

STATE OF MICHIGAN
COURT OF APPEALS

MARY ANN HENNIG,

Plaintiff-Appellee,

v

CITY OF TROY,

Defendant-Appellant,

and

DEMARIO DARNELL WILLIAMSON and
ENTERPRISE LEASING COMPANY OF
DETROIT,

Defendants.

UNPUBLISHED

July 14, 2009

No. 285777

Oakland Circuit Court

LC No. 2007-080621-NI

Before: Davis, P.J., and Murphy and Fort Hood, JJ.

PER CURIAM.

Defendant City of Troy¹ appeals as of right from the trial court's order denying its motion for summary disposition premised on governmental immunity. We affirm.

Plaintiff was injured when a police vehicle that was in pursuit of a fleeing felon on Interstate 75 struck her vehicle. Defendant filed a motion for summary disposition, alleging that it was entitled to judgment as a matter of law because the police officer was not negligent in operating his motor vehicle. The trial court denied defendant's motion for summary disposition, holding that there were disputed facts that precluded the grant of summary disposition. Specifically, the disputed facts included, "among others, one, did a slowly driven citizen operated vehicle pull out from the shoulder and into the Officer's path; was the officer legally involved in the pursuit; and three, were there bystander vehicles stopped on the left." Defendant

¹ Defendant Demario Darnell Williamson is the driver of the vehicle that fled from police. He is currently incarcerated. Defendant Enterprise Leasing Company of Detroit is the owner of the vehicle that was involved in the police pursuit. They are not involved in this appeal.

appeals as of right from the trial court's denial of the motion for summary disposition addressing the application of governmental immunity.²

The trial court's decision regarding a motion for summary disposition is reviewed de novo on appeal. *Kuznar v Raksha Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008). Summary disposition may be granted when a claim is barred because of immunity granted by law. MCR 2.116(C)(7). The application of governmental immunity presents a question of law subject to de novo review on appeal. *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). "Summary disposition is suspect where motive and intent are at issue or where the credibility of a witness is crucial." *Foreman v Foreman*, 266 Mich App 132, 135-136; 701 NW2d 167 (2005). When the truth of a material factual assertion made by a moving party is contingent upon credibility, summary disposition should not be granted. *Id.* at 136. The trial court may not make factual findings or weigh credibility when deciding a motion for summary disposition. *In re Handelsman*, 266 Mich App 433, 437; 702 NW2d 641 (2005). When the evidence conflicts, summary disposition is improper. *Lysogorski v Bridgeport Charter Twp*, 256 Mich App 297, 299; 662 NW2d 108 (2003).

The general rule provides that governmental agencies are immune from tort liability when the governmental agency is engaged in the exercise or discharge of a governmental function. MCL 691.1407(1). Governmental immunity was established to limit the government's exposure to liability. *Renny v MDOT*, 478 Mich 490, 501 n 28; 734 NW2d 518 (2007). The Government Tort Liability Act (GTLA), MCL 601.1401 *et seq.*, permits a cause of action against a governmental agency in six limited areas. *Lash v Traverse City*, 479 Mich 180, 195 n 33; 735 NW2d 628 (2007). The statutory exemptions to governmental immunity are to be narrowly construed. *Maskery v Univ of Mich Bd of Regents*, 468 Mich 609, 614; 664 NW2d 165 (2003). A governmental agency "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." MCL 691.1405.

"[P]olice officers giving chase owe a duty to innocent persons[.]" *Robinson v Detroit*, 462 Mich 439, 451; 613 NW2d 307 (2000). However, the police owe no duty to a wrongdoer, regardless of whether the wrongdoer is a fleeing driver or a passenger in the fleeing vehicle. *Id.* By statute, police officers are exempt from speed limits when chasing violators of the law, but are not exempt from the consequences of a reckless disregard for the safety of others, MCL 257.632. *Robinson, supra*. Therefore, the Legislature "has placed a duty upon police officers toward innocent persons when they are giving chase." *Id.* at 452. A police officer's *decision* to pursue a fleeing felon does not fall within the motor vehicle exception to governmental immunity. *Id.* at 457-458. Rather, a plaintiff's injuries must result from the operation of the governmental vehicle. *Id.* at 456-457.

² Defendant's motion for summary disposition is not contained in the lower court record. However, defendant also asserted that summary disposition was proper because plaintiff did not suffer a serious impairment of a body function. The trial court also denied this part of the motion for summary disposition. Defendant does not challenge this ruling as an alternate basis to reverse.

An officer's physical handling of a motor vehicle during the course of responding to an emergency call may constitute negligent operation of a motor vehicle. *Newton v Michigan State Police*, 263 Mich App 251, 268; 688 NW2d 94 (2004).

