STATE OF MICHIGAN

COURT OF APPEALS

JOANNE M. SEARS, Plaintiff-Appellee,	UNPUBLISHED February 7, 2013
v	No. 305923 Macomb Circuit Court
SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION, a/k/a SMART, Defendant-Appellant,	LC No. 2010-004321-NI
and SHARON POINTER, Defendant.	

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and BOONSTRA, JJ.

PER CURIAM.

Defendant Suburban Mobility Authority for Regional Transportation (SMART)[1] appeals as of right an order denying its motion for summary disposition in this negligence/governmental immunity action. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case arises out of a rear-end collision that occurred on February 23, 2010, on Groesbeck Highway near the intersection of Martin Road in the city of Roseville. Plaintiff stopped several car lengths from a traffic light to allow another vehicle to enter into traffic from a gas station driveway. Pointer was driving a bus owned by defendant at the time of the accident. The bus was behind plaintiff's vehicle at the traffic light and collided with the rear of

[1] Defendant Pointer was apparently dismissed from the lawsuit prior to the summary disposition motion. The use of "defendant" in this opinion refers to defendant SMART. We will refer to defendant Pointer as "Pointer."

plaintiff's vehicle. The collision damaged plaintiff's car. The Roseville Police Department investigated the incident and noted that plaintiff had sustained no injury from the accident. The officer's police report description of what occurred is as follows:

> [Plaintiff's vehicle] was rear-ended by [the SMART bus] and pushed several feet. [Plaintiff] said she believed [the bus] to be stopped behind her when it suddenly moved forward and pushed her car for several feet. [Pointer] said she was stopped for the light when the engine suddenly started to rev forcing the vehicle ahead. [Pointer] said she pushed the brakes and eventually got the vehicle to stop.

Several months later, plaintiff filed a complaint against Pointer and defendant alleging gross negligence and ordinary negligence. Plaintiff's allegations included: (1) driving at an excessive speed; (2) driving in such a manner as to be unable to stop within the assured distance; (3) failing to keep a reasonable lookout for the other person and vehicles on the highway; (4) failing to have the vehicle equipped with proper brakes and/or failing to apply the brakes in time; (5) failing to drive with due care and caution; (6) failing to take all possible precautions to avoid any collision with other motor vehicles; (7) failing to make observations of the conditions on the highway; and (8) failing to obey and drive in conformity with applicable statutes and ordinances of the city of Roseville. Plaintiff further alleged that defendant is liable for Pointer's negligence under the doctrine of respondeat superior. Plaintiff alleged that defendants' breaches were the actual and proximate cause of plaintiff's injuries.

Defendant moved for summary disposition under MCR 2.116(C)(7), (C)(8), and (C)(10), arguing in part that it is a governmental entity entitled to governmental immunity under the Governmental Tort Liability Act (GTLA), MCL 691.1407 *et seq.*, and that plaintiff failed to allege that the operation of the SMART bus was not a governmental function. Defendant also asserted that it could be liable only if the injury arose out of the negligent operation of the motor vehicle. Defendant posited that, based on the evidence, there were only two potential causes for the accident: (1) a mechanical problem that caused the bus to lurch forward on its own, or (2) the SMART bus was hit from the rear by a red truck that forced it to collide with plaintiff's vehicle. Defendant supported its motion for summary disposition with three pieces of evidence: (a) pictures of plaintiff's vehicle; (b) the police report; and (c) a report of plaintiff's consulting psychologist.[2]

According to defendant, the former theory is supported by Pointer's deposition testimony that "the engine inexplicably revved, and the bus lurched forward."[3] According to the police

[2] We discuss the relevance and admissibility of this evidence *infra*.

[3] Defendant did not attach the transcript of Pointer's deposition testimony in support of its motion for summary disposition. Although defendant has attached excerpts of the deposition transcript to its brief on appeal, this Court's review is limited to evidence actually presented to the trial court at the time of its ruling on summary disposition; the record may not be enlarged on appeal. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009).

report, Pointer also told the officer on the scene that "she was stopped for the light when the engine suddenly forced the vehicle ahead." Pointer testified in her deposition that the SMART bus had twice previously lurched forward in January 2011, and that the problem had been resolved by SMART mechanics. Plaintiff testified in her deposition that she saw the SMART bus approaching from the rear; however, she looked away and did not see whether the bus came to a complete stop. Plaintiff did not identify any of Pointer's actions as contributing to the accident. Defendant also offered the psychologist's report as supportive of the engine revving theory, in that it describes plaintiff as giving the following account of the accident:

> I was stopped at a red light . . . and I looked in my rearview mirror a [sic] saw a SMART bus coming and slowing down; when I looked forward waiting for the light to change I heard a big bang hit me and I looked back in my rearview mirror and saw a great big bus was in my trunk and I heard an engine racing . . . The bus driver told me the bus wouldn't stop, the engine was racing and the only way she could get it to stop was by putting on the emergency brake.

