STATE OF MICHIGAN

COURT OF APPEALS

JEFFREY BRUCE POPPEN,

Plaintiff-Appellant,

v

WILLIS JAMES TOVEY, JR. and CITY OF GRAND RAPIDS,

Defendants-Appellees.

UNPUBLISHED
March 18, 2003

No. 236471
Kent Circuit Court
LC No. 99-012358-NI

Before: Whitbeck, C.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

In this action alleging governmental entity and employee liability for negligent operation of a motor vehicle, plaintiff appeals by leave granted the trial court's order granting summary disposition in favor of defendants. We affirm.

I. Basic Facts and Procedural History

This cases arises from a motor vehicle accident in which plaintiff collided with a City of Grand Rapids water truck. It is not disputed that plaintiff struck the truck from behind while that vehicle was stopped in the curb lane of the two travel lanes designated for southbound traffic along East Paris Avenue in the city of Grand Rapids. It is similarly not disputed that at the time of the accident the city vehicle was sitting with its four-way emergency flashers and overhead warning lights activated, and had been stopped for a period of approximately three to five minutes in order to allow a city employee to inspect a city-owned and maintained fire hydrant.

Plaintiff, who suffered injury after being ejected from his vehicle during the crash, filed this lawsuit against both the city and the driver of the truck, defendant Willis Tovey, alleging that Tovey was grossly negligent in (1) failing to alert approaching traffic that he had blocked the curb lane by marking the area behind the truck with warning devices, and (2) blocking, impeding, obstructing or otherwise interfering with the normal flow of traffic in violation of MCL 257.676b. The trial court granted summary disposition in favor of defendant Tovey after concluding that the undisputed facts did not establish that Tovey had acted in a grossly negligent manner in failing to mark the area behind his truck, as required for governmental employee liability under MCL 691.1407(2). The trial court also found that Tovey owed plaintiff no duty under MCL 257.676b, and that summary disposition in favor of the city was similarly

appropriate because plaintiff's injuries did not result from the "operation" of a government-owned motor vehicle within the meaning of MCL 691.1405, the motor vehicle exception to the statutory immunity afforded a governmental agency by MCL 691.1407.

II. Analysis

A. Standard of Review

Because the trial court dismissed plaintiff's claims on the basis of statutory governmental immunity, we review the motion as granted under MCR 2.116(C)(7). An order granting summary disposition under MCR 2.116(C)(7) is reviewed de novo on appeal. *Pusakulich v City of Ironwood*, 247 Mich App 80, 82-83; 635 NW2d 323 (2001). In reviewing the order, we must give consideration to the affidavits, depositions, admissions, and other documentary evidence filed by the parties, and determine whether they indicate that defendants are in fact entitled to immunity. *Id*. If the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a claim is barred by immunity is a question for the court to decide as a matter of law. *Diehl v Danuloff*, 242 Mich App 120, 123; 618 NW2d 83 (2000).

B. Plaintiff's Claim Against the City of Grand Rapids

Plaintiff first argues that summary disposition of his claim against the City of Grand Rapids was improper. Specifically, plaintiff argues that trial court erred in concluding that his claim did not fall within the motor vehicle exception to statutory governmental immunity because his injuries did not result from the "operation" of a government-owned motor vehicle. We disagree.

As a general rule, a governmental agency is immune from tort liability when it is "engaged in the exercise or discharge of a governmental function." MCL 691.1407(1).[1] There are, however, several narrowly drawn exceptions to such immunity, including the motor vehicle exception. This exception provides that a governmental agency "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 . . . ." MCL 691.1405 (Emphasis added).

Citing *Wells v Dep't of Corrections*, 79 Mich App 166; 261 NW2d 245 (1977) and *Nolan v Bronson*, 185 Mich App 163; 460 NW2d 284 (1990), plaintiff argues that for purposes of the motor vehicle exception it is not necessary that a vehicle be in motion at the time of the injury to find that the injury resulted from "operation" of a motor vehicle. Rather, all that is necessary is that the vehicle "'is being used or employed in some specific function or to produce some desired work or effect.'" *Nolan*, *supra* at 177, quoting *Wells*, *supra* at 169. Our Supreme Court, however, recently rejected this expansive definition of "operation" in *Chandler v Muskegon Co*, 467 Mich 315; 652 NW2d 224 (2002), finding that such a construction defines the term "so

[1] It is not disputed here that, at the time of the accident, defendants were engaged in the exercise of a government function.