[N]egligence is conduct that fails to measure up to an acceptable standard. The standard now employed by the law is that of a reasonably prudent man acting under the same or similar circumstances. Whether or not the standard has been attained is, normally, a jury question. Only under the most extreme circumstances, those, in fact, where reasonable minds could not differ upon the facts, or the inferences to be drawn therefrom, can the case be taken from the jury. If honest differences of opinion between men of average intelligence might exist, the issue should not be resolved by the court alone. [*McKinney v Yelavich*, 352 Mich 687, 691-692; 90 NW2d 883 (1958).]

Generally, the elements of a negligence action are: (1) a duty owed by the defendant to the plaintiff; (2) a breach of the defendant's duty; (3) causation; and (4) damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

In *Frohman v Detroit*, 181 Mich App 400, 414-415; 450 NW2d 59 (1989), this Court set forth the standard for evaluating police pursuit cases:

We conclude that in police pursuit cases an initial legal decision should be made to determine whether the nature of the pursuit is such as to create a question which must be submitted to a jury. We invite the Supreme Court or Legislature to establish a bright line test which provides that a decision to engage in pursuit, as a matter of law, cannot be the basis of a claim for negligence. Only when the officer's driving *itself* is a direct cause of an injury would the question of negligence be submitted as a fact question to the jury. The determination should not turn on how the officer was conducting the pursuit but rather on what effect the manner in which the officer drove his vehicle had on the cause of the accident.

In the present case, defendant contends that the trial court erred in ruling that there were questions of fact that precluded summary disposition. We disagree.

Review of the record reveals that Officer Joseph Mairorano testified that he was in pursuit of a fleeing felon when a citizen vehicle suddenly pulled off the left shoulder in front of his police cruiser. The officer put the brakes on and pulled to the center lane from the left lane. He was "almost clear" of the left lane when he was struck by another police vehicle. Officer Mairorano testified that he did not pull onto the left shoulder because there was another car off the road on that side. He opined that he could not come to a complete stop or utilize the left shoulder because of his traveling speed and the vehicle off to the left. He opined that the safest course of action was to proceed to the center lane because when he looked immediately to the right, "it was clear." Officer Mairorano was suddenly "struck from behind," and his car started spinning. His vehicle then crashed into the vehicle driven by plaintiff. However, Father Jerome Singer of Nativity of Our Lord Church, a witness to the accident, testified that police were traveling at a fast rate of speed in an attempt to catch the fleeing vehicle and to contain the vehicle by "boxing" it in. He opined that the police vehicles were traveling so fast that they could not stop, and the rate of speed caused the crash with plaintiff's vehicle. Father Singer

opined that the police cars turned sideways when the brakes were applied because of the speed of travel. He testified that he felt afraid as a result of the conditions on the highway and began to pray.

Further, Officer Mark Cole testified that he did not have personal knowledge regarding the reason for the lane change by Officer Mairorano. He could not attest regarding the speed or location of the vehicle that purportedly came from the left shoulder that Officer Mairorano opined was the cause of his evasive action into the center lane. Officer Cole testified that there was no way to communicate with Officer Mairorano because the event transpired in a matter of seconds.³

Summary disposition is inappropriate where the credibility of the witnesses is at issue or where the evidence conflicts. *Handelsman, supra*; *Lysogorski, supra*. In light of the factual disparity regarding the circumstances surrounding the accident, we conclude that the trial court properly denied defendant's motion for summary disposition. Officer Mairorano opined that he had no other option but to move into the center lane after being cut off by a slow moving vehicle in the left lane. He further opined that passing or stopping on the left shoulder was not an option because of a vehicle ahead on the left side. However, Father Singer opined that the police cruisers were traveling too fast for the traffic conditions, and consequently, could not stop their vehicles as required. The factual disparity precludes defendant's request for summary disposition based on the application of governmental immunity.

Affirmed.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Karen M. Fort Hood

³ In addition to the testimony of police officers and witnesses, plaintiff also submitted expert opinion regarding the speeds of vehicles before and at the time of the collision between the police vehicles. Also, a portion of the crash between the police vehicles was captured on video although the equipment in Officer Mairorano's vehicle was not functioning properly. It is unclear from the video exactly where the impact between the officers' vehicles occurred although Officer Mairorano opined that he was struck from behind. The parties did not provide information regarding the location of the damage to Officer Cole's vehicle. Therefore, it cannot be definitively concluded that Officer Cole's vehicle actually struck Officer Mairorano's vehicle from behind as opposed to a side impact collision. In light of this additional conflicting information, we cannot conclude as a matter of law regarding the propriety of the operation of the vehicle by Officer Mairorano. *Frohman, supra*.