STATE OF MICHIGAN

COURT OF APPEALS

DONALD TALLEY,

Plaintiff-Appellant,

v

MACOMB INTERMEDIATE SCHOOL DISTRICT,

Defendant-Appellee,

and

RONDA FRANCINE GERMAIN,

Defendant.

UNPUBLISHED
November 29, 2018

No. 341980
Macomb Circuit Court
LC No. 2016-004197-NF

Before: O'BRIEN, P.J., and TUKEL and LETICA, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition to defendant.[1] We affirm.

This case arises out of a June 6, 2014 automobile accident between an automobile driven by plaintiff and a school bus driven by Ronda Francine Germain, who was employed as a school bus driver for defendant. Although the parties agree on some of the basic facts, plaintiff's account of the events differs from the accounts of Germain and Officer Justin Forrest, the officer that responded to the scene of the crash. It is undisputed that the accident occurred on Frazho Road where it intersects with Blumfield Street. Frazho runs east and west, and Blumfield runs north and south. Where Blumfield and Frazho intersect, Blumfield only runs north; it dead-ends at Frazho and does not continue further south. It is also undisputed that Frazho is a single-lane road, that the accident occurred around 8:20 a.m., and that the bus and plaintiff's vehicle were traveling west on Frazho before the accident.

[1] The trial court's order also granted summary disposition to Ronda Francine Germain, but plaintiff does not appeal that portion of the order.

That is where the agreement between the parties ends. According to plaintiff, he was never driving behind the bus. Rather, he was stopped at a red light at Blumfield and Fazho[2] in the "right lane," and the bus pulled up next to him "in the left lane" or "in the left-hand turn lane."[3] Plaintiff testified that the bus then "turned straight into" him "for some reason" that he "can't explain." Germain allegedly told plaintiff that she "didn't see" him. Plaintiff gave conflicting testimony about what he was doing when the bus turned into him. At one point, plaintiff testified that the bus hit him "while [he was] stopped," but he later testified that his vehicle was "barely taking off," that he was going "[m]aybe one mile" per hour, and that his car "didn't get halfway into the intersection" before the accident. Plaintiff testified that the bus was going "[m]aybe five miles an hour, if that." Plaintiff emphasized that the bus hit his vehicle—and that he did not hit the bus—because his vehicle was only damaged on the side, not the front. Plaintiff testified that neighbors saw the accident and called the police, and that an officer arrived about 10 minutes after the accident. Plaintiff was uncooperative with the officer because he perceived the officer to be an "asshole." Plaintiff testified that he received a traffic citation for causing the accident.

Germain, in an affidavit, testified that Frazho is a two-lane road, one lane heading in both directions, and that there is a "parking lane" on either side of the two-lane road "for parked cars only." Germain testified that "[t]here is no traffic control signal or sign on Frazho, where Blumfield meets westbound Frazho." According to Germain, she checked her mirrors before turning onto Blumfield and "no vehicles [were] to [her] right, either parked or driving in the parking lane." Germain testified that she turned on her turn signal and slowed the bus to make a right turn. While the bus was turning right onto Blumfield, plaintiff allegedly attempted to pass the bus on the right while driving in the parking lane, which resulted in the accident.

Officer Forrest, in an affidavit, testified that "Frazho has one lane going in each direction, with one lane traveling westbound and one lane traveling eastbound. There is no traffic signal, traffic light[,] or traffic sign on westbound Frazho where Blumfield meets Frazho. Vehicles park along the curb on Frazho." According to Officer Forrest, plaintiff told him that the accident "occurred when [plaintiff] was attempting to pass the school bus on the right, while driving where vehicles park on westbound Frazho." Officer Forrest found plaintiff at fault for the accident because it is improper to attempt to pass a vehicle on the right and plaintiff was driving in the parking lane.

Plaintiff commenced this action on December 5, 2016, alleging two counts: negligence against Germain and vicarious liability against defendant. Following discovery, defendant filed a dispositive motion. As relevant to this appeal, defendant argued under MCR 2.116(C)(7) and (10) that there was no genuine issue of material fact that Germain was not negligent, let alone

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[2] Pictures of the intersection submitted by the parties in the trial court show that there is no light or other traffic control device at Frazho and Blumfield.

