

STATE OF MICHIGAN
COURT OF APPEALS

KARLA E. STELLJES, Personal Representative of
the Estate of DAVID R. STELLJES,

UNPUBLISHED
October 6, 2000

Plaintiff-Appellant,

v

No. 216222
Ingham Circuit Court
LC No. 97-016787

MICHIGAN STATE POLICE,

Defendant-Appellee.

Before: Meter, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

Plaintiff appeals by right from an order granting defendant summary disposition under MCR 2.116(C)(7) and (10). We affirm.

Plaintiff filed a complaint alleging gross negligence, negligent operation of a motor vehicle, and a violation of constitutional due process rights arising out of a police chase during which Michigan State Trooper Norman Harrington intentionally rammed the decedent David Stelljes' vehicle from behind in an attempt to stop the decedent from fleeing. The ramming procedure caused the decedent to lose control of his vehicle, crash into a tree, and die. Defendant moved for summary disposition under MCR 2.116(C)(7), (8), and (10), arguing that it was governmentally immune from liability, that plaintiff did not set forth facts that would establish a state constitutional claim, and that no genuine issue of material fact existed regarding plaintiff's claims.

The trial court based its grant of defendant's motion on MCR 2.116(C)(7) (governmental immunity) and (10) (no genuine issue of material fact). This Court reviews a trial court's decision on a motion for summary disposition de novo. *Harrison v Olde Financial Corp*, 225 Mich App 601, 605; 572 NW2d 679 (1997). In reviewing a motion granted under 2.116(C)(7), we consider all documentary evidence submitted by the parties and accept the plaintiff's well-pleaded allegations, except those contradicted by documentary evidence, as true. *Iovino v Michigan*, 228 Mich App 125, 131; 577 NW2d 193 (1998); *Patterson v Kleiman*, 447 Mich 429, 433-435; 526 NW2d 879 (1994). We view the uncontradicted allegations in favor of the plaintiff and determine whether an exception to governmental immunity applies. *Id.* In reviewing a motion granted under MCR

2.116(C)(10), we look at the entire record, view the evidence in favor of the nonmoving party, and decide if there exists a relevant issue about which reasonable minds might differ. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). If, as in the instant case, the nonmoving party would bear the burden of proof at trial, that party, in order to avoid summary disposition, must provide documentary evidence showing the existence of a disputable issue. *Quinto v Cross & Peter Co*, 451 Mich 358, 362; 574 NW2d 314 (1996).

Plaintiff claims that governmental immunity did not exist in this case because Harrington acted in a grossly negligent fashion and because defendant was vicariously liable for this negligence. We disagree. Despite plaintiff's attempts to couch Harrington's actions in terms of negligence, plaintiff's claim was actually for an *intentional tort*, since she claimed that the decedent died as a result of Harrington's intentional decision to perform the ramming procedure. See, e.g., *Smith v Stolberg*, 231 Mich App 256, 258-259; 586 NW2d 103 (1998). As stated in *Alexander v Riccinto*, 192 Mich App 65, 71-72; 481 NW2d 6 (1991), employers may not be held vicariously liable for the intentional torts of their employees. See also *Payton v Detroit*, 211 Mich App 375, 393; 536 NW2d 233 (1995), *Harrison v Director of Dep't of Corrections*, 194 Mich App 446, 450; 487 NW2d 799 (1992), and *Bischoff v Calhoun Co Prosecutor*, 173 Mich App 802, 806; 434 NW2d 249 (1988), citing *Smith v Dep't of Public Health*, 428 Mich 540, 544; 410 NW2d 749 (1987), affirmed sub nom *Will v Mich Dep't of State Police*, 491 US 58 (1989). Accordingly, summary disposition for defendant was proper.

