STATE OF MICHIGAN

COURT OF APPEALS

KATHLEEN PANZOFF,

Plaintiff-Appellee,

v

STATE OF MICHIGAN, doing business as MICHIGAN STATE POLICE,

Defendant-Appellant,

and

CHRISTOPHER GEORGE KURISH,

Defendant.

UNPUBLISHED
July 23, 2020

No. 349303
Court of Claims
LC No. 18-000124-MZ

Before: FORT HOOD, P.J., and JANSEN and TUKEL, JJ.

PER CURIAM.

In this personal injury action involving the motor vehicle exception to the Governmental Tort Liability Act (GTLA), MCL 691.1402 *et seq*., defendant, the State of Michigan, doing business as the Michigan State Police (MSP), appeals as of right the Court of Claims' order denying its motion for summary disposition. We affirm.

I. FACTUAL BACKGROUND

On October 21, 2017, plaintiff Kathleen Panzoff was stopped at a red light on the Southfield Service Drive in Detroit when MSP Trooper Christopher Kurish[1], while driving a fully-marked patrol car, rear-ended her vehicle. After the accident, plaintiff was treated for shoulder, neck, and back injuries. Her treatment included shoulder surgery, multiple steroid injections into

[1] Kurish has been dismissed from the litigation.

various places along her spine, a rhizotomy to her lumbar spine, and a recommendation for a spinal stimulator.

In June 2018, plaintiff filed suit alleging that Trooper Kurish's negligence in causing the accident was the proximate cause of her injuries and that any preexisting conditions were exacerbated and aggravated by the accident. Following the close of the discovery period, defendant moved for summary disposition and argued that it was entitled to governmental immunity because Trooper Kurish did not cause plaintiff's injuries: plaintiff's injuries preexisted the accident. Specifically, defendant argued that plaintiff had a 10-year history of neck and back pain for which she had been receiving treatment before the accident. Defendant argued that medical records from her treating physicians detailed these preexisting issues. In response, plaintiff submitted documentary evidence from Dr. Stephen Mendelson, who had treated plaintiff for shoulder injuries caused by the accident, and Dr. James Honet, who had treated plaintiff for neck and back issues before and after the accident. Dr. Honet averred in his affidavit that plaintiff's neck and back issues had been "exasperated and made worse by the" accident at issue.

In denying defendant's motion for summary disposition, the Court of Claims relied on the affidavits of Dr. Mendelson and Dr. Honet when concluding that plaintiff had established a question of fact that precluded summary disposition. Specifically, the Court of Claims explained:

> plaintiff has satisfied her obligation of responding to the state's motion with affidavits that establish a genuine issue of material fact with respect to whether she suffered any new injuries in the accident, and/or whether the accident aggravated any preexisting conditions. . . . Plaintiff's documentary evidence is sufficient to establish a question of fact regarding the requisite "resulting from" causation required by MCL 691.1405. See *Robinson v Detroit*, 462 Mich 439, 457; 613 NW2d 307 (2000). And because a genuine issue of material fact remains for trial, the state's motion must be DENIED.

This appeal followed.

II. STANDARD OF REVIEW

Defendant moved for summary disposition under MCR 2.116(C)(7), (C)(8), and (C)(10). However, the trial court considered evidence outside of the pleadings, and granted summary disposition under MCR 2.116(C)(7) and (C)(10). This Court reviews de novo a trial court's grant of summary disposition under MCR 2.116(C)(7). *Citizens Ins Co v Scholz*, 268 Mich App 659, 662; 709 NW2d 164 (2005). Summary disposition under MCR 2.116(C)(7) is appropriate where the moving party has immunity, *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999), such as the immunity provided by the GTLA.

Likewise, this Court

> review[s] a trial court's decision regarding a motion for summary disposition de novo. *Lowrey v LMPS & LMPJ, Inc.*, 500 Mich 1, 5-6, 890 NW2d 344 (2016). A motion for summary disposition brought under MCR 2.116(C)(10) "tests the factual sufficiency of the complaint," *Shinn v Mich Assigned Claims Facility*, 314 Mich App 765, 768, 887 NW2d 635 (2016), and should be granted when "there is

no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law," *West v Gen Motors Corp*, 469 Mich 177, 183, 665 NW2d 468 (2003).

"The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence." *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 693, 818 NW2d 410 (2012). The court must consider all of the admissible evidence in a light most favorable to the nonmoving party. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29, 772 NW2d 801 (2009). However, the party opposing summary disposition under MCR 2.116(C)(10) "may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Oliver v Smith*, 269 Mich App 560, 564, 715 NW2d 314 (2006) (quotation marks and citation omitted). "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." *Bahri v IDS Prop Cas Ins Co*., 308 Mich App 420, 423, 864 NW2d 609 (2014) (quotation marks and citation omitted). [*Lockwood v Twp of Ellington*, 323 Mich App 392, 400-401; 917 NW2d 413 (2018).]

III. ANALYSIS

The GTLA mandates that "except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). However, narrow statutory exceptions exist, including the motor vehicle exception found in MCL 691.1405. This exception provides that "[g]overnmental agencies shall be liable for bodily injuries 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[.]" MCL 691.1405. At issue in this appeal is whether plaintiff's injuries "result[ed] from" Trooper Kurish's negligent operation of a government vehicle.

