STATE OF MICHIGAN

COURT OF APPEALS

CARMEN Y. BURGIE,

Plaintiff-Appellee,

v

ROBIN M. LILEIKIS and CATHERINE LILEIKIS,

Defendants,

and

CAPITAL AREA TRANSPORTATION AUTHORITY, DAVID R. ROBINSON, JOHN L. WINGO, and SANDY RIOS,

Defendants-Appellants.

UNPUBLISHED
February 10, 2005

No. 250666
Ingham Circuit Court
LC No. 02-000300-NI

Before: Markey, P.J., and Murphy and O'Connell, JJ.

PER CURIAM.

Defendants Capital Area Transportation Authority (CATA), Robinson, Rios, and Wingo, appeal by leave granted from the trial court order that deferred the court's ruling on their motion for summary disposition pursuant to MCR 2.116(C)(7) and (10). Plaintiff filed a claim against these defendants and against defendants Robin and Catherine Lileikis. The complaint alleged various forms of negligence against defendants for injuries she sustained when she walked between two parked buses and out into the roadway where defendant Robin Lileikis struck her with a jeep. The buses were being driven by Robinson and Wingo. Rios was the director of operations at CATA. We reverse.

Appellants first argue that the trial court erred in denying summary disposition to defendants Robinson, Rios, and Wingo, because their actions, even if grossly negligent, were not "the proximate cause" of plaintiff's injuries as a matter of law. We agree. A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201(1998). Such a motion should be granted when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10).

In this case, the material facts underlying the suit were undisputed, so resolution of appellants' motion depended solely on whether those facts were sufficient to establish a prima facie case for liability. MCR 2.116(C)(10). In this case, defendants Rios, Wingo, and Robinson were undisputedly employees of CATA, a governmental agency. Therefore, MCL 691.1407(2) applies and states the following:

> [E]ach officer and employee of a governmental agency . . . is immune from tort liability for an injury . . . caused by the officer, employee, or member while in the course of employment or service . . . if all of the following are met:
>
> * * *
>
> (c) The . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

Our Supreme Court has stated, "The phrase 'the proximate cause' is best understood as meaning the one most immediate, efficient and direct cause preceding an injury." *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000). Applying the standard in this case, the jeep's impact with plaintiff's body was "the one most immediate, efficient and direct cause" of her injuries, and neither the bus drivers nor CATA's director of operations exercised control over the motion of those entities. *Curtis v Flint*, 253 Mich App 555, 563; 655 NW2d 791 (2002). Therefore, even if plaintiff had established the necessary level of negligence, her claims against these defendants were factually insufficient to overcome their immunity. *Id*.

Appellants next argue that the trial court erred in denying summary disposition as to defendant CATA because plaintiff's injuries did not arise out of the "operation" of a motor vehicle and because plaintiff's injuries did not qualify as "damage resulting from" the buses' operation. MCL 691.1405. We agree. "Governmental agencies shall be liable for bodily injury and property damage *resulting from* the negligent *operation* by any . . . employee of the governmental agency, of a motor vehicle of which the governmental agency is owner . . . ." MCL 691.1405 (emphasis added). Otherwise, governmental agencies are generally immune from tort liability. MCL 691.1407(2). In the present case, plaintiff does not challenge that CATA was a governmental agency discharging a governmental function. Therefore, plaintiff's claim against CATA fails unless her injuries resulted from the operation of the buses. *Id*.

> Because the statute allows liability only for injuries "resulting from" the negligent operation of a government-owned vehicle, as opposed to a lesser "but for" standard, the motor vehicle exception will not apply unless there is physical contact between the government-owned vehicle and that of the plaintiff, or the government-owned vehicle physically forced the plaintiff's vehicle off the road or into another vehicle or object. [*Curtis*, *supra* at 561.]

In the present case, the buses did not physically hit plaintiff and did not physically push the jeep into plaintiff. Contrary to plaintiff's claims, the buses did not force her into the path of the oncoming jeep, because they exerted no physical force on her at all. As a result, plaintiff's

injuries did not result from the buses negligent "operation" within the meaning of the statute, and the trial court erred when it failed to grant CATA's motion for summary disposition.

Reversed and remanded for entry of judgment in favor of appellants. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Peter D. O'Connell

S T A T E O F M I C H I G A N

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MURPHY, J. (*dissenting*).

