STATE OF MICHIGAN

COURT OF APPEALS

DERRICK FITPATRICK,

Plaintiff-Appellee,

and

HENRY FORD HEALTH SYSTEM,

Intervening Plaintiff,

v

ALLSTATE INSURANCE COMPANY,

Defendant,

and

CHARTER COUNTY OF WAYNE,

Defendant-Appellant.

UNPUBLISHED
January 11, 2024

No. 364252
Wayne Circuit Court
LC No. 21-004660-NF

Before: GLEICHER, P.J., and BORRELLO and SHAPIRO, JJ.

PER CURIAM.

Plaintiff Derrick Fitpatrick was injured in a motor vehicle accident in Detroit when his minibike collided with a vehicle owned by defendant Charter County of Wayne (the County) and driven by the County's employee, Terrance Kurylo. Fitpatrick sued the County alleging that Kurylo negligently operated the County's vehicle and caused Fitpatrick's injuries, and that the County was liable for Kurylo's conduct under the motor vehicle exception to governmental immunity, MCL 691.1405. The County moved for summary disposition under MCR 2.116(C)(7) (immunity granted by law), (C)(8) (failure to state a claim), and (C)(10) (no genuine issue of material fact). The trial court denied this motion. Construing the evidence in Fitpatrick's favor, a question of fact exists concerning whether Kurylo operated the County's vehicle negligently. Therefore, we affirm.

I. BACKGROUND

In its motion for summary disposition, the County asserted that on the day of the accident, Kurylo was traveling westbound down Tireman Avenue; Fitpatrick was "unlawfully operating an illegal and unregistered minibike," ran a stop sign, and collided with the County's vehicle at the intersection of Tireman Avenue and St. Mary's Street. According to the County, a Detroit police officer arrived, observed the scene, and after obtaining information from Fitpatrick and Kurylo, wrote a report concluding that Fitpatrick disobeyed a stop sign, collided with the County's vehicle, and was injured. The County attached photographs of its vehicle, Fitpatrick's minibike, and the accident scene; the police officer's report; two incident reports Kurylo made after the accident; the deposition testimony of Kurylo, the officer, and Fitpatrick; and a collision reconstruction report authored by engineer Charles Funk, Ph.D., on behalf of the County.

The County argued that Kurylo did not operate its vehicle in a negligent manner, and that it was shielded from liability by governmental immunity. Highlighting Kurylo's deposition testimony, the engineer's collision reconstruction report, and that Fitpatrick was cited for failing to obey a stop sign, the County contended that Fitpatrick could not offer any admissible evidence that Kurylo was negligent; rather, all admissible evidence compelled the conclusion that Fitpatrick was at fault for the accident. Citing *Scott v Harris*, 550 US 372; 127 S Ct 1769; 167 L Ed 2d 686 (2007), the County asserted that a trial court should not adopt one of two conflicting stories when ruling on a motion for summary disposition, and that a version of the facts blatantly contradicted by the record should not be control the outcome. Asserting that the testimony of Kurylo and police officer was consistent with the record evidence, including the accident reconstruction report and the physical evidence, the County argued that no reasonable juror could find that the driver was negligent and that it was entitled to summary disposition on governmental immunity grounds.[1]

In his response, Fitpatrick offered a starkly different version of the facts. Fitpatrick asserted that he was riding the minibike westbound down Tireman Avenue when Kurylo ran a stop sign while turning from St. Mary's street onto Tireman Avenue, and hit Fitpatrick with the passenger side front fender of the County's vehicle. Fitpatrick supported his version of the facts with citations to his own deposition testimony and several photographs inserted into the text of his response, and reference to an unidentified witness shown in one of the photographs. In his argument, Fitpatrick repeated that he was traveling westbound on Tireman Avenue, noted there was no stop sign on Tireman, asserted that he had the right-of-way, and contended that this created an issue of material fact that must be submitted to the jury, which should "assess the credibility of the witnesses to decide who is telling the truth about how the accident happened."

In reply, the County asserted that even when the evidence is viewed in the light most favorable to Fitpatrick, no reasonable inference could be made in his favor. The County contended that Fitpatrick lacked any evidence "other than his own unsupported self-serving testimony, while [the County] has lay witness testimony supported by uncontroverted expert testimony to establish

[1] Defendant also argued that, even if governmental immunity did not apply in this case, plaintiff's claim should be barred under the wrongful conduct rule, citing *Orzel v Scott Drug Co*, 449 Mich 550; 537 NW2d 208 (1995). The trial court did not rule on this issue and the County does not raise this issue on appeal.

[that Fitpatrick] was 100% at fault." The County noted that Fitpatrick failed to present any scientific or factual evidence to support his version of events or identify any other witnesses, and attacked the photographs included in Fitpatrick's response as either not supported by Fitpatrick's deposition testimony or inadmissible because they lacked foundation.

After hearing oral argument on the motion, the trial court agreed with Fitpatrick, refused to judge the credibility of the witnesses or determine the "viability"—i.e., determine the meaning and weight—of the photographs, and concluded that "[t]hat's within the province of the jury and not the judge and the Court, taking the light—taking the evidence in the light most favorable to the non-moving party, must deny this motion for summary disposition." The trial court entered an order denying the County's motion for summary disposition,[2] and this appeal followed.

II. STANDARD OF REVIEW

This Court reviews a trial court's decision on a motion for summary disposition de novo. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). "In reviewing a motion for summary disposition under MCR 2.116(C)(7), a court considers the affidavits, pleadings, and other documentary evidence presented by the parties and accepts the plaintiff's well-pleaded allegations as true, except those contradicted by documentary evidence." *McLean v Dearborn*, 302 Mich App 68, 72-73; 836 NW2d 916 (2013). The evidence submitted must be considered in the light most favorable to the nonmoving party. *Id*. at 73. "If the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a claim is barred by immunity is a question for the court to decide as a matter of law." *Ray v Swager*, 321 Mich App 755, 761 n 1; 909 NW2d 917 (2017).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the factual allegations in the complaint. *El-Khalil*, 504 Mich at 159. "When considering such a motion, a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone." *Id*. at 160. "A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery." *Id*. However, because the County's motion for summary disposition relied on documentary evidence beyond the pleadings, we analyze it under MCR 2.116(C)(10). See *Cary Investments, LLC v Mount Pleasant*, 342 Mich App 304, 312-313; 994 NW2d 802 (2022) ("[I]f a summary disposition motion based on MCR 2.116(C)(8) presented the trial court with evidence beyond the pleadings, we treat the motion as having been brought and decided under MCR 2.116(C)(10) . . . .").

A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *El-Khalil*, 504 Mich at 160. "When considering such a motion, a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id*. "A motion under MCR 2.116(C)(10) may only be granted when there is no genuine issue of material fact." *Id*. "A

[2] On the same day, the court entered a stipulated order dismissing Fitpatrick's and plaintiff Henry Ford Hospital's claims against defendant Allstate Insurance Company pursuant to a settlement agreement.

genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *Id.*

A movant satisfies its burden under MCR 2.116(C)(10) by "submitting affirmative evidence that negates an essential element of the nonmoving party's claim, or by demonstrating to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 7; 890 NW2d 344 (2016) (cleaned up). "[T]he nonmoving party 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. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Id.* (citations omitted; quoting *Quinto v Cross and Peters Co*, 451 Mich 359, 362-363; 547 NW2d 314 (1996)).

III. ANALYSIS

"As a general rule, a governmental agency is immune from tort liability when it is engaged in the exercise or discharge of a governmental function." *Wood v Detroit*, 323 Mich App 416, 419-420; 917 NW2d 709 (2018); see also MCL 691.1407(1). "In order to assert a viable claim against a governmental agency, a plaintiff must plead facts establishing that an exception to governmental immunity applies to his or her claim." *Id.* at 420. MCL 691.1405, the motor vehicle exception to governmental immunity, provides 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 the owner . . . ." The parties do not dispute that Fitpatrick was injured when he collided with a vehicle owned by the County and driven by the County's employee. The only dispute is whether Kurylo operated that vehicle in a negligent manner. "To establish a prima facie case of negligence, a plaintiff must prove the following elements: (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages." *Anderson v Transdev Servs*, 341 Mich App 501, 508; 991 NW2d 230 (2022).

On this issue, the parties' positions differed starkly. The County asserted that Fitpatrick was riding the minibike southbound on St. Mary's Street, ran the stop sign at the intersection of Tireman Avenue, and collided with Kurylo. The County supported this assertion with the accident reports submitted by Kurylo, the deposition testimony of Kurylo and the responding police officer, the accident reconstruction report prepared by its expert witness, and numerous photographs of the accident scene. In contrast, Fitpatrick asserted that he was riding the minibike westbound on Tireman Avenue when Kurylo ran the stop sign on St. Mary's Street and hit him. Fitpatrick supported this assertion with his own deposition testimony clearly stating that he was traveling westbound on Tireman, as well as two photographs inserted into the text of his response.

In light of this conflict between the evidence presented by the County and Fitpatrick, ruling in favor of the County would require us to completely disregard Fitpatrick's deposition testimony, essentially finding Fitpatrick not credible. However, when deciding a motion for summary disposition, courts are not permitted to assess the credibility of witnesses or weigh the evidence. *Barnes v 21st Century Premier Ins Co*, 334 Mich App 531, 540; 965 NW2d 121 (2020) ("The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if

material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10)."). Accordingly, the trial court appropriately denied the County's motion for summary disposition.

On appeal, the County attacks the reliability of Fitpatrick's deposition testimony. For example, the County asserts that Fitpatrick "admitted he had no idea where he was driving just prior to the accident." However, Fitpatrick was adamant that he rode the minibike down Tireman Avenue, not St. Mary's Street. In any event, the reliability of the County's deposition testimony is a matter for the jury, not the trial court deciding a motion for summary disposition.

The County's reliance on the United States Supreme Court's decision in *Scott* is misplaced. First, although it may be persuasive, federal law is generally not binding authority on state law questions. See *Sharp v City of Lansing*, 464 Mich 792, 809; 629 NW2d 873 (2001). Second, in *Scott*, the nonmoving party's position was contradicted by videotape evidence showing a police chase as it occurred. In light of that video evidence, the Court explained that the nonmoving party's version of events was so discredited by the video evidence that no reasonable juror could have believed it, and concluded that the lower court "should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape." *Scott*, 550 US at 380-381. Here, Fitpatrick's deposition testimony is not discredited by videotape evidence, but is simply contradicted by the deposition testimony of Kurylo, the responding officer, and the opinion of the County's expert. While the County certainly submitted substantial evidence supporting its version of events, no video or other similarly definitive and indisputably reliable evidence so clearly discredited Fitpatrick's story such that no reasonable juror would believe it.

The County contends that Fitpatrick offered only "conjecture and speculation" in response to the motion for summary disposition, citing *Karbel v Comerica Bank*, 247 Mich App 90; 635 NW2d 69 (2001). In *Karbel*, this Court affirmed a trial court order granting summary disposition in favor of the defendant because the plaintiff's proffered evidence presented only a "mere possibility" that a missing sailboat reached territorial waters before disappearing. *Id*. at 107. Fitpatrick did not testify at his deposition that it was "possible" that he was riding the minibike on Tireman Avenue, but clearly insisted that he was on Tireman and Kurylo ran the stop sign on St. Mary's Street. This testimony is not conjecture.

The County's objections to the photographs included in Fitpatrick's response to the motion for summary disposition are similarly unavailing. The County, citing *In re Robinson*, 180 Mich App 454; 447 NW2d 765 (1989), contends that the photographs submitted by Fitpatrick were inadmissible and should have been stricken by the trial court because Fitpatrick failed to provide any foundation for their admission. In *Robinson*, this Court concluded that a proper foundation had been laid for the admission of autopsy photographs at a criminal trial. *Id*. at 460-461. Unlike *Robinson*, this case does not involve the admissibility of photographs at trial. On a motion for summary disposition, evidence must be admissible in content, but is not required to be in admissible form. The trial court may consider evidence that *would* be admissible with a proper foundation. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 373; 775 NW2d 618 (2009). The County does not contend that the photographs could never be admissible, only that Fitpatrick failed to lay a proper foundation and that one of the photographs had not been produced before Fitpatrick responded to the motion for summary disposition.

Because the photographs would be admissible with a proper foundation, the trial court did not err by declining to rule on their admissibility.

We affirm.

/s/ Elizabeth L. Gleicher
/s/ Stephen L. Borrello
/s/ Douglas B. Shapiro