STATE OF MICHIGAN

COURT OF APPEALS

ZACHARY KOTT-MILLARD,

Plaintiff-Appellee,

v

CITY OF TRAVERSE CITY and L. CLINCH MARINA DUNCAN,

Defendants-Cross Plaintiffs,

and

BARRY SMITH,

Defendant/Cross Plaintiff-Appellant,

and

ROBERT COLE, CARL REICH ELECTRIC, INC., FLOTATION DOCKING SYSTEMS, INC., WAGGENER ELECTRIC COMPANY, SAUNDERS ELECTRIC, INC., SIMPLEXGRINNELL, LP, PHILLIP NAULT, and DALE STEVENS ,

Defendants,

and

GLAWE, INC., SMITHGROUP JJR, LLC d/b/a SMITHGROUP JJR, and RHOADES ENGINEERING CORP.,

Defendants-Cross Defendants.

MICHAEL J. LONG, Personal Representative for the Estate of MICHAEL KNUDSEN,

Plaintiff-Appellee,

UNPUBLISHED
June 5, 2014

No. 314971
Grand Traverse Circuit Court
LC No. 2012-028981-NO

v

No. 314975
Grand Traverse Circuit Court
LC No. 2012-029041-nO

CITY OF TRAVERSE CITY and L. CLINCH MARIANA DUNCAN,

Defendants-Cross Plaintiffs,

and

BARRY SMITH,

Defendant/Cross Plaintiff-Appellant,

and

ROBERT COLE, CARL REICH ELECTRIC, INC., WAGGENER ELECTRIC COMPANY, SAUNDERS ELECTRIC, INC., SIMPLEXGRINNELL, LP, PHILLIP NAULT, and DALE STEVENS,

Defendants,

and

GLAWE, INC., SMITHGROUP JJR, LLC. d/b/a SMITHGROUP JJR, and WHOADES ENGINEERING CORP.,

Defendants-Cross Defendants.

MICHAEL J. LONG, Personal Representative of the Estate of MICHAEL KNUDSEN,

Plaintiff-Appellant,

v

No. 315043
Grand Traverse Circuit Court
LC No. 12-029041-NO

CITY OF TRAVERSE CITY, and L. CLINCH MARINA DUNCAN

Defendants/Cross Plaintiffs-
Appellees,

and

SMITHGROUP JJR, LLC, CARL REICH ELECTRIC, INC., WAGGENER ELECTRIC CO., and GLAWE, INC.,

Defendants.

ZACHARY KOTT-MILLARD,

Plaintiff-Appellant,

v

No. 315044
Grand Traverse Circuit Court
LC No. 12-028981-NO

CITY OF TRAVERSE CITY and L. CLINCH MARINA DUNCAN,

Defendants/Cross Plaintiffs-
Appellees,

and

ROBERT COLE,

Defendant-Appellee,

and

CARL REICH ELECTRIC, INC., WAGGENER ELECTRIC, CO, and GLAWE, INC.,

Defendants.

Before: CAVANAGH, P.J., and OWENS and M.J. KELLY, JJ.

PER CURIAM.

These appeals have been consolidated to advance the administration of the appellate process. In Docket Nos. 314971 and 314075, defendant, Barry Smith, appeals as of right from a circuit court order denying his motion for summary disposition under MCR 2.116(C)(7) (immunity granted by law). We reverse and remand to the trial court for entry of summary disposition in favor of Smith.

In Docket Nos. 315043 and 315044, plaintiffs, Michael J. Long, as personal representative of the estate of Michael Knudsen, and Zachary Kott-Millard, appeal by leave

granted the same order, which granted summary disposition to defendants, Traverse City, Duncan L. Clinch Marina, and Robert Cole. We affirm.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case involves the electrocution and drowning death of 18-year-old Michael Knudsen and the serious personal injury of plaintiff Zachary Kott-Millard. On August 15, 2011, Knudsen jumped off the F dock into the water at defendant Duncan L. Clinch Marina. Knudsen surfaced and screamed that he could not swim. Kott-Millard jumped into the water to help Knudsen. Kott-Millard began screaming, "Current. There's current in the water." Holly Sellers observed the incident and began taking her shoes off intending to help the boys. When Sellers heard "current" she assumed there was an undertow, but then was told by another man not to jump in because there was electricity in the water.