As to the second theory, Pointer testified that she was not aware of a red truck and did not see it at the scene. Plaintiff testified also that she did not see a red truck collide with the SMART bus. The only mention in the lower court record of a red truck colliding with Pointer's SMART bus appears to be a reference in defendant's summary disposition brief to statements allegedly made by plaintiff to Pointer on the scene. According to Pointer's deposition testimony (which, again, was referenced in the summary disposition briefing but not provided to the trial court, but which was provided on appeal), plaintiff told Pointer on the scene that a red truck had hit the bus from behind and pushed the bus into plaintiff's vehicle. Defendant's summary disposition brief also vaguely referred to "[w]itness statements at the scene, including that of Casmond Pointer, the driver's son," and that "[o]ne of the passengers on the SMART community transit bus, Casmond Pointer, indicated that a red truck hit the bus in the rear while attempting to pass it, and pushed the bus forward." However, no witness statements or other evidentiary support for such assertions appears in the record. Pointer testified in her deposition that she "never heard [her] son make any statements, so I don't know what that [sic] all about."

In response to defendant's motion for summary disposition, plaintiff offered no evidence either to rebut the above theories or in support of any alternative theory. Instead, plaintiff asserted that defendant was prima facie guilty of negligence because Pointer had rear-ended plaintiff's vehicle, and that this was sufficient to create a fact question for a jury. Plaintiff also asserted that there was no admissible evidence that the bus had a mechanical defect, and that defendant had failed to comply with the notice provision of MCR 2.112 to assert a defense of nonparty at fault.

On July 18, 2011, the trial court heard arguments on the motion for summary disposition. In a written opinion and order, the trial court found that there was no clear, positive and credible evidence that Pointer was not negligent in rear-ending plaintiff's vehicle. The trial court noted that defendant did not submit Pointer's deposition transcript to the court. In any event, the trial court found that the credibility of Pointer's testimony concerning the cause of the accident was most appropriately left to the trier of fact. The trial court found no evidence in the record supporting the red truck theory. The trial court also found (with respect to the red truck theory) that defendant should have also filed a notice of nonparty at fault in accordance with MCR

2.112(K). The trial court denied defendant's motion for summary disposition. This appeal followed.

II. STANDARD OF REVIEW

Defendant has moved for summary disposition pursuant to MCR 2.116(C)(7), MCR 2.116(C)(8), and MCR 2.116(C)(10). This Court reviews de novo the trial court's denial of summary disposition under MCR 2.116(C)(7) and MCR 2.116(C)(10); the Court's jurisdiction does not extend to reviewing denial under MCR 2.116(C)(8). MCR 7.203(A)(1); MCR 7.202(6)(a)(v).

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, except those contradicted by documentary evidence, as true. *Oliver v Smith*, 290 Mich App 678, 683; 810 NW2d 57 (2010). "[T]he substance or content of the supporting proofs must be admissible in evidence." *Maiden v Rozwood*, 461 Mich 109, 119 (1999). The evidence submitted must be considered "in the light most favorable to the opposing party." *MEEMIC Ins. Co. v DTE Energy Co.*, 292 Mich. App. 278, 807 N.W.2d 407 (2011), appeal denied, 490 Mich. 873, 803 N.W.2d 333 (2011).

In presenting a motion for summary disposition under MCR 2.116(C)(10), the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence submitted in the light most favorable to the nonmoving party. *Oliver*, 290 Mich App at 683. Summary disposition is appropriate if, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

III. THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT SUMMARY DISPOSITION

Defendant argues that it is immune from liability because the facts do not support a finding that Pointer negligently operated the SMART bus. MCL 691.1407(1); *Jackson County Drain Comm'r v Stockbridge*, 290 Mich App 273, 284; 717 NW2d 391, lv den 477 Mich 873 (2006). Relevant to this case is the "motor vehicle exception" found in 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 defined in Act No. 300 of the Public Acts of 1949, as amended, being sections 257.1 to 257.923 of the Complied Laws of 1948.

For defendant to be deprived of governmental immunity, the injury to plaintiff must have resulted from the negligent *operation* of a motor vehicle as a motor vehicle. *Chandler v Muskegon County*, 467 Mich 315, 320-321; 652 NW2d 224 (2002). The definition of "operation" in the context of the statute is narrow, does not extend to "maintenance," and is limited to "activities that are directly associated with the driving of a motor vehicle." *Id*. at 320-321 and n 7. Governmental immunity is a characteristic of government and plaintiff was

required to plead her claim in avoidance of immunity by averring facts indicating that the pertinent conduct was not the exercise of a governmental function or was subject to an exception to immunity. *Odom v Wayne* County, 482 Mich 459, 478-479; 760 NW2d 217 (2008).

