to September 16, 2010. In addition, Plaintiff posits that speed evidence is critical to her case, however, she had no legal obligation to provide Defendant with an expert report before the summary disposition hearing and/or discovery deadline.

Pursuant to the Court's ruling that decedent was legally intoxicated, Plaintiff claims the Court may not make factual findings or weigh the credibility of witnesses in negligence actions, thus, the Court committed error in ruling decedent was intoxicated as a matter of law. See *Barnell v Taubman Co*, 203 Mich App 110; 512 NW2d 13 (1993).

ANALYSES

With regard to Defendant's comparative negligence argument, pursuant to MCL § 500.3135(2)(b), Michigan's no-fault statute and case law, precedent holds that when no issue of material fact exists regarding the conduct of a decedent, the trial court may find, as a matter of law, that the decedent was more than 50% responsible. *Huggins v Scripter*, 469 Mich 898; 669 NW2d 813 (2003).

Comparative negligence is usually a question for the trier of fact. *Poch v Anderson*, 229 Mich App 40, 51; 580 NW2d 456 (1998). However, comparative negligence may be decided

on a motion for summary disposition where "no reasonable juror could find that defendant was more at fault than the decedent in the accident as required by MCL § 500.3135(2)(b)." *Huggins, supra*. When reasonable minds cannot differ whether one party was substantially more at fault than the other, summary disposition is appropriate. *Id.*

In *Huggins*, evidence showed that the defendant driver could not see the pedestrian decedent as he crested a hill and struck the decedent. The *Huggins* Court assumed the decedent was negligent and pointed to a police accident reconstructionist's opinion that no driver would have enough time to avoid the collision given the decedent's location just beyond the crest of the hill, thus no reasonable juror could find that the defendant was more at fault than the decedent in the accident. *Huggins, supra*. Where a decedent violates statutory law and puts himself in a position where he cannot be seen by oncoming traffic the defendant is not primarily responsible for the collision. *Id*.

A comparison of the present case with *Huggins* demonstrates why this Court correctly denied Defendant's Motion for Summary Disposition and why reconsideration with regard to comparative negligence is inappropriate. In *Huggins*, the evidence clearly showed that the decedent was not visible to the driver prior to the accident and the court determined that no reasonable juror could find the driver to be more at fault than the decedent. In contrast, the facts in this case indicate that the decedent was visible prior to the crash. Thus, there remains a question for the jury as to which party was more at fault. While Michigan courts have found that there is no duty to anticipate the negligence of another or to avoid a collision no matter what the circumstances, it is entirely possible for jurors to interpret the facts of this case and the parties' actions differently. See *Corpron v Skiprick*, 334 Mich 311 318; 54 NW2d 601 (1952); *Berry v J & D Auto Dismantlers*, 195 Mich 476, 484; 491 NW2d 585 (1992).

Defendant claims that he did everything possible to avoid the accident, while the decedent did nothing to avoid the accident. The Defendant contends that this fact, along with other evidence, proves that he was not responsible for the accident and that the decedent was 100% at fault. Defendant arguments are based on facts, therefore, it is left to the trier of fact to weigh the evidence and to determine comparable negligence.

The trial court's decision to impose discovery sanctions rests in the trial court's discretion. *MacArthur Patton Christian Ass'n v Farm Bureau Ins. Group*, 403 Mich 474, 475;

270 NW2d 101 (1978); *Kurczewski v State Highway Comm*, 112 Mich App 544, 549-550; 316 NW2d 484 (1982). The term discretion itself:

> [I]nvolves the idea of choice, of an exercise of will, of a determination made between competing considerations. In order to have an abuse in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of judgment but defiance thereof, not the exercise of reason but rather passion or bias. *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

While it is within the trial court's authority to bar an expert witness as a sanction for failure of a party to abide by discovery rules, the fact that such action is discretionary rather than mandatory necessitates a consideration of the circumstances of each case to determine if such a drastic sanction is appropriate. *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990). A court should give careful consideration to the factors involved and consider all of its options in determining what sanction is just and proper in the context of the relevant case. *Houston v Southwest Detroit Hosp*, 166 Mich App 623, 629-630; 420 NW2d 835 (1987). The factors that should be considering in determining the appropriate sanctions are: (1) whether the violation was willful or accidental; (2) the party's history of refusing to comply with discovery requests; (3) prejudice; (4) actual notice to the defendant of the witnesses and length of time prior to trial that defendant received such actual notice; (5) whether there exists a history of plaintiff engaging in deliberate delay; (6) the degree of compliance by the plaintiff with other provisions of the court's order; (7) an attempt by the plaintiff to timely cure the defect; and (8) whether a lesser sanction would better serve the interests of justice. See *Dean*, *supra* at 32-33.