As there are genuine issues of material fact regarding plaintiff's claims with respect to causation, I respectfully dissent.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Koenig v City of South Haven,* 460 Mich 667, 674; 597 NW2d 99 (1999). Issues of law are also reviewed de novo. *Mahaffey v Attorney General,* 222 Mich App 325, 334; 564 NW2d 104 (1997).

The appropriate court rule and subsection to consider in this case for purposes of summary disposition is MCR 2.116(C)(7)(claim is barred because of immunity granted by law). A party may support a motion brought pursuant to MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence, which must be considered if submitted. *Maiden v Rozwood,* 461 Mich 109, 119; 597 NW2d 817 (1999). The substance or content of the supporting proofs must be admissible in evidence. *Id.* The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. *Id.* Under MCR 2.116(C)(7), a court must look to the documentary evidence presented to determine

whether there is a genuine issue of material fact regarding the particular defense raised pursuant to (C)(7), and if a factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate. See *Huron Tool & Engineering Co v Precision Consulting Services, Inc,* 209 Mich App 365, 377; 532 NW2d 541 (1995).

In regard to the individual governmental employees named as defendants, governmental immunity does not afford them protection where there conduct amounts "to gross negligence that is the proximate cause of the injury or damage." MCL 691.1407(2). The "proximate cause" language of MCL 691.1407(2)(c) requires that, to impose liability on a governmental employee for gross negligence, the employee's conduct must be "the one most immediate, efficient, and direct cause preceding an injury." *Robinson v Detroit,* 462 Mich 439, 459; 613 NW2d 307 (2000).

I disagree with the majority's conclusion that, as a matter of law, the jeep's impact with plaintiff's body was "the proximate cause" of her injuries and that neither the bus drivers nor the director of operations exercised control over the motions of plaintiff and the driver of the jeep. While it is true that the jeep struck plaintiff and that the impact directly administered injury upon her, I am of the opinion that the Supreme Court's reference in *Robinson* to "the one most immediate, efficient, and direct cause preceding an injury" does not necessarily mean one looks only at the last instrumentality that impacted the body of the injured party, especially if there is no fault on the part of the person who controls or directs the instrumentality. For example, if a government vehicle, being driven in an erratic and grossly negligent manner, barrels over the guardrail of an overpass and a driver on the roadway below swerves, in a reasonable and justifiable manner, just in time to avoid the government vehicle as it crashed to the ground, but yet swerved into the path of another vehicle, thereby injuring the occupants of the second vehicle, certainly the operation of the government vehicle would be "the one most immediate, efficient, and direct cause" of the injury for purposes of liability. This would be true despite the fact that it was the swerving vehicle that directly impacted the second vehicle and injured the occupants. Any other conclusion would be nonsensical. Support for this position can be found in *Robinson* itself, where the Court stated as follows:

> [I]f an innocent person is injured as a result of a police chase because a police car physically forces a fleeing car off the road or into another vehicle or object, such person may seek recovery against a governmental agency pursuant to the motor vehicle exception to governmental immunity *and also against the officer operating the police vehicle if the individual police officer is "the proximate cause" of the accident.* [*Robinson, supra* at 445 n 2 (emphasis added).]

Clearly, were a court to look solely at the instrumentality that directly impacted or struck the injured party in determining "the proximate cause" of an injury, the court's action would be contrary to the emphasized language in the preceding paragraph. The quoted language indicates that a police officer's operation of his or her vehicle could be "the proximate cause" of an injury, although the vehicle itself did not strike the injured party. If it were otherwise, the *Robinson* Court would have simply stated that the officer could not be held liable as the officer was not "the proximate cause" under the hypothetical scenario where the police cruiser forces a fleeing car into another vehicle or object.

Turning to the case at bar, a reasonable juror could conclude that plaintiff would not have walked into the path of the jeep, or, alternatively, the jeep would have timely observed plaintiff before striking her and taken evasive action had the buses not been idling in a location that obscured a pedestrian's view of traffic before the pedestrian traversed the crosswalk and which obscured a vehicle operator's view of pedestrians until a point where it was too late to avoid an accident. In other words, a jury could find that the location of the buses at a pedestrian crosswalk was "the one most immediate, efficient, and direct cause" of the injury. Contrary to the majority's position, a reasonable juror could conclude that the actions of the bus drivers and the director of operations affected the motions of plaintiff and the driver of the jeep. Moreover, a reasonable juror could find that it was grossly negligent for the bus drivers to park their vehicles in the area of the pedestrian crosswalks and in parking the buses in such a manner as to block the crosswalks, as well as it being grossly negligent for the director of operations to allow a bus stop to be located in such an area.