The defendant had the initial burden of supporting its position with documentary evidence. *Oliver*, 290 Mich App at 683. Defendant provided to the trial court the following pieces of documentary evidence: (1) pictures of the damage to the plaintiff's car, (2) a crash report prepared by the Michigan State Police Officer who responded to the accidents, and (3) the report of James F. Zender, Ph.D., P.C., a licensed clinical psychologist, entitled "Clinical Psychology Consultation Report," prepared after an initial psychological evaluation with plaintiff.

In response to defendant's motion for summary disposition, Plaintiff presented no evidence of Pointer's negligence, but relied on the presumption found in MCL 257.402(a), which provides:

> In any action, in any court in this state when it is shown by competent evidence, that a vehicle traveling in a certain direction, overtook and struck the rear end of another vehicle proceeding in the same direction, or lawfully standing upon any highway within this state, the driver or operator of such first mentioned vehicle shall be deemed prima facie guilty of negligence. This section shall apply, in appropriate cases, to the owner of such first mentioned vehicle and to the employer of its driver or operator.

This presumption "'may be rebutted with a showing of an adequate excuse or justification under the circumstances[.]'" *White v Taylor Distributing Co.*, 275 Mich App 615, 637; 739 NW2d 132 (2007). The "evidence required to rebut this presumption as a matter of law should be positive, unequivocal, strong, and credible." *Lucas v Carson*, 38 Mich App 552, 557; 196 NW2d 819 (1972).

After careful examination of the record, we conclude that the trial court did not err in denying summary disposition pursuant to MCR 2.116(C)(7) and MCR 2.116(10) because, on the evidentiary record before the trial court, genuine issues of material fact exist as to the driver's liability and, consequently, whether defendant was entitled to immunity.

With regard to the three pieces of evidence submitted by defendant, one is irrelevant, one is inadmissible, and the final does not support defendant's position that no genuine issue of material fact exists. First, the pictures of the damage to the plaintiff's car are not relevant to a determination of liability. Second, although the police report is hearsay, it is "plausibly admissible under the business record exception, MRE 803(6)." *Maiden v Rozwood*, 461 Mich 109, 124; 597 NW2d 817 (1999). However, Pointer's statement within the police report is hearsay within hearsay and is not subject to an exception (nor does defendant contend otherwise). *Id.* at 125 n 8. Even if Pointer's statement could be admitted under some exception, given her employment as a professional bus driver, Pointer arguably has a motive to represent that the accident was not her own fault. Accordingly, the credibility of her testimony concerning the cause of the accident is most appropriately left to the trier of fact. *Skinner v Square D Co.*, 445 Mich 153, 161; 516 NW2d 475 (1994).

Finally, the psychological report, viewed in the light most favorable to the plaintiff, does not support defendant's contention that no question of material fact exists as to Pointer's negligence in this case. Although defendant makes much of plaintiff's account, as reflected in the report, that she "heard a big bang hit me and I looked back in my rearview mirror and saw a great big bus was in my trunk and I heard an engine racing," we conclude that plaintiff's statement that she simply heard an engine racing, is not factually dispositive.[4] As the trial court correctly pointed out, plaintiff's statement does not even establish "*whose* engine she heard" much less "*why* the engine was 'racing." The mere fact that the bus's engine was audible when it collided with plaintiff's vehicle does little, if anything, to aid a determination of liability, particularly on summary disposition.

We find defendant's admissible documentary evidence inadequate to support its contention that no question of material fact exists as to its immunity from liability, therefore, denial of summary disposition under MCR 2.116 (C)(10) was correct. We also find that defendant's evidence did not specifically contradict plaintiff's allegations; thus, denial of summary disposition under MCR 2.116(C)(7) was correct.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Mark J. Cavanagh

[4] The report additionally contains the following further account from plaintiff: "The bus driver told me the bus wouldn't stop, the engine was racing and the only way she could get it to stop was by putting on the emergency brake." We find this statement similarly nondispositive.

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BOONSTRA, J., (*concurring*).

I concur in the majority opinion. I write separately to provide additional clarity with regard to the necessity of properly supporting a motion for summary disposition.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). The trial court denied the motion, but did not articulate a rationale for this denial under any particular subrule. Because the trial court considered material outside the pleadings, however, we should review the decision as though it were based on MCR 2.116(C)(10). *Krass v Tri-Co Security, Inc*, 233 Mich App 661, 664-665; 593 NW2d 578 (1999). For the reasons stated below and by the majority, I conclude that the trial court did not err in denying summary disposition pursuant to MCR 2.116(C)(10), because, on the evidentiary record before the trial court, genuine issues of material fact existed as to whether defendant was entitled to immunity.[1]

[1] The record further leads me to conclude that defendant also was not entitled to summary disposition under subrules (C)(7) or (C)(8). Plaintiff alleged that defendant Pointer operated the

The trial court, in essence, found that defendant had not submitted admissible evidence sufficient to counter the statutory presumption that Pointer was negligent. MCL 257.402(a). "In regard to automobile accidents, MCL 257.402(a) provides a rebuttable presumption of negligence under specified circumstances." *White v Taylor Distributing Co, Inc*, 275 Mich App 615, 636; 739 NW2d 132 (2007). Defendant argues that it has offered evidence that rebuts the presumption of negligence, and that the presumption plays no further role in this case. But I conclude that defendant did not successfully carry its *initial* burden of showing that no genuine issue of material fact exists in this case; therefore, it follows that defendant has also not presented evidence to rebut the presumption of negligence on the part of Pointer.