broadly that it could apply to virtually any situation imaginable in which a motor vehicle is involved regardless of the nature of its involvement." *Id*. at 321. Noting the well-established principle that the statutory exceptions to governmental immunity must be narrowly construed, the Court concluded that the phrase "'operation of a motor vehicle' means that the motor vehicle is being operated *as* a motor vehicle" and, therefore, encompasses only those "activities that are directly associated with the driving of a motor vehicle." *Id*. at 320-321 (Emphasis in original). Applying this definition to the undisputed facts of this case, we find no error in the trial court's conclusion that plaintiff's injuries did not result from "operation" of a government-owned motor vehicle. At the time of the collision, the city vehicle had been stopped for approximately three to five minutes in order to permit its passenger to inspect a public utility. Once stopped for this purpose, its presence on the road was no longer "directly associated with the driving" of that vehicle. Accordingly, the vehicle was not being operated "as" a motor vehicle at the time of the accident and summary disposition in favor of the city was appropriate.

C. Plaintiff's Claims Against Defendant Tovey

Plaintiff next argues that, because reasonable minds could differ regarding whether defendant Tovey was grossly negligent in failing to mark the area behind his truck, a material question of fact precluding summary disposition of his claim against Tovey existed. Again, we disagree.

Governmental employees are immune from liability for injuries they cause during the course of their employment if their "conduct does not amount to gross negligence that is the proximate cause of the injury or damage." MCL 691.1407(2)(c). Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Id*. To be the proximate cause of an injury, the gross negligence must be "the one most immediate, efficient, and direct cause of the injury or damage . . . ." *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000). Evidence of ordinary negligence does not create a question of fact regarding gross negligence. *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999).

In seeking summary disposition below, defendants provided the trial court with the deposition testimony of three drivers who witnessed the accident, each of whom testified that the flashers and overhead warning lights on the truck were clearly visible from a distance sufficient to warn them of the upcoming hazard in the roadway. Witness Linda Smith additionally testified that as she was attempting to change lanes in order to avoid the obstruction, plaintiff came "flying around" her into the curb lane, after which she watched in disbelief as plaintiff continued in that lane without slowing until striking the stopped truck. Smith's testimony was supported by that of Gaylord Schuur and Kurt Hillard, each of whom also testified regarding their disbelief as they watched plaintiff pass Smith then accelerate into the rear of the clearly visible stopped truck. Given this testimony, we conclude that the trial court correctly found that reasonable minds could not differ as to whether Tovey's failure to employ additional warning devices or to conduct the inspection at a different time was so reckless as to demonstrate a substantial lack of concern for whether plaintiff would be injured. MCL 691.1407(2)(c). Accordingly, because there was no question of material fact surrounding the gross negligence issue, the trial court did

not err when it granted defendant Tovey summary disposition on the basis of governmental immunity.[2]

The trial court similarly did not err in finding that MCL 257.676b imposed no duty on Tovey not to block the roadway or otherwise interfere with traffic. That statute provides, in relevant part:

> A person, without authority, shall not block, obstruct, impede, or otherwise interfere with the normal flow of vehicular or pedestrian traffic upon a public street or highway in this state, by means of a barricade, object, or device, or with his or her person. This section shall not apply to persons maintaining, rearranging, or constructing public utility facilities in or adjacent to a street or highway. [MCL 257.676b(1).]

Presumably noting that the statute specifically excepts from its purview "persons maintaining . . . public utility facilities in or adjacent to a street or highway," the trial court found it inapplicable to the circumstances here. We agree with the trial court's decision in this regard despite plaintiff's contention that, because the city employees were "inspecting" rather than "maintaining" a public utility, the statute applies to impose a specific duty not to obstruct the roadway. Plaintiff's argument in this regard is merely an exercise in semantics, which may not be employed to preclude defendants from summary disposition in their favor. See, e.g., *Camden v Kaufman*, 240 Mich App 389, 397; 613 NW2d 335 (2000). In any event, even assuming that MCL 257.676b placed a duty on Tovey not to block the road, the presumption arising from its violation is merely one of ordinary negligence, not gross negligence, *Klinke v Mitsubishi Motors Corp*, 458 Mich 582, 592; 581 NW2d 272 (1998), and is insufficient to create a genuine issue of material fact preventing summary disposition. *Maiden*, *supra*.

We affirm.

/s/ William C. Whitbeck
/s/ Michael J. Cavanagh
/s/ Richard A. Bandstra

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[2] Moreover, as argued by defendants, plaintiff's own deposition testimony indicates that his failure to see the stopped utility vehicle stemmed, not from the insufficiency of warning devices but rather his following too closely behind a large civilian truck traveling in the inside lane and attempting to pass that vehicle without a clear view of upcoming traffic in the curb lane. Such an admission belies any notion that Tovey's alleged gross negligence was "the one most immediate, efficient, and direct cause" of plaintiff's injuries. *Robinson*, *supra*.