[3] A westbound driver cannot make a left-turn at Blumfield and Frazho because Blumfield only runs north at Frazho. Photos of the intersection provided by the parties show that there is no left-turn lane at the intersection. Also, the parties agree that Frazho is a single-lane road.

grossly negligent, so plaintiff's claims were barred by governmental immunity under MCL 691.1407(1). In a written opinion following a hearing, the trial court agreed with defendant. The trial court concluded that plaintiff failed to provide any support for his assertion that Germain breached her duty of care and therefore granted summary disposition to defendant on plaintiff's claim of vicarious liability. The trial court similarly concluded that, because plaintiff could not establish a question of fact whether Germain was negligent, he failed to establish a question of fact as to gross negligence and granted Germain summary disposition on plaintiff's claim against her as an individual.

On appeal, plaintiff only contests the trial court's grant of summary disposition for his claim against defendant. Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition because, when viewing the evidence in the light most favorable to plaintiff, a reasonable juror could conclude that Germain was negligent. We disagree.

Appellate courts review de novo a trial court's grant of summary disposition. *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 506; 885 NW2d 861 (2016). Defendant moved for summary disposition under MCR 2.116(C)(7) and (10), arguing that there were no genuine issues of material fact that the motor-vehicle exception did not apply so defendant was entitled to governmental immunity as a matter of law. As explained by this Court in *Dextrom v Wexford Co*, 287 Mich App 406, 428-429; 789 NW2d 211 (2010),

> MCR 2.116(C)(7) provides that a motion for summary disposition may be raised on the ground that a claim is barred because of immunity granted by law. When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them. If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact. If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court. [Footnotes omitted.]

In *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999), our Supreme Court explained the standard for a motion under MCR 2.116(C)(10) as follows:

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.

A genuine issue of material fact exists when, after viewing the evidence in a light most favorable to the nonmoving party, reasonable minds could differ on the issue. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

Under MCL 691.1407(1), a governmental agency is immune from tort liability if it is engaged in a governmental function, subject to certain exceptions. See *Robinson v City of Lansing*, 486 Mich 1, 6; 782 NW2d 171 (2010). Neither party contests that defendant—a public school district—is a governmental agency. Nor do the parties dispute that Germain, who was driving a school bus owned by defendant at the time of the accident, was engaged in a governmental function. See *Cobb v Fox*, 113 Mich App 249, 257; 317 NW2d 583 (1982). Defendant was thus immune from tort liability absent an exception. MCL 691.1407(1). The exception at issue in this case is the motor-vehicle exception found in MCL 691.1405, which 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 owner[.]"

To sustain a claim of negligence, a plaintiff must show: (1) a duty existed from the defendant; (2) the defendant breached that duty; (3) the breach was the proximate cause of the injury; and (4) damages. *Latham v Nat'l Car Rental Sys, Inc*, 239 Mich App 330, 340; 608 NW2d 66 (2000).

The plaintiff has the burden of producing evidence sufficient to support a prima facie case of negligence. *Berryman v Kmart Corp*, 193 Mich App 88, 91-92; 483 NW2d 642 (1992). "The mere occurrence of an accident is not, in and of itself, evidence of negligence." *Clark v Kmart Corp*, 242 Mich App 137, 140; 617 NW2d 729 (2000), rev'd on other grounds 465 Mich 416 (2001). The plaintiff must present facts that establish, either directly or circumstantially, negligence. *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 9; 279 NW2d 318 (1979). "Where the circumstances are such as to take the case out of the realm of conjecture and bring it within the field of legitimate inference from established facts, the plaintiff makes at least a prima facie case." *Clark*, 242 Mich App at 140-141.

A driver owes a duty to other motorists and pedestrians to exercise ordinary and reasonable care and caution in the operation of her car. *Zarzecki v Hatch*, 347 Mich 138, 141; 79 NW2d 605 (1956). She must make reasonable allowances for traffic, weather, and road conditions. *DePriest v Kooiman*, 379 Mich 44, 46; 149 NW2d 449 (1967). But a driver is not required "to guard against every conceivable result, to take extravagant precautions, [or] to exercise undue care," and she is "entitled to assume that others using the highway in question would under the circumstances at the time use reasonable care themselves and take proper steps to avoid the risk of injury." *Hale v Cooper*, 271 Mich 348, 354; 261 NW 54 (1935).

Apart from this standard duty of care, a driver has a statutory duty while operating a vehicle to determine that a turn can be safely made before making the turn. MCL 257.648. Violation of a statutorily imposed duty constitutes negligence per se and "gives rise to a *prima facie* case of negligence." *McKinney v Anderson*, 373 Mich 414, 419; 129 NW2d 851 (1964).