Even assuming, arguendo, that plaintiff sufficiently pleaded *and* raised a question of fact with regard to gross negligence,¹ as opposed to an intentional tort, defendant was still immune from liability. A governmental agency is immune from liability for the tortious actions of an employee as long as actions involved the exercise or discharge of a governmental function. *Payton, supra* at 391-393. The appropriate inquiry involves the general activity that Harrington was performing at the time he rammed the decedent's vehicle, not the tort itself. *Id.* at 392. Here, the alleged tort of gross negligence occurred while Harrington was engaged in activities related to the operation of a state police force, which is a governmental function for governmental immunity purposes. *Id.* at 392-393; see also *Isabella Co v Michigan*, 181 Mich App 99, 104-105; 449 NW2d 111 (1989). Therefore, defendant was immune from tort liability.

Plaintiff additionally argues that the exception to governmental immunity found in MCL 691.1405; MSA 3.996(105) applied to this case and that summary disposition therefore should not have been granted. MCL 691.1405; MSA 3.996(105) states that "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" that the government agency owns. Although plaintiff sought to bring her action within the ambit of this statute by labeling her claim as negligence, her cause of action, again, is more accurately based on a claim of an intentional tort. The gravamen of the complaint was not that Trooper Harrington operated his vehicle negligently, but that Harrington should not have

¹ As indicated *infra*, we in fact hold that plaintiff did *not* sufficiently raise a question of fact regarding negligence, much less gross negligence.

performed the rear-end maneuver. It was undisputed that Harrington performed the rear-end maneuver intentionally. Insofar as plaintiff's complaint was based on an intentional tort, the negligent operation exception to governmental immunity did not apply; defendant remained immune.² See *Smith v Stolberg*, *supra* at 258-259.

Even assuming, *arguendo*, that plaintiff's claim was properly based on negligence, we find that summary disposition was proper because there was no genuine issue of material fact in dispute. Plaintiff failed to produce any evidence indicating how Trooper Harrington negligently performed the ramming maneuver.³ The trial court properly dismissed plaintiff's claim for negligent operation of a motor vehicle.

Finally, plaintiff argues that the trial court erred in dismissing plaintiff's state constitutional tort claim. We disagree. A state agency may be held liable for a violation of the state constitution only if a custom, policy, or policymaker caused a person to be deprived of a constitutional right and the policy or custom at issue was "the moving force" behind the constitutional violation. *Carlton v Dep't of Corrections*, 215 Mich App 490, 505; 546 NW2d 671 (1996); see also *Monell v New York City Dep't of Social Services*, 436 US 658, 694; 98 S Ct 2018; 56 L Ed 2d 611 (1978), and *Pembaur v City of Cincinnati*, 475 US 469, 480-481; 106 S Ct 1292; 89 L Ed 2d 452 (1986). The state may be held liable only if the custom or policy mandated the improper action. *Carlton*, *supra* at 505. Moreover, the state may not be held liable based on a respondeat superior theory. *Monell*, *supra* at 694; *Alexander*, *supra* at 73; *Carlton*, *supra* at 504. Here, plaintiff based her constitutional claim on the ramming procedure, she did not allege that a policy or custom *mandated* that Harrington perform the procedure, and her claim was based on respondeat superior. Both *Carlton*, *supra* at 505, and *Alexander*, *supra* at 73, mandated the dismissal of the claim.⁴

Affirmed.

² Plaintiff suggests that the trial court should not have dismissed her negligent operation of a motor vehicle claim on grounds of governmental immunity because defendant did not argue governmental immunity when arguing that this claim should be dismissed. Defendant clearly stated on the first page of its motion for summary disposition, however, that "[p]laintiff's claims are barred by immunity provided by law."

³ Plaintiff attempts to show a genuine issue of material fact by citing evidence that was not included in the lower court record. We are not allowed, however, to expand the record on appeal. See *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999).

⁴ Plaintiff contends that the trial court improperly dismissed her constitutional claim under MCR 2.116(C)(10) when defendant argued for dismissal of this claim only under MCR 2.116(C)(8). We disagree. Defendant's motion for summary disposition stated generally that "[t]here is no genuine issue of material fact" and did not limit this statement to only certain of plaintiff's claims. Moreover, defendant argued in its brief in support of summary disposition that plaintiff failed to produce sufficient evidence of a constitutional violation.

/s/ Patrick M. Meter
/s/ Richard Allen Griffin
/s/ Michael J. Talbot