One of Knudsen and Kott-Millard's friends who was present was able to pull Kott-Millard out of the water. Sellers continued to attempt to help Knudsen, but when she grabbed him the current began to run through her as well. Paramedics arrived and removed Knudsen from the water after the electricity had been turned off. Knudsen was taken to the hospital where he was pronounced dead at 8:00 p.m. An autopsy revealed that the cause of death was asphyxia by drowning due to low voltage electrocution.

Following the incident, electricians from Windemuller Electric inspected the dock and prepared a report. The report stated,

> We found corroded, broken, and over-heated equipment ground materials and an ungrounded conductor that had worn through its insulation making contact with the junction box. . . . It appears that over time the motion or vibration of the dock began to wear at the insulation of the ungrounded conductor. . . . The insulation on the grounding conductor heading further out on the dock was completely melted and the copper was brittle and disintegrating.

Plaintiffs each filed a negligence action, which were consolidated by stipulation, against, among others, Traverse City, the marina, Robert Cole, the director of public service for the city, and Barry Smith, the harbormaster (collectively referred to as "the city defendants").[1] Plaintiffs alleged that the city's operation of the marina is a proprietary function because it charges fees and is engaged in an operation for profit. Plaintiffs also alleged that as governmental employees, Cole and Smith were grossly negligent.

The city defendants jointly moved for summary disposition based on governmental immunity. The trial court granted the city and the marina's motion for summary disposition finding that the operation of the marina was a governmental function and did not fall under the proprietary function exception to governmental immunity. The trial court also granted summary

[1] The others include the contractors and engineers who performed renovations on the marina. They are not parties to these appeals.

disposition to defendant Cole stating that he was entitled to governmental immunity because his conduct did not constitute gross negligence. However, the trial court denied defendant Smith's motion for summary disposition, finding that there was a genuine issue of material fact whether his conduct constituted gross negligence. These appeals followed.

II. DOCKET NOS. 314971 AND 314975

Defendant Smith argues that the trial court erred when it denied his motion for summary disposition under MCR 2.116(C)(7), because he is a government employee, he was not grossly negligent, and, even if he were, his gross negligence was not the proximate cause of plaintiffs' injuries. A trial court's decision to grant or deny a motion for summary disposition under MCR 2.116(C)(7) is reviewed de novo to determine if the moving party was entitled to judgment as a matter of law. *Diamond v Witherspoon*, 265 Mich App 673, 681; 696 NW2d 770 (2005). "A motion under MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties." *Id.* (quotation marks and citations omitted). We accept plaintiff's well-pleaded allegations as true, except those contradicted by documentary evidence. *Oliver v Smith*, 290 Mich App 678, 683; 810 NW2d 57 (2010). "If reasonable jurors could honestly reach different conclusions regarding whether conduct constitutes gross negligence, the issue is a factual question for the jury." *Id.* at 685.

Government officers and employees are immune from tort liability if (1) they are acting or reasonably believe they are acting within the scope of their employment, (2) their "conduct does not amount to gross negligence that is the proximate cause of the injury or damage," and (3) the governmental agency is engaged in a governmental function. MCL 691.1407(2). Here, the parties only contest whether defendant Smith was grossly negligent. Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). This Court has stated,

> [G]ross negligence . . . suggests . . . almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks. It is as though, if an objective observer watched the actor, he could conclude, reasonably, that the actor simply did not care about the safety or welfare of those in his charge. [*Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004).]

"The proximate cause" means that the government employee's conduct must be "the one most immediate, efficient, and direct cause preceding an injury." *Seldon v Suburban Mobility Auth for Regional Transp*, 297 Mich App 427, 441; 824 NW2d 318 (2012) (quotation marks and citations omitted).

Smith asserted that he was "not aware of any electrical problems associated with F Dock prior to this incident." Smith also asserted that no one had reported seeing, hearing, or feeling any electrical activity in the water near the F dock. Craig Witt and Abbey Waltz, who were at the marina the day before the accident, both testified that they had seen arcing light and heard loud buzzing near the E dock. However, Witt and Waltz did not report what they saw to anyone at the marina. And marina employees who were working that day testified that they had not observed the arcing or heard the buzzing described by Witt and Waltz. Moreover, according to a

diagram of the marina, the E dock is located on the opposite side of the harbor from the F dock—over 200 feet away.

Keisha Bell and Jordan Newstead described feeling electricity in the water near the F dock earlier that summer, but neither one reported their experiences to anyone at the marina. Jesse Williams also testified that he had felt electricity in the water near the F dock over a year before the accident. He testified that after feeling the electricity he floated his boat to a fuel pump and told the dock attendant that he had felt a shock in the water. He was unable to recall specific details including whether the dock attendant was male or female and whether he had used the word "electricity" or "shock." Additionally, Michelle Mackey, who was paddle boarding with her husband Todd Mackey in the marina on June 25, 2011, testified that a man who appeared to be 50 years old "came running out [with urgency] and said that we needed to get out of the water . . . because he believed that there was live—well, I don't know if he said he believed it or if he thought there may be live electricity in the water."

Plaintiffs argue that this evidence at the very least creates a fact question as to whether defendant Smith was aware of the danger of electricity in the water prior to the accident. Plaintiffs assert it is for the jury to decide whether Smith was informed by his staff of the buzzing and bright arcing witnessed by Witt and Waltz. Smith, however, argues that no reasonable juror could conclude that he was aware of the danger without relying on impermissible speculation. Thus, the resolution of this issue turns on the distinction between a reasonable inference and conjecture or speculation. Our Supreme Court provided the distinction between a reasonable inference and an impermissible conjecture as follows:

> "[A] conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence." [*Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994), quoting *Kaminsi v Grand Trunk WR Co*, 347 Mich 417, 422; 79 NW2d 899 (1956).]

The Court makes clear that when there is a "reasonable basis" for an inference, the question can go to a jury, but when "the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced," it is an issue for the trial court to decide. *Id.* at 165.

Even when viewed in the light most favorable to plaintiffs, there is no record evidence that reasonably leads to the conclusion that Smith engaged in "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." To so conclude would require the jury to find that Smith knew that there was a danger and decided not to do anything about it. This is not a case where there is conflicting testimony about what Smith knew—no witness testified that he or she told Smith directly about a danger of electrocution. The argument is that Smith "must have known" based on the surrounding circumstances. Witt and Waltz testified that they saw arcing but did not report what they saw. They assumed someone would see it. Plaintiffs' argument asks the jury to assume that not only did someone at the marina see

the arcing, but that they reported it to Smith. The jury could assume that the person who shouted at the Mackeys to get out of the water was Smith, but there is no evidence that it was. Thus, to conclude that Smith knew that the water was electrified and did not care if anyone were electrocuted, the jury would be required to speculate. Accordingly, we reverse the trial court's determination that a genuine issue of material fact exists whether Smith was grossly negligent.

III. DOCKET NOS. 315043 AND 315044

Plaintiffs argue that the trial court erred when it granted defendant Cole's motion for summary disposition under MCR 2.116(C)(7) because Cole had notice that the water was electrified and did not act. According to the city's organization chart, Cole oversees nine separate city agencies including garbage, parks and recreation, and water systems. There is no evidence, however, that Cole was directly informed about an electrical problem at the marina. Thus, if the case proceeded to trial, the fact-finder would be asked to speculate from a presumption that because Smith was aware of the problem (itself a presumption predicated on pure speculation), defendant Cole must have been aware also, given his position in the hierarchy of city government. Because this matter involves pure speculation, the trial court properly granted summary disposition in this regard. *Skinner*, 445 Mich at 165.

Plaintiffs also argue that Cole was grossly negligent because he acknowledged receipt of an owner and operator's manual for the electrical system and yet failed to follow its recommendations. Plaintiffs argue that the owner and operator's manual states that a life-threatening condition could occur if the electrical system is not inspected annually.

The first sentence of the manual, under the heading "Electrical System Design" states, "The electrical system is designed and installed under the 1990 NEC specifications and should require very little attention throughout the life of the marina. The manual next states, "Flexible conduit jumps at the ramp's expansion joint however, are prone to winter damage as, cold temperatures significantly reduce the conduit's flexibility." Further down the page are the words "USE EXTREME CAUTION" in all-caps with a skull and cross bones icon on either side of the text. The text below this reads as follows:

> In the event that one of your electrical system's main disconnect breakers becomes kicked open there exists a potentially very dangerous scenario—one which remains imperative that all personnel involved with the marina's operation must be aware of. The "potential scenario" involves a direct short (or fault) of a "hot" feeder—perhaps having been cut by constant flexing movement within an internally steel-lined flex conduit. . . . With a hot line contacting the ground system, a fault has occurred, and if working properly, the fault will "kick" that circuit's breaker.
>
> Depending on the fault's severity, it is possible (through the micro second necessary to "kick" the referenced breaker) for the ground system's integrity to be destroyed via a blowout of the ground cable itself. If the circuit's faulted breaker is subsequently reset (without further checks), a highly volatile and dangerous situations may *statically* exist. . . . THE ENTIRE BASIN IS NOW ELECTRIFIED. [Italics and capitalization in original.]

This information is followed by a skull and crossbones, a bomb with a lit fuse, and an exclamation point.

The manual goes on to state that to avoid this situation,

> it is imperative to have a licensed electrician perform ground system integrity checks as well as determining the absence of any voltage within the basin—that is: once the fault has been corrected and the circuit's breaker has been reset.
>
> It is furthermore recommended that once each year, all the power service to the marina is shut off and each of the feeder conduits inspected visually at the connections for any wear or failure. If any problem is seen, the power should remain off until an electrician can assess the extent of the wear and repair if necessary.

In his affidavit, Cole states that he reviewed the manual and, "[w]ith respect to the electrical system, I read and understood that it should require very little attention throughout the life of the marina." He further states, "I did not understand the Owner's and Operator's Manual to require or even recommend that each and every junction box (there are 80) be inspected on a yearly basis by anyone much less a licensed electrician." In his deposition, Cole was asked to describe what he understood the "potential scenario" described in the manual to be. Looking at the manual he answered,

> He describes a main breaker kicking out, in other words, kicking the system off and he's cautioning against reconnecting that breaker without checking to make sure of what the cause was. If a breaker switch kicks off at one of the main panels he says you don't go up there and turn it back on because there might be something wrong that would then charge the water.

Cole also testified as follows:

> *Q.* Did the city ever hire a licensed electrician to perform ground system integrity checks in 2003 to 2011?
>
> *A.* No.
>
> *Q.* Why not?
>
> *A.* I don't have an answer for that.
>
> *Q.* Did this document [the manual] recommend that that be done?
>
> *A.* You read that into the record yourself.
>
> *Q.* So the answer would be yes, correct?
>
> * * *

> *A.* He's talking about here—I think you're trying to confuse me obviously, but he's talking about—again, I'm going back to what you just cited. It says this is a life threatening situation. If it occurs it is imperative to have a licensed electrician perform ground system integrity checks as well as determining the absence of any—once the fault has been corrected and the circuit breaker has reset, so we're still talking about the circuit breaker situation, which has not occurred.

Cole also testified that the "ramp's expansion joints" described in the manual are the areas of the dock where the dock connects to the shore. Further, the electrical inspection performed after the accident revealed, "corroded, broken, and over-heated equipment ground materials and an ungrounded conductor that had worn through its insulation making contact with the junction box."

Cole's understanding of the manual is reasonable. The manual generally states that the electrical system should "require very little attention." However, it also addresses the issue of "flexible conduit jumps at the ramp's expansion joints" and the deadly "potential scenario" described in detail above. The manual recommends yearly visual inspections of the "feeder conduits." Smith stated that "[i]n addition to the routine maintenance, we perform regular, if not daily, visual inspections of the docks, including the pedestals; particularly where the docks connect to the shore since we have had some issues in that regard." The manual does not appear to require annual "ground system integrity checks." Rather, ground system integrity checks are required if the main breaker kicks out. The ground system integrity checks are described as a response to an event, not as an item of routine maintenance. That these checks were never performed does not lead to the conclusion that defendant Cole was grossly negligent.

Moreover, the evidence suggests that the cause of the electrocution was breakage and corrosion in a junction box. The manual does not specifically address inspection or maintenance requirements of the junction boxes. Again, the question comes down to whether Cole was aware of a danger and acted with disregard for safety. There does not appear to be any direct evidence that Cole knew there was a hazardous situation present at the marina. Even in the light most favorable to the plaintiffs, the evidence at most suggests that Cole may have been negligent in fully understanding the need for inspections of the electrical system. "[E]vidence of ordinary negligence does not create a material question of fact concerning gross negligence." ." *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999). "Rather, a plaintiff must adduce proof of conduct 'so reckless as to demonstrate a substantial lack of concern for whether an injury results.' To hold otherwise would create a jury question premised on something less than the statutory standard." *Id*. at 123, quoting MCL 691.1407(2)(c). Accordingly, we conclude that the trial court did not err by granting summary disposition to Cole.

Finally, plaintiffs argue that the trial court erred when it held that the marina was not a proprietary function. MCL 691.1407(1