The majority relies on *Curtis v Flint,* 253 Mich App 555; 655 NW2d 791 (2002). In *Curtis,* the plaintiff's vehicle crashed into the rear of another vehicle driven by Jonathan Kells, whose vehicle had pulled over to the curb lane and come to an abrupt stop near an intersection when Kells waved a paramedic in an emergency vehicle through the intersection as the paramedic was responding to an emergency call. The injured plaintiff sued the city and the paramedic. This Court affirmed the trial court's order granting summary disposition in favor of the paramedic because "the most immediate, efficient, and direct cause of plaintiff's injuries was Kells' abrupt movement and stopping of his vehicle." *Id.* at 563. In the opinion's discussion of the city's liability under the motor vehicle exception to governmental immunity, MCL 691.1405, the Court observed that, "assuming that Kells was forced to stop in order to avoid colliding with the paramedic unit, there is nothing in the evidence offered below to indicate that Kells was required to enter plaintiff's lane in order to do so. In other words, Kells' decision to abruptly change lanes and stop was one of many options available to him; it was not physically required by the alleged negligent operation of the emergency vehicle." *Id.* at 562. Although the *Curtis* panel gave cursory treatment to its conclusion that the paramedic was not liable because his actions were not the proximate cause of the accident, it is clear that the Court placed all fault for the accident on Kells. Had Kells been definitively forced to take a particular evasive action to avoid a collision with the paramedic unit, such that no blame could rest with him, and he then hit the plaintiff's vehicle, I do not believe that the *Curtis* panel would have concluded, in the context of summary disposition, that the paramedic's actions were not the proximate cause of any ensuing accident.

Here, although there was evidence that the driver of the jeep may have been speeding and did not slow down or stop at the pedestrian crosswalk, the driver testified in her deposition that the buses blocked her view of the crosswalk area from where plaintiff emerged and that she did not see plaintiff until plaintiff was right in front of her vehicle and struck. I am not aware of any law that requires a driver to slow down and stop at a pedestrian crosswalk absent observation of a person preparing to walk in the crosswalk or observation of a person already walking in the crosswalk. I am not prepared to state as a matter of law that the jeep driver was "the proximate cause" of the accident. Furthermore, plaintiff testified that, although she could not state with absolute certainty that she looked for traffic as she passed by the buses and entered the roadway, she was "pretty sure" she did. Additionally, one of the bus drivers honked his horn because he realized that plaintiff could not see the jeep approaching the crosswalk. Based on this evidence

and the location and size of the buses, it is not unreasonable to conclude, when viewing the evidence in a light most favorable to plaintiff, that the buses blocked plaintiff's ability to get a clear view of the oncoming traffic to some degree and hindered her ability to safely cross the street. I am not prepared to state as a matter of law that plaintiff was "the proximate cause" of the injury. Of course, it cannot be said as matter of law that the alleged gross negligence of the governmental employees was "the proximate cause" of plaintiff's injury. I agree with the trial court that the proper resolution of the matter was to allow plaintiff to present her proofs to a jury.

With respect to the liability of the Capital Area Transportation Authority (CATA), MCL 691.1405 provides that a governmental agency is liable for bodily injury "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[.]" The majority concludes that plaintiff's injuries did not result from the operation of the buses as the buses did not physically hit plaintiff, did not physically push the jeep into plaintiff, and did not force her into the path of the oncoming jeep. The majority's reading of *Curtis,* which is cited in support of its ruling, and which decision was predicated on *Robinson,* is much too narrow. In *Robinson, supra* at 445, the Supreme Court stated that the plaintiffs failed to show that the injuries resulted "from the operation of the police cars where the police cars did not hit the fleeing car or physically cause another vehicle or object to hit the vehicle that was being chased or physically force the vehicle off the road or into another vehicle or object." I would find that there was evidence sufficient to survive summary disposition, where the driver of the jeep testified that the buses blocked her full view of plaintiff attempting to traverse the crosswalk. A reasonable juror could conclude that the presence of the buses idling in the area of the crosswalks physically blocked the jeep driver's view of pedestrians, thereby causing the jeep to maintain its speed and not decelerate before striking plaintiff. There was sufficient evidence, when viewed in a light most favorable to plaintiff, to find that plaintiff's injuries resulted from the operation of government vehicles.

I would affirm the ruling of the trial court.

/s/ William B. Murphy