Defendant has documented that Plaintiff's expert reports and/or discovery were requested on January 26, 2010, March 3, 2010, April 13, 2010, May 7, 2010, and July 2, 2010. Mr. McDonald's affidavit was not filed until September 3, 2010 and his expert report was not produced until September 16, 2010. Furthermore, on July 29, 2010, the Defendant scheduled a deposition of McDonald for September 3, 2010. On August 2, 2010, Plaintiff canceled McDonald's previously scheduled deposition. Subsequently, Plaintiff informed the Defendant that the next available date McDonald could be deposed was September 29, 2010. The Defendant then contacted Plaintiff and requested an earlier deposition date, specifically a date prior to the summary disposition hearing. Defendant contacted Plaintiff again on August 17,

2010 in an attempt to schedule an earlier deposition, but was informed that no August dates were available.

The Court now affirms its prior ruling that speed is no longer an issue for trial, as a matter of law, as Plaintiff's expert witness has been barred from testifying in this case. The Court has reviewed the procedural and discovery related history of this case with respect to the factors elaborated in *Dean v Tucker* and finds that barring Plaintiff's expert is an appropriate sanction under the circumstances. *Dean*, *supra*.

In *Dean*, plaintiff's expert was barred because she failed to timely file her witness list. On appeal, the court found that there was no indication the plaintiff *willfully* failed to file her witness list, rather it was apparently an inadvertent mistake, therefore, the trial court had abused its discretion in imposing such an excessive sanction. *Dean*, *supra* at 34 (emphasis added). Here, Plaintiff's failure to provide expert discovery prior to the hearing on the motion for summary disposition was clearly willful and intentional.

Throughout discovery in this case, Plaintiff repeatedly failed to provide Defendant with requested reports and information and, additionally, hindered Defendant's efforts to depose McDonald. These facts also suggest that Plaintiff engaged in deliberate delay with the intent of prejudicing the defense. While the Defendant had prior notice of Plaintiff's witness and Plaintiff attempted to cure the defect by later providing an expert report, the circumstances here warrant the sanction imposed on Plaintiff and the interests of justice are best served by affirming the Court's prior ruling.[1]

Finally, the Plaintiff has no grounds to contest the Court's ruling that the decedent was legally intoxicated and impaired as a matter of law. Plaintiff asserts there remains a material question of fact regarding whether the decedent's ability to function was impaired and that the Court lacks authority to make such a finding. However, the applicable test to determine if a genuine issue of material fact exists, is whether the kind of record that might be developed, giving the benefit of reasonable doubt to the opposing party, would leave open issues upon which reasonable minds might differ. *Skinner*, *supra*; MCR 2.116(C)(10). The law in Michigan states that:

[1] It should not be forgotten that the Defendant properly supported his argument that he was not speeding at the motion hearing and Plaintiff's only rebuttal was an untimely conclusory affidavit.

> Impaired ability to function due to the influence of intoxicating liquor or a controlled substance means that, as a result of an individual drinking, ingesting, smoking, or otherwise consuming intoxicating liquor or a controlled substance, the individual's senses are impaired to the point that the ability to react is diminished from what it would be had the individual not consumed liquor or a controlled substance. An individual is legally presumed to have an impaired ability to function due to the influence of intoxicating liquor or a controlled substance if, under the statutory standard, a presumption would arise that the individual's ability to operate a vehicle was impaired. MCL § 600.2955a(2)(b).

To legally operate a vehicle in this state, the statutory maximum blood alcohol content (BAC) for an individual must not exceed .08 grams or more per 100 milliliters of blood. MCL § 257.625(1)(b). When the decedent's blood was tested after the accident, his BAC was .144 grams or 55% in excess of the statutory limit.

Whether the decedent's ability to function was impaired at the time of the accident is a question of law, not a question of fact. The applicable statutes establish that an individual with a BAC of .08 grams per 100 milliliters of blood legally has 'an impaired ability to function.' MCL § 600.2955a. The decedent's BAC exceeded .08 grams per 100 milliliters after the accident, thus, the decedent was legally intoxicated and impaired as a matter of law. Reasonable minds could not differ regarding the decedent's impaired ability to function when the relevant laws are applied to the facts in this case.

CONCLUSION

To warrant granting a motion for reconsideration, the moving party must demonstrate evidence of palpable error and that, were it not for the alleged error, a different disposition would have been reached by the court. *McCormick v Carrier*, 485 Mich 851; 770 NW2d 357 (2009). This Court finds that, despite evidence of decedent's blindness (in one eye) obtained in the recent deposition, there remain issues of fact regarding the conduct of both the decedent and Defendant prior to the accident. The Court is not persuaded as a matter of law on uncontested facts that the decedent, whether partially blind or not, was at least 51% at fault for this accident and finds that reasonable minds could differ regarding whether one party was substantially more at fault than the other. The question of comparable negligence must be submitted to a jury, thus, Defendant William Miller's Motion for Reconsideration is denied.

For the reasons stated herein, the Plaintiff has failed to establish evidence of palpable error, therefore, the Court affirms its rulings that speed is no longer an issue for trial and that

the decedent was legally intoxicated and impaired as a matter of law. The Plaintiff's Partial Motion for Partial Reconsideration Pursuant to MCR 2.119(F) is denied.

IT IS SO ORDERED.

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HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____