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STATE OF MICHIGAN
COURT OF APPEALS

JULIA MICKENS,

Plaintiff-Appellee,

v

MEEMIC INSURANCE COMPANY and APRIL
NICKERSON,

Defendants,

and

SUBURBAN MOBILITY AUTHORITY FOR
REGIONAL TRANSPORTATION, also known as
SMART,

Defendant-Appellant.

UNPUBLISHED

December 28, 2021

No. 354694

Wayne Circuit Court

LC No. 19-002121-NI

Before: BORRELLO, P.J., and JANSEN and BOONSTRA, JJ.

PER CURIAM.

Defendant¹ Suburban Mobility Authority for Regional Transportation (SMART) appeals by right the trial court’s order denying in part its motion for summary disposition under MCR 2.116(C)(7) and (C)(10). We reverse and remand for entry of an order granting summary disposition in favor of SMART.

¹ Plaintiff’s claim against MEEMIC Insurance Company (MEEMIC) was dismissed by stipulated order on May 14, 2020, and the trial court dismissed plaintiff’s claim against defendant April Nickerson on August 12, 2020.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Between 6:30 p.m. and 6:45 p.m. on February 19, 2018, plaintiff's SUV came into contact with a SMART bus as the two vehicles drove side-by-side on the two westbound lanes of Valley View Road in Dearborn. This portion of Valley View Road essentially served as an entrance ramp to the southbound side of Evergreen Road. April Nickerson (Nickerson), a SMART employee, was driving the bus at the time, traveling toward Evergreen Road. No passengers were on the bus. The bus was equipped with cameras that recorded the accident. The video shows that Nickerson approached the traffic light at the intersection of Valley View Road and Evergreen Road and brought the bus to stop at a red light. There were two cars stopped in front of her, but no cars were visible in the left-hand lane. Nickerson testified that when she stopped the bus, the front half of the bus was in the right-hand lane and the back half was in the left lane, so that she was blocking both lanes of traffic.

A reflective construction barricade blocked the left-hand lane of Valley View Road, just past the traffic light and before the road merged with southbound Evergreen Road. Because of this barricade, motorists could merge onto southbound Evergreen Road only by using the right-hand lane of Valley View Road. In the video, as soon as the light turns green, plaintiff's SUV can be seen driving along the side of Nickerson's bus in the left-hand lane of Valley View Road. Nickerson then starts to move the bus forward, straightening out the bus so that it is fully within the right-hand lane. Plaintiff's vehicle accelerates, pulling alongside the bus. Plaintiff's vehicle then brakes and drifts out of the left-hand lane into the right-hand lane. A few seconds later, plaintiff's vehicle brakes and comes to a complete stop in the middle of the intersection. Just after plaintiff brakes, a screeching noise is heard, and the left-hand side of the bus can be seen sliding across the right side of plaintiff's vehicle. The impact does not cause plaintiff's vehicle to move. Nickerson estimated she was traveling at about 10 to 15 miles per hour at the time of the collision.

In her deposition, and despite the video footage of the accident, plaintiff gave a completely different account of the events leading up to the accident. Plaintiff testified that she had been stopped at the traffic light at the intersection of Valley View and Evergreen Roads. Then, according to plaintiff, while waiting for the light to change, the SMART bus came from behind her and ran the red light, side-swiping plaintiff's stopped vehicle.

In 2020, plaintiff filed suit against SMART, Nickerson, and MEEMIC, plaintiff's no-fault insurer. Plaintiff brought a first-party action against MEEMIC for personal injury protection (PIP) benefits and a third-party negligence action against SMART and Nickerson. Plaintiff alleged that she had suffered injuries to her shoulders and spine from the accident, and that these injuries constituted a serious impairment of body function in excess of the no-fault threshold.

SMART and Nickerson moved for summary disposition under MCR 2.116(C)(7) and (C)(10). They argued that they were shielded by governmental immunity under the governmental tort liability act (GTLA), MCL 691.1401 *et seq.* Specifically, they argued that plaintiff had failed to show that Nickerson had operated the bus negligently, and therefore neither SMART nor Nickerson could be held liable under the GTLA. They also argued that the record established that plaintiff was more than 50% at fault for the collision, because video evidence showed that plaintiff had attempted to pass the bus on the left, had encountered the construction barrels blocking the left lane, and then had entered the right lane occupied by the bus. SMART and Nickerson also

argued that plaintiff's claimed injuries did not amount to a serious impairment of an important body function under MCL 500.3135.

