

STATE OF MICHIGAN
COURT OF APPEALS

ROBIN SAKOFSKE, as Personal Representative
of the ESTATE OF JOHN SAKOFSKE,

UNPUBLISHED
October 22, 2019

Plaintiff-Appellee,

v

No. 342714
Wayne Circuit Court
LC No. 16-001084-NI

HEATHER LOUISE GERING, COUNTY OF
WAYNE, and WAYNE COUNTY
DEPARTMENT OF PUBLIC SERVICES, doing
business as WAYNE COUNTY ROADS
DIVISION,

Defendants-Appellants.

Before: RIORDAN, P.J., and K. F. KELLY and CAMERON, JJ.

RIORDAN, P.J. (*concurring*).

I join the majority opinion.

I write separately to note that plaintiff did not carry her burden of establishing that the expert witness’s testimony was relevant and admissible. *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010) (the proponent of evidence bears the burden of establishing relevance and admissibility); *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 373; 775 NW2d 618 (2009) (evidence offered in response to a motion for summary disposition pursuant to MCR 2.116(C)(10) must be “substantively admissible, it does not have to be in admissible form[]” provided it is admissible in content). Although the trial court is not permitted to weigh the credibility of expert witnesses, *Ykimoff v Foote Mem Hosp*, 285 Mich App 80, 101; 776 NW2d 114 (2009), an expert’s singular reliance on his own hypothetical depiction of an event indicates that his testimony may be too speculative to assist the fact-finder, and therefore runs afoul of MRE 702. *Craig ex rel Craig v Oakwood Hosp*, 471 Mich 67, 84; 684 NW2d 296 (2004). During his deposition, plaintiff’s expert testified that his theory was based primarily on one portion of Spencer’s deposition testimony, which the majority correctly concludes was purely speculative. Specifically, he stated that “[W]e have to look at the totality of the circumstances how it fits, right, and we start to evaluate statements, credibility.” He

further admitted that there was no physical evidence to support his hypothesis. Instead, he pointed to the notable absence of brake marks as evidence that Sakofske could not avoid Gering's dump truck, and the offset impact as evidence of evasive maneuvering. However, the expert admitted that the lack of brake marks on the road does not mean that Sakofske did not decelerate. Rather, the expert connected this absence of physical evidence to his theoretical conclusion that Gering pulled out in front of Sakofske. This reliance on a hypothetical depiction of the collision is too speculative to assist the trier of fact. *Id.*

Therefore, I agree with the majority opinion and its conclusion.

/s/ Michael J. Riordan