

STATE OF MICHIGAN
COURT OF APPEALS

STEPHANIE BAXTER,

Plaintiff-Appellee,

v

CHEBOYGAN COUNTY ROAD
COMMISSION,

Defendant-Appellant.

UNPUBLISHED

January 25, 2011

No. 294409

Cheboygan Circuit Court

LC No. 08-007875-NZ

Before: METER, P.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals by right the trial court's denial of summary disposition pursuant to MCR 2.116(C)(7) and (10). This case arises out of a motor vehicle accident in which plaintiff was injured when she swerved to avoid a collision with what was apparently one of defendant's trucks. Defendant claims governmental immunity. We affirm.

We review decisions on motions for summary disposition de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A party is entitled to summary disposition under MCR 2.116(C)(7) where an applicable law renders the party immune from liability. *Odom v Wayne County*, 482 Mich 459, 466; 760 NW2d 217 (2008). The moving party may introduce affidavits, depositions, admissions, or other documentary evidence to support a motion under MCR 2.116(C)(7). *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Allegations set forth in the complaint are accepted as true unless the moving party submits documentation to contradict the allegations. *Id.* "If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred." *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000).

A motion under MCR 2.116(C)(10) challenges the factual sufficiency of the complaint. *Maiden*, 461 Mich at 119. Under this subsection, the trial court considers affidavits, pleadings, depositions, admissions, and other evidence that the parties introduce in the light most favorable to the non-moving party. *Id.* at 119-120. Summary disposition under MCR 2.116(C)(10) is proper where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002).

The accident took place on a snowy November morning. Plaintiff was driving to work at approximately 25 miles an hour and wearing a seatbelt. Only one lane of her road had been plowed, and there was no shoulder. At a curve in the road, she observed a large truck, consistent with a description of one of defendant's vehicles, driving at an excessive speed toward her. She had nowhere to go and swerved to avoid a collision. Her vehicle hit a snow embankment and rolled. The truck made no physical contact with plaintiff's vehicle, and neither the truck nor the driver remained at the scene. The trial court determined that there was a genuine question of fact whether the truck was one of defendant's. On appeal, defendant does not challenge the trial court's finding of a genuine question of fact. Rather, defendant contends that the claim is barred as a matter of law because plaintiff failed to establish the applicability of the motor vehicle exception to governmental immunity. We disagree.

Governmental agencies are generally immune from tort liability when carrying out a governmental function, although a number of exceptions exist to this general rule. *Curtis v City of Flint*, 253 Mich App 555, 558-560; 655 NW2d 791 (2002). Under the motor vehicle exception, MCL 691.1405 "[g]overnmental agencies shall be liable for bodily injury ... resulting from the negligent operation by any ... employee of the governmental agency, of a motor vehicle of which the governmental agency is owner" *Id.* Application of this exception requires a plaintiff to prove that the vehicular accident physically involved a government-owned vehicle. *Id.* at 562. This proof can be based on physical contact between the governmental agency's vehicle and the plaintiff's vehicle, or it can be based on the governmental agency's vehicle "otherwise physically forc[ing the plaintiff's vehicle] off the road or into another vehicle or object." *Id.* at 560, quoting *Robinson v City of Detroit*, 462 Mich 439, 457; 613 NW2d 307 (2000).

There is no dispute that defendant's vehicle did not directly touch plaintiff's vehicle: plaintiff conceded that no physical contact occurred, and there exists no evidence to support a contrary conclusion. The only real issue is whether there is a genuine question of fact whether one of defendant's vehicles physically forced her off the road. Defendant argues that this case is similar to *Curtis*, wherein the plaintiff struck another motorist, who had in turn moved into the plaintiff's lane and stopped his vehicle in response to an oncoming emergency vehicle. This Court explains that the other motorist in *Curtis* had multiple options, so moving to obstruct plaintiff "was not physically required by the alleged negligent operation of the emergency vehicle." *Curtis, supra*, 253 Mich App at 562. Defendant asserts that plaintiff here likewise had multiple options available to her. Defendant therefore concludes that because she was not *required* to maneuver as she did, she cannot establish that defendant's truck "physically forced" her off the road. We disagree.

Although plaintiff testified that she contemplated stopping, which could conceivably be construed as an admission that she had the option to stop, it appears from context that this would have been an illusory option at best. Our reading of the record instead is that after momentary contemplation, she concluded that there was inadequate time to stop, particularly considering the road's icy conditions. Therefore, she felt she had no choice but to swerve to avoid hitting the truck. The police officer dispatched to the accident corroborates this: he testified that plaintiff told him that she swerved to avoid colliding with the truck. Plaintiff thought she was going to die because, given the approaching truck and the snow embankment and trees along the side of the road, she had nowhere to go. We find this testimony sufficient to establish a genuine

question of fact regarding whether a government-owned vehicle physically forced plaintiff off the road. Accordingly, defendant is not entitled to summary disposition on the ground that governmental immunity bars plaintiff's claim.

Affirmed.

/s/ Patrick M. Meter

/s/ Michael J. Kelly

/s/ Amy Ronayne Krause