Defendant argued that plaintiff's injuries did not occur because of Pointer's negligent operation of the SMART bus. Defendant instead advanced theories that the bus either was hit by a hit-and-run driver or suffered a mechanical problem that caused it to lurch forward. In support of its motion for summary disposition, however, defendant offered only three pieces of evidence. As the majority notes, one was irrelevant to the issue of liability, one was inadmissible, and one was insufficient to create a genuine issue of material fact.

Defendant further relied on its recounting of Pointer's testimony to the effect that (a) the accident had occurred as a result of the bus lurching forward on its own; and (b) plaintiff had indicated that she had seen a red truck that may have collided with the bus. Critically, however, as the trial court properly noted, defendant did not offer Pointer's deposition into evidence.

Defendant argues nonetheless that it adequately summarized Pointer's deposition testimony in its brief in support of its motion, and thus the trial court erred in failing to consider the "substance" and "content" of Pointer's testimony. Defendant misapprehends its duty as the proponent of a summary disposition motion under MCR 2.116(C)(10). Defendant bore the initial burden of supporting its position by "[a]ffidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion." MCR 2.116(G)(3)(b); *Oliver v Smith*, 269 Mich App 560, 564; 715 NW2d 314 (2006). The submission of such materials is "*required* . . . when judgment is sought based on subrule (C)(10)." MCR 2.116(G)(3)(b) (emphasis added). Only *upon* the submission of such materials is the trial court to consider their "content or substance," and the court rules impose that obligation as a *limitation*. That is, the court rules direct that the trial court shall "*only*" consider those materials

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SMART bus negligently in several respects. Plaintiff thus successfully pleaded her claim in avoidance of governmental immunity and, considering the pleadings on their face, the trial court did not err in failing to grant summary disposition to defendant on the ground that plaintiff's pleadings were defective. MCR 2.116(C)(8); see also *Kendricks v Rehfield*, 270 Mich App 679, 681; 716 NW2d 623 (2006). Further, under subrule (C)(7), the trial court was required to consider all of plaintiff's well-pleaded allegations as true unless specifically contradicted by the documentation submitted by the movant. *Patterson v Kleiman*, 447 Mich 429, 434 n 6; 526 NW2d 879 (1994). As I find defendant's admissible documentary evidence inadequate to support its contention that no question of material fact exists as to its immunity from liability, I also find that defendant's evidence did not specifically contradict plaintiff's allegations; thus, summary disposition under MCR 2.116(C)(7) also would not have been appropriate.

"*to the extent* that the content or substance would be admissible as evidence to establish . . . the grounds stated in the motion." MCR 2.116(G)(6) (emphasis added).

The court rules do not, as defendant seems to maintain, authorize or direct the trial court to consider the "content or substance" of materials that were never themselves submitted as evidentiary support for a motion. They do not somehow expand the universe of materials that the trial court may consider, to include the supposed "content or substance" of materials that were never submitted to the trial court. They do not require or authorize a trial court to accept a representation as to the "content or substance" of materials that were not submitted to the trial court. And any such representation, absent the submission of the evidence itself, is entitled to no deference or assumption of accuracy, and does not in any way shift the burden to the opposing party to object or to rebut the representation.

The very essence of subrule (C)(10) is that parties may not rely upon assertions made in their motions or responses, but must go beyond the pleadings with *evidentiary* support. Thus, there is no merit to defendant's argument that its assertions as to Pointer's testimony, contained in its brief in support of its motion for summary disposition, were themselves sufficient to shift the burden to plaintiff on the (C)(10) motion.

In sum, I agree with the trial court that defendant was not entitled to summary disposition, although for the reason that defendant simply failed to carry its initial burden of production, rather than that it failed to rebut the presumption of negligence. I offer no opinion as to whether, under the circumstances of this case, a motion for summary disposition could or could not have been properly supported; but here defendant's motion for summary disposition simply was not. I would thus affirm the trial court's decision because it reached the right result, notwithstanding my differing reasoning. See *Klooster v Charlevoix*, 488 Mich 289, 331; 795 NW2d 578 (2011).

/s/ Mark T. Boonstra