In response, plaintiff argued that a reasonable juror could conclude that Nickerson had operated the bus with gross negligence, and that there was a question of fact as to whose conduct had proximately caused the accident. Citing her medical records, plaintiff also argued that she had suffered injuries that exceeded the no-fault threshold.

After a hearing, the trial court granted the motion for summary disposition in part and denied it in part. As to plaintiff's claim that Nickerson had been grossly negligent, the trial court granted the motion, dismissing Nickerson from the case. Nevertheless, the trial court found there were genuine issues of material fact as to whether Nickerson had operated the bus negligently and as to the proximate cause of the accident. The trial court therefore denied SMART's motion with respect to its entitlement to governmental immunity under MCL 691.1405, and with respect to whether plaintiff was more than 50% at fault for the accident. The trial court also found that a question of fact existed as to the nature and extent of plaintiff's injuries.

This appeal followed.

II. STANDARD OF REVIEW

We review de novo a trial court's ruling regarding a motion for summary disposition. *Heaton v Benton Constr Co*, 286 Mich App 528, 531; 780 NW2d 618 (2009).

The applicability of governmental immunity and the statutory exceptions to immunity are also reviewed de novo on appeal. MCR 2.116(C)(7) provides for summary disposition when a claim is barred because of immunity granted by law. The moving party may submit affidavits, depositions, admissions, or other documentary evidence in support of the motion if substantively admissible. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. We must consider the documentary evidence in a light most favorable to the nonmoving party for purposes of MCR 2.116(C)(7). If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. But when a relevant factual dispute does exist, summary disposition is not appropriate. [*Moraccini v Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012) (citations, quotation marks, and ellipses omitted).]

When reviewing a motion under MCR 2.116(C)(10),

this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. [*Zaher v Miotke*, 300 Mich App 132, 139-140; 832 NW2d 266 (2013) (quotation marks and citations omitted).]

III. ANALYSIS

SMART argues that the trial court should have found that the motor-vehicle exception to governmental immunity, MCL 691.1405, was inapplicable and that it was therefore entitled to governmental immunity. Specifically, SMART argues that the trial court erred by holding that there were genuine issues of material fact as to whether Nickerson operated the bus negligently and as to the proximate cause of the accident. We agree.

Under the GTLA, when a governmental agency “is engaged in the exercise or discharge of a governmental function,” that governmental agency is generally immune from tort liability. *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010), quoting MCL 691.1407(1). The broad immunity afforded by the statute is limited by several narrowly-drawn exceptions, *Wesche v Mecosta Co Rd Comm*, 267 Mich App 274, 276; 705 NW2d 136 (2005), aff’d in part rev’d in part on other grounds 480 Mich 75 (2008) (citation omitted), one of which is the motor-vehicle exception, MCL 691.1405.

Neither party disputes that SMART was engaged in the discharge of a governmental function when operating the bus. They dispute, however, whether the motor-vehicle exception to governmental immunity applies. MCL 691.1405 states in relevant part that “[g]overnmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency of a motor vehicle of which the governmental agency is owner” See also *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 53; 760 NW2d 811 (2008). To prove that the motor-vehicle exception applies, plaintiff was required to offer evidence that Nickerson operated the bus negligently, see *Seldon v Suburban Mobility Auth for Regional Transp*, 297 Mich App 427, 437; 824 NW2d 318 (2012), and that this negligence proximately caused plaintiff’s alleged injuries, see *Curtis v City of Flint*, 253 Mich App 555, 560-561; 655 NW2d 791 (2002).

As a threshold issue, we agree with SMART that plaintiff’s deposition testimony (that she was side-swiped by the bus while it ran a red light) was insufficient to create a genuine issue of material fact regarding the circumstances of the incident. To be sure, issues of witness credibility and what weight to assign a witness’s testimony are typically issues for the fact-finder to resolve. See *Barnes v 21st Century Premier Ins Co*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 347120); slip op at 11. But this case does not involve two witnesses telling a different story. It instead involves one witness telling a story that is patently contradicted by video evidence. See *Fuhr v Trinity Health Corp*, 495 Mich 869; 837 NW2d (2013)²; see also *Scott v Harris*, 550 US 372, 380; 127 S Ct 1769, 1776; 167 L Ed 2d 686 (2007) (finding no genuine issue of material

