STATE OF MICHIGAN

COURT OF APPEALS

JOANNE M. SEARS,

Plaintiff-Appellee,

v

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

Defendant-Appellant,

and

SHARON POINTER,

Defendant.

UNPUBLISHED
February 7, 2013

No. 305923
Macomb Circuit Court
LC No. 2010-004321-NI

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

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