Here, because we are reviewing a motion for summary disposition, the evidence is to be taken in the light most favorable to plaintiff as the nonmoving party, *Allison*, 481 Mich at 425, and this Court is to refrain from passing judgment on a witness's credibility, *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). But "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for

summary judgment." *Scott v Harris*, 550 US 372, 380; 127 S Ct 1769; 167 L Ed 2d 686 (2007). See also *Fuhr v Trinity Health Corp*, 495 Mich 869, 869 (2013) (adopting the dissenting opinion in *Fuhr v Trinity Health Corp*, unpublished per curiam opinion of the Court of Appeals, issued April 16, 2013 (Docket No. 309877), which in turn adopted *Scott*'s rule for disregarding testimony that is so "blatantly contradicted by the record" that "no reasonable jury could believe it" when deciding whether there was a genuine issue of material fact in a motion for summary disposition).[4]

Here, plaintiff testified that he was stopped at a light, the bus pulled up to his left in the "left-hand turn lane" and also stopped at the light, and then the bus "for some reason" turned right from the left-turn lane and hit plaintiff's car while the car was stopped.[5] Yet no reasonable jury could believe much of this testimony because it is blatantly contradicted by the record. Photos of the intersection of the accident show that there is no traffic light or other traffic control device at the intersection, there is no "left-hand turn lane" at the intersection, and there is only one lane in either direction separated by a double-yellow line. Photos taken immediately after the accident show that the vehicles collided in the middle of Blumfield Street on Frazho Road. The school bus is slightly turned to the right, and plaintiff's car is mostly in front of the bus with the bus appearing to have impacted the side of plaintiff's car. Based on the vehicles' positions as depicted in the photos, plaintiff could not have been stopped *before* Blumfield on Frazho when he was hit, but had to have been in the intersection.

It is unclear whether this Court should reject plaintiff's testimony in its entirety because material facts are "blatantly contradicted by the record" or whether we should only reject the portions of plaintiff's testimony that are blatantly contradicted. We ultimately need not decide this issue because, under either interpretation, there is no question of material fact that Germain was not negligent.

If this Court completely disregards plaintiff's testimony, then the only evidence of the accident is Germain's and Officer Forrest's testimony. Both testified that plaintiff attempted to pass the school bus on the right in the parking lane while the school bus was turning right from Frazho Road onto Blumfield Street. Germain testified that she checked her mirrors before turning, signaled that she was going to turn, and slowed down before executing the turn. Germain was not required to anticipate plaintiff attempting to illegally pass her on the right in a lane intended for parked vehicles. See MCL 257.637; *Hale*, 271 Mich at 354. On this evidence, there is no material question of fact that Germain did not breach her duty to exercise ordinary and reasonable care while driving. *Zarzecki*, 347 Mich at 141. Nor is there any question of material fact that Germain did not breach her statutory duty to determine that the turn could be safely made before making it. See MCL 257.648. To the contrary, Germain ascertained that she

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[4] In *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 369; 817 NW2d 504 (2012), our Supreme Court explained that an order issued by the Michigan Supreme Court that adopts the dissenting opinion in the Court of Appeals constitutes binding precedent.

[5] As detailed earlier, plaintiff's testimony about the details of the accident was inconsistent, so this is but one version of plaintiff's account of the accident.

could safely make the right turn, and the accident occurred when plaintiff unexpectedly and illegally attempted to pass Germain on the right in a parking lane. Thus, if we completely disregard plaintiff's testimony, there is no genuine question of material fact that Germain did not breach a duty of care and therefore was not negligent. See *Latham*, 239 Mich App at 340.

If this Court accepts plaintiff's testimony to the extent that it is not blatantly contradicted by the record, he still failed to present evidence to support a prima facie case of negligence. See *Berryman*, 193 Mich App at 91-92. When viewing plaintiff's testimony that is not blatantly contradicted by the record, *Scott*, 550 US at 380, in the light most favorable to plaintiff as the nonmoving party, *Allison*, 481 Mich at 425, plaintiff was stopped on Frazho Road at Blumfield Street before the accident,[6] the bus pulled up next to plaintiff on his left and stopped, and when they both moved forward (plaintiff testified that the bus was going maybe five miles per hour and he was going maybe one mile per hour), the bus turned and hit plaintiff's vehicle. It is undisputed that Frazho is a single-lane road. Again, in the light most favorable to plaintiff, the bus was stopped to plaintiff's left. No one testified that the bus was driving in the wrong lane of traffic. Officer Forrest and Germain both testified—and no testimony contradicted them—that to the right of Frazho's single lane is a parking lane.[7] Because Frazho is a single-lane road with a parking lane to the right of the throughway, the only way that the bus could have pulled up on plaintiff's left was if the bus was in the throughway and plaintiff was stopped in the parking lane. Germain testified that she turned on her turn signal before turning onto Blumfield Street. This testimony was undisputed. According to plaintiff, when both vehicles began moving, Germain turned into plaintiff which resulted in the accident.