² In *Fuhr*, our Supreme Court overruled this Court’s unpublished decision and remanded for entry of summary disposition in favor of the defendants “for the reasons stated in the Court of Appeals dissenting opinion.” *Fuhr*, 495 Mich at 869. The dissenting judge in *Fuhr*, Judge Hoekstra, stated that he would have affirmed the trial court’s grant of summary disposition to the defendants because the plaintiff’s deposition testimony was “blatantly contradicted by the record so that no reasonable jury could believe it,” and that it therefore “does not create a genuine issue of material fact.” *Fuhr v Trinity Health Corp*, unpublished opinion of the Court of Appeals, issued April 16, 2013 (Docket No. 309877), rev’d 495 Mich 869 (2013) (HOEKSTRA, J., dissenting).

fact where the plaintiff's self-serving deposition testimony was plaintiff's only evidence of discrimination and was "blatantly contradicted by the record so that no reasonable jury could believe it.") As a result, we conclude that there was no genuine issue of material fact regarding whether, as plaintiff asserted, the SMART bus had side-swiped plaintiff's stopped vehicle while running a red light.

"In order to establish a prima facie negligence claim, a plaintiff must prove four elements: (1) duty, (2) breach of the duty, (3) causation, and (4) damages." *Seldon*, 297 Mich App at 433, citing *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004). The mere occurrence of an accident is not, by itself, evidence of negligence. *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 9; 279 NW2d 318 (1979). A plaintiff must present some evidence, other than the fact that an accident occurred, that either directly or circumstantially establishes a defendant's negligence. *Id.* One way that a plaintiff can provide evidence of negligent conduct is by showing that a defendant violated a provision of the Michigan Vehicle Code, MCL 257.1 *et seq.* See *Rodriguez v Solar of Mich, Inc*, 191 Mich App 483, 487; 478 NW2d 914 (1991) (citation omitted). If a plaintiff can do so, he or she creates a prima facie case on which a jury may infer that a defendant acted negligently. *Id.* at 487-488 ("Violation of a statute by a plaintiff or a defendant creates a prima facie case from which a jury may draw an inference of negligence.").

In opposing the motion for summary disposition before trial court, plaintiff argued that the evidence showed that Nickerson had violated MCL 257.636(1) and MCL 257.643. MCL 257.636(1) states:

(1)The following rules govern the overtaking and passing of vehicles proceeding in the same direction, subject to sections 637 to 643a:

(a) The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass at a safe distance to the left of that vehicle, and when safely clear of the overtaken vehicle shall take up a position as near the right-hand edge of the main traveled portion of the highway as is practicable.

(b) Except when overtaking and passing on the right is permitted, *the driver of an overtaken vehicle shall give way to the right in favor of the overtaking vehicle and shall not increase the speed of his or her vehicle until completely passed by the overtaking vehicle.* [MCL 257.636(1) (emphasis added)].

And, in relevant part, MCL 257.643(1) states: "The operator of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of the vehicles and the traffic upon and the condition of the highway."

The video footage establishes that Nickerson violated neither of these rules. Three seconds after the light turned green, Nickerson moved the bus so that it was completely in the right-hand lane. Thus, Nickerson "[gave] way to the right in favor of the overtaking vehicle . . ." See MCL 257.636(1)(b). Second, when plaintiff was driving in the left-hand lane alongside Nickerson, Nickerson maintained her speed. Nothing in the video suggests that Nickerson accelerated to prevent plaintiff from overtaking her. The only reason plaintiff fell behind Nickerson was because plaintiff braked—twice. Nickerson did not "increase the speed of . . . her vehicle" in violation of

MCL 257.636(1)(b). Third, there is nothing in the video that supports plaintiff's speculation that Nickerson was following the vehicle in front of her "more closely than [was] reasonable and prudent, having due regard for the speed of the vehicles and the traffic upon and the condition of the highway." Plaintiff introduced no evidence from which a reasonable juror could conclude that Nickerson violated either MCL 257.636(1) or MCL 257.643(1).