A. ADMISSIBILITY OF EXPERT WITNESS OPINIONS

We first address defendant's argument that plaintiff failed to present any admissible evidence to show that her injuries resulted from Trooper Kurish's negligent operation of his MSP owned vehicle. Defendant specifically takes issue with Dr. Mendelson's and Dr. Honet's affidavits, offered by plaintiff to create a question of fact, in which they expressed their opinions that plaintiff's injuries were caused or exacerbated by the accident at issue. Defendant argues that these affidavits were inadmissible because they lacked a proper foundation and did not comport with the requirements of MRE 702 or MRE 703. However, defendant's argument must fail.

This Court has made clear that evidence presented to support or rebut a motion for summary disposition need only be substantively admissible; it need not be presented in admissible form. See *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 373; 775 NW2d 618 (2009), where this Court concluded that where a trial court "could only consider substantively admissible evidence" when ruling on a motion for summary disposition, that

evidence "does not have to be in admissible form." *Id*. See also *Maiden*, 461 Mich at 109 (citation and quotation marks excluded), where our Supreme Court articulated that evidence used to avoid summary disposition "must be admissible in content. . .. Occasional statements in cases that the party opposing summary judgment must present admissible evidence . . . should be understood in this light, as referring to the content or substance, rather than the form, of the submission." Thus, whether defendant's argument on appeal has merit relies entirely on whether the *contents* of plaintiff's documentary evidence would be admissible at trial with a proper foundation.

We previously addressed the applicability of the rules of evidence to an affidavit submitted in the context of a summary disposition motion. In *Dextrom v Wexford Co*, 287 Mich App 406; 789 NW2d 211 (2010), this Court concluded:

> [T]here is no requirement that an expert's qualifications and methods be incorporated into an affidavit submitted in support of, or opposition to, a motion for summary disposition. Rather, the *content* of the affidavits must be admissible in *substance*, not form. And the requirements of MRE 702 are foundational to the admission of the expert's testimony at trial. Thus, it is significant that defendants here do not attack the admissibility of the content of [the expert's] affidavit, only its foundation. As MCR 2.119(B)(1)(c) provides, the affidavit need only show that the affiant, *if sworn as a witness*, can testify competently to the facts stated in the affidavit. Whether [the expert] will ultimately meet the MRE 702 requirements to be sworn as a witness is a matter reserved for trial. [*Id.* at 428.]

In this case, as in *Dextrom*, defendant does not argue that the contents, i.e., the opinions, of Dr. Mendelson's and Dr. Honet's affidavits are admissible. Thus, even though the present form of the affidavits may be lacking in foundation and therefore inadmissible at trial under MRE 702 or MRE 703, that is an insufficient basis to exclude the affidavits from consideration on a motion for summary disposition. *Barnard*, 285 Mich at 373-374. The Court of Claims did not err by considering them.

B. THE "RESULTING FROM" REQUIREMENT

Defendant next argues that the Court of Claims erred in denying its motion for summary disposition where plaintiff failed to create a question of fact regarding whether her injuries were the result of Trooper Kurish's negligence. We disagree.

In order for the motor vehicle exception to apply, a plaintiff's injuries must "result from the operation of a government vehicle." *Robinson v City of Detroit*, 462 Mich 439, 456; 613 NW2d 307 (2000), citing MCL 691.1405. "Because the statute allows liability only for injuries 'resulting from' the negligent operation of a government-owned vehicle, as opposed to a lesser 'but for' standard, the motor vehicle exception will not apply unless there is physical contact between the government-owned vehicle and that of the plaintiff[.]" *Curtis v City of Flint*, 253 Mich App 555, 561; 655 NW2d 791 (2002).

Defendant does not dispute that Trooper Kurish, while operating a government-owned vehicle, made physical contact with plaintiff's vehicle. Rather, defendant argued in the Court of Claims, and here on appeal, that plaintiff has failed to demonstrate that her identified bodily

injuries meet the "resulted from" standard, or were directly caused by Trooper Kurish's failure to timely stop his vehicle. Indeed, in moving for summary disposition, defendant argued that plaintiff's alleged bodily injuries predated the instant collision: plaintiff had complained of neck and back pain for over 10 years, and had been receiving treatment. In support of its position, defendant submitted plaintiff's medical records, from before and after the accident, which defendant claims shows that plaintiff offered the same complaints of pain both before and after the accident, with no aggravation or exacerbation after the accident.

In response, plaintiff submitted two affidavits from medical care providers who had treated plaintiff: Dr. Mendelson and Dr. Honet. In his affidavit, Dr. Mendelson averred that plaintiff "suffered a left rotator cuff shoulder injury in the October 21, 2017 collision." It further stated that "[a]s a result of the October 21, 2017 automobile collision," plaintiff "suffered tears to her labrum, supraspinatus tendon, infraspinatus tendon, and biceps tendon along with adhesive." It then lists the medical treatment she received for these injuries. Dr. Honet's affidavit contains the same language, opining that the injuries he treated were "suffered . . . in the October 21, 2017 collision" and that "[a]s a result of the October 21, 2017 automobile collision," plaintiff sustained multiple injuries for which she required medical treatment. Both physicians expressly stated that plaintiff's injuries "resulted from" the accident.

On the basis of the foregoing, we conclude that the Court of Claims correctly determined that plaintiff had "satisfied her obligation of responding to" defendant's summary disposition motion with "documentary evidence . . . sufficient to establish a question of fact regarding whether the requisite 'resulting from' causation required by MCL 691.1405" was shown. Indeed, at the summary disposition stage, a plaintiff is not required to prove any one fact absolutely. She need only present sufficient evidence to create a question of fact. Where a question of fact remained whether plaintiff's injuries "resulted from" or were exacerbated by the instant collision, the Court of Claims properly denied defendant's motion for summary disposition.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Kathleen Jansen
/s/ Jonathan Tukel