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[6] We see no reason to reject that plaintiff was stopped on Frazho at Blumfield before the accident. Drivers stop for any number of reasons, and that plaintiff cited to a reason that is factually impossible does not necessarily negate that he and the school bus were nevertheless stopped before the accident. There is nothing about the photos of the accident or of the intersection that "blatantly contradicts" plaintiff's testimony that he was stopped before the accident, so reasonable minds could differ on that fact.

On appeal and at trial, plaintiff in his briefs acknowledged that there is no light or stop sign at Frazho and Blumfield, but asserted that, based on a "Google Street View Screen Capture" of the intersection that includes a sign warning of a nearby school, plaintiff and Germain "may have been stopped at a school crossing." No one testified to this; plaintiff repeatedly testified that he and Germain were stopped at a traffic light. The argument put forth in plaintiff's briefs is, at best, speculation, which cannot create a question of fact. See *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993).

[7] On appeal, plaintiff speculates that, based on photos in evidence, there was no "parking lane" on Frazho Road. Similar to plaintiff's assertion about the school sign, *no one* testified that there was not a parking lane on Frazho Road; Germain's and Officer Forrest's testimony that there *was* a parking lane on Frazho Road was undisputed. Plaintiff even acknowledged at his deposition that cars parked on the side of Frazho. Plaintiff's assertion on appeal that "there is no 'parking lane' " is another attempt to create a question of fact based on speculation, which is insufficient. See *Libralter Plastics*, 199 Mich App at 486.

On these facts, Germain was not negligent. Plaintiff could only have been stopped in the parking lane. Germain pulled up next to plaintiff in the arterial lane of Frazho Road where traffic was supposed to travel. Because Germain was traveling in the arterial lane, she "was the favored driver." *Churukian v La Gest*, 357 Mich 173, 180; 97 NW2d 832 (1959) (quotation marks and citation omitted). Plaintiff, who was stopped next to the arterial lane in a lane intended for parking, was "the subordinate driver" and was required to "yield the right of way." *Id*. (quotation marks and citation omitted). Germain, from the arterial lane, conveyed her intent to turn onto Blumfield Street by using her turn signal. Again, as the subordinate driver, plaintiff had a duty to yield the right of way. Germain had no commensurate duty to anticipate that plaintiff, who was in a lane intended for parking, would decide to pull forward and disregard Germain's right of way. See *Hale*, 271 Mich at 354 (stating that a driver is not required "to guard against every conceivable result, to take extravagant precautions, [or] to exercise undue care"). To the contrary, Germain was entitled to assume that plaintiff would not begin moving from the parking lane into the intersection that Germain, from the arterial lane, signaled that she was turning into. See *id*. (stating that a driver is "entitled to assume that others using the highway in question would under the circumstances at the time use reasonable care themselves and take proper steps to avoid the risk of injury"). Based on the foregoing, when viewing the evidence in the light most favorable to plaintiff as the nonmoving party and disregarding plaintiff's deposition testimony to the extent that it was so blatantly contradicted by the record that no reasonable jury could believe it, plaintiff failed to establish any genuine issue of material fact whether Germain breached a duty of care. Because reasonable minds could not differ as to Germain's lack of negligence, the trial court properly granted defendant's motion for summary disposition.

Plaintiff contends that, based on *Fife v Warren*, 105 Mich App 725, 726; 307 NW2d 410 (1981), he produced evidence creating a question of fact that he was not negligent and the trial court erred by granting defendant's motion. *Fife* is a two-page case, and in pertinent part states:

> The facts are undisputed. Plaintiff was traveling south on Main Street in Perry, Michigan, when he executed a right turn into a bank. In so doing, he came into contact with defendant's auto. The defendant's vehicle was at all times within the boundary lines of a parking space on the street. Defendant was in her car and had just begun to move when the collision occurred. Her automobile had traveled about 12 inches but was still within the parking boundary lines at the point of impact.
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> Based upon the facts in this case, we are in agreement with the trial court's conclusion that plaintiff did not produce any evidence of negligence on the part of the defendant. As there was no genuine issue as to any material fact, summary judgment was proper.

At most, *Fife* provides support for plaintiff's argument that he—like the parked driver in *Fife*—was not negligent. But the fact that plaintiff was not negligent in no way establishes that Germain *was* negligent. The trial court ruled that plaintiff failed to establish that Germain was negligent, and *Fife* neither supports nor contradicts that ruling.

Affirmed.

/s/ Colleen A. O'Brien
/s/ Jonathan Tukel
/s/ Anica Letica