Plaintiff also argued that Nickerson was negligent by not slowing down to let plaintiff merge into the right-hand lane. In other words, plaintiff suggested that Nickerson had a duty to allow plaintiff to merge into the right-hand lane. Whether a duty exists is a question of law. *Seldon*, 297 Mich App at 433, citing *Anderson v Wiegand*, 223 Mich App 549, 554; 567 NW2d 452 (1997). Our Supreme Court has held that a driver is not required "to guard against every conceivable result, to take extravagant precautions, to exercise undue care" and is "entitled to assume that others using the highway in question would under the circumstances at the time use reasonable care themselves and take proper steps to avoid the risk of injury." *Hale v Cooper*, 271 Mich 348, 354; 261 NW 54 (1935), *aff'd on reh* 271 Mich 357 (1935). Also, our Supreme Court has held, as a general rule, that "there is no duty that obligates one person to aid or protect another." *Williams v Cunningham Drug Stores, Inc.*, 429 Mich 495, 498-499; 418 NW2d 381 (1988), citing 2 Restatement Torts, 2d, § 314, p 116.

Under the specific circumstances of this case, requiring a driver in Nickerson's position to stop and allow another vehicle to merge would essentially require Nickerson (and other similarly situated drivers) to take extravagant precautions to aid or protect drivers like plaintiff. In effect, it would require a driver like Nickerson to stop at a green light and obstruct the flow of traffic, simply because plaintiff failed to see an upcoming construction barricade or wished to merge into the bus's lane ahead of it rather than behind it. Plaintiff has not provided any support for the proposition that such a duty should be imposed on Nickerson.

Plaintiff also argued that Nickerson was negligent in stopping the bus at the red light so that the bus occupied both lanes. Nickerson testified that she did so in order to keep the bus from being "cut off," presumably by cars in the left hand lane accelerating in front of the bus and cutting over into the right lane before the road was reduced to one lane. But it is clear from the video that when plaintiff's vehicle collided with the SMART bus, the bus was completely within the right lane. Whether or not the bus had occupied two lanes previously while stopped at a red light has no bearing on whether Nickerson was operating the bus negligently when the accident occurred. The trial court therefore incorrectly concluded that there was evidence from which a reasonable juror could conclude that Nickerson had operated the bus negligently.

Additionally, even if Nickerson's conduct in blocking two lanes prior to the accident was relevant and negligent, the trial court nonetheless erred by concluding that a reasonable juror could conclude that Nickerson's conduct had proximately caused the accident. The motor-vehicle exception requires that plaintiff prove that her injury "result[ed] from" the negligent operation of a government-owned vehicle. MCL 691.1405; *Curtis*, 253 Mich App at 560-561; cf. *Patrick v Turkelson*, 322 Mich App 595, 617; 913 NW2d 369 (2018) ("Establishing cause in fact requires the plaintiff to "present substantial 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.") (quotation marks and citation omitted). For this reason, a plaintiff must show that his or her bodily injury was caused by or was a consequence of Nickerson's negligent operation. See *Robinson v City of*

Detroit, 462 Mich 439, 456; 613 NW2d 307 (2000) (defining the phrase “resulting from” as used in MCL 691.1405 as meaning “[t]o occur or exist as a consequence of a particular cause[;] To end in a particular way[;] The consequence of a particular action, operation or course; outcome.”). Establishing negligent operation alone is not enough to pierce the shield of governmental immunity.

In this case, there is no genuine issue of material fact as to whether Nickerson’s stopping of the bus in both the right-hand and left-hand lanes caused the collision. From the video footage and Nickerson’s testimony, it is clear that Nickerson’s conduct bore no causal connection to the accident. Even though the back half of the bus protruded into the left-hand lane while Nickerson was stopped at the traffic light, the video footage shows that plaintiff was still able to drive her vehicle around the bus in the left-hand lane. More importantly, as soon as Nickerson started the bus moving, she pulled the bus into the right-hand lane so that the bus was fully within that lane. When the collision occurred ten seconds later, Nickerson was no longer blocking the left-hand lane. Simply put, plaintiff has offered nothing to suggest that the manner in which Nickerson was stopped before the light turned green had anything to do with the accident.

The trial court erred by holding that a genuine issue of material fact existed regarding both Nickerson’s allegedly negligent conduct and causation. SMART was entitled to governmental immunity. On remand, the trial court shall enter an order granting SMART’s motion for summary disposition under MCR 2.116(C)(7) and (C)(10). Given that summary disposition is appropriate on the basis of governmental immunity, we need not address SMART’s other claims of error.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Mark T. Boonstra