

STATE OF MICHIGAN
COURT OF APPEALS

MAXINE RILEY,

Plaintiff-Appellee,

v

SUBURBAN MOBILITY AUTHORITY FOR
REGIONAL TRANSPORTATION, a/k/a
SMART,

Defendant-Appellant,

and

KELLIE BEACH, AMY-JO DAVIDSON, and
BRISTOL WEST PREFERRED INSURANCE
COMPANY,

Defendants.

UNPUBLISHED

June 5, 2014

No. 312729

Wayne Circuit Court

LC No. 11-007084-NF

Before: RIORDAN, P.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

Defendant, Suburban Mobility Authority for Regional Transportation (SMART),¹ appeals as of right the trial court order denying its motion for summary disposition in favor of plaintiff, Maxine Riley. We affirm.

I. FACTUAL BACKGROUND

Plaintiff was injured while riding as a wheelchair-bound passenger on a SMART specialty van from Royal Oak's Beaumont Hospital to her home in Southfield. The incident

¹ Because only defendant SMART is an appellant in the instant appeal, "defendant" will refer to SMART.

occurred at the intersection of 14 Mile and Woodward when the specialty van stopped suddenly. Plaintiff slipped out of her wheelchair onto the floor.

Plaintiff ultimately filed a complaint against her insurance company alleging that it unreasonably denied her prompt personal protection insurance benefits, in violation of MCL 500.3142 and MCL 500.3148. Plaintiff also asserted a negligence claim against SMART, alleging that her injuries resulted from the driver's negligent operation of the specialty van. Plaintiff argued that defendant was vicariously liable for the driver's actions that resulted in serious and permanent injuries, which included arm, neck, back, shoulder, and leg injuries, all of which required multiple and lengthy hospitalizations, and resulted in permanently disabling and serious impairments of important body functions.

Defendant SMART moved for summary disposition under MCR 2.116(C)(7) on the basis of governmental immunity, and under MCR 2.116(C)(10) on the basis that plaintiff failed to establish a serious impairment of a body function under MCL 500.3135. The trial court denied defendant's motion for summary disposition, finding a genuine issue of material fact. Defendant now appeals.

II. GOVERNMENTAL IMMUNITY

A. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7), which permits summary disposition when a claim is barred by immunity. *Maiden v Rozwood*, 461 Mich 109, 118-119; 597 NW2d 817 (1999). Although not a requirement, "[a] party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence." *Id.* at 119. "The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Id.* "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. If a factual dispute exists, however, summary disposition is not appropriate." *RDM Holdings, LTD v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008) (quotation marks and citations omitted).

B. ANALYSIS

"The governmental tort liability act, M.C.L. § 691.1401 *et seq.*, provides immunity from tort liability to governmental agencies engaged in a governmental function." *Stanton v City of Battle Creek*, 466 Mich 611, 614-615; 647 NW2d 508 (2002) (footnotes omitted). "[T]he immunity conferred upon governmental agencies and subdivisions is to be construed broadly and . . . the statutory exceptions are to be narrowly construed." *Id.* at 618. One such exception is MCL 691.1405, which provides: "Governmental 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. . . ." As used in this section, " 'operation of a motor vehicle' encompasses activities that are directly associated with the driving of a motor vehicle." *Chandler v Co of Muskegon*, 467 Mich 315, 321; 652 NW2d 224 (2002); *Seldon v Suburban Mobility Auth for Regional Transp*, 297 Mich App 427, 434-435; 824 NW2d 318 (2012).

In the instant case, defendant contends that the trial court erred in denying its motion for summary disposition pursuant to MCR 2.116(C)(7) because plaintiff admitted that the only basis for her negligence claim was the driver's failure to take her to the hospital, which does not fall under the governmental immunity exception. We disagree.

During the deposition, plaintiff testified as follows:

Q: What, if anything, do you think [the driver] did wrong?

A: Should have took me [sic] to the hospital.

Q: Should have taken you to the hospital?

A: Yeah.

Q: Is that the only thing you have a concern about him?

A: About him personally?

Q: Yes.

A: Um-hmm.

Q: That he should have taken you to the hospital?

A: He should, because he was apologetic and everything.

A: He tried to help me.

Q: Okay. And so, again, so as to SMART, do you look at SMART in addition to the bus driver? Is there something that you think SMART did wrong?

A: Yes, I think they told him to take me home.

Q: Okay. But you don't have any personal knowledge of it?

A: I can't prove that, no. But I do know that he didn't say another word to me. He just drove me home, even though I was talking to him about going to Beaumont, he did not turn. He did not say nothing.

Q: Okay. But that's just speculation on your part that someone at SMART told him to just take you home?

A: That's right.

Q: Okay. And that was the only thing that you think SMART or the driver did was that they should have taken you to the hospital?

A: That's right.

From this exchange, defendant concludes that plaintiff conceded that her negligence claim was limited to the driver's refusal to take her to the hospital, which does not fall within the governmental immunity exception. Yet, a careful review of the above cited passage reveals that plaintiff did not make any admissions regarding the negligence claim. Plaintiff's lay opinion about whether the driver's conduct could be characterized as "wrong" was not an admission to the legal inquiry of whether the driver breached an applicable legal duty and caused her injuries. See *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993) ("[t]he requisite elements of a negligence cause of action are that the defendant owed a legal duty to the plaintiff, that the defendant breached or violated the legal duty, that the plaintiff suffered damages, and that the breach was a proximate cause of the damages suffered.").

Moreover, when specifically asked, plaintiff testified about the driver's conduct during the actual incident, explaining the following:

[The driver] was going across Woodward, but the light changed, and so he speeded up. He was in the — when you go across Woodward, it's one lane, but you have to merge to the left or the right, so he was in the left side of the lane before you get to the light at Greenfield, and somebody was turning. I guess he didn't see them turning over there to the last second, and then he hit his brakes. That's when I went flying.²]

Thus, in the broader context of plaintiff's testimony, she did not make a binding admission that defendant's behavior was not negligent. We find no error in the trial court's conclusion that, when read as a whole, plaintiff's deposition testimony did not operate as a binding and conclusive admission that eviscerates her negligence claim.

Defendant, however, contends that plaintiff failed to demonstrate a genuine issue of material fact with respect to whether the driver negligently operated the specialty van. We again disagree.

Defendant argues that plaintiff's claim of negligence related to her refusal to wear a seatbelt and the sudden stop that was a normal incident of travel, which is insufficient to sustain a negligence claim. However, this ignores evidence of the driver's operation of the specialty van. As noted above, plaintiff testified that the driver sped up through the 14 Mile/Woodward intersection but did not see a car turning until the last second, so suddenly hit the brakes to avoid collision. She clarified that she did not actually see where the car came from, but that "[w]hat made him stop was he was gonna hit the people in the left lane, and he had to stop." The driver also admitted that SMART received a complaint from another a driver indicating that while on 14 Mile Road, the driver was attempting to merge left when the SMART bus driver sped up to prevent the driver from merging, even though the driver had nowhere to go because the lane was

² Plaintiff later clarified that she did not actually see from where the car came.

ending. This evidence is sufficient to raise a question of fact regarding whether the driver was operating the specialty van negligently, which caused plaintiff's injuries. Because there was evidence that the driver was operating the specialty van in a negligent manner, the trial court did not err in finding this was not merely a normal incident of travel. See *Seldon v Suburban Mobility Auth for Regional Transp*, 297 Mich App 427, 437; 824 NW2d 318 (2012) (plaintiff may not "recover for injuries sustained" during "normal incidents of travel" unless there was evidence of "negligence pertaining to the operation of a bus[.]").

We find no error in the trial court's denial of defendant's motion for summary disposition on these grounds.

III. EVIDENTIARY HEARING

Lastly, defendant requests a remand for an evidentiary hearing on the issue of whether plaintiff suffered a "serious impairment of a body function" pursuant to MCL 500.3135.³ Rather than evaluating the evidence or establishing no genuine issue of material fact exists, defendant instead cites *Hunter v Sisco*, 300 Mich App 229; 832 NW2d 753 (2013). In *Hunter*, this Court found no genuine issue of material fact regarding the serious impairment threshold, but "because defendant brought its motion under both MCR 2.116(C)(7) and (10)," the proper remedy was a full evidentiary hearing to determine whether plaintiff suffered a serious impairment of a body function. *Id.* at 243. The *Hunter* court reiterated that "a trial is not the proper remedial avenue to take in resolving the factual questions under MCR 2.116(C)(7) dealing with governmental immunity." *Id.* at 243-244 (quotation marks, brackets, and citation omitted).

However, in this case, defendant moved for summary disposition of the serious impairment issue under MCR 2.116(C)(10), not under (C)(7) based on governmental immunity. Thus, governmental immunity—an issue generally decided before trial—is not implicated.⁴ Moreover, in light of the extensive evidence already presented in the lower court on the impairment issue, we are not persuaded that a further evidentiary hearing is warranted in this case.

IV. CONCLUSION

Defendant has failed to establish that plaintiff conceded her negligence claim, that no genuine issue of material fact existed regarding negligent operation of the specialty van, or that defendant was entitled to any further hearing regarding serious impairment. While plaintiff

³ To the extent that this issue was not appealable as of right, we exercise our discretion in the interests of judicial economy to address this issue as leave granted.

⁴ We also note that whether an exception to governmental immunity exists, MCL 691.1405, is a distinct question from whether a plaintiff can maintain a negligence action under the no-fault act, MCL 500.3135.

asserts that she is entitled to sanctions pursuant to MCR 7.216(C)(1), she has not filed a motion pursuant to MCR 7.211(C)(8), nor do we find sanctions warranted on Court's initiative.

We have reviewed all remaining arguments in appellant's brief and find them to be without merit. We affirm.

/s/ Michael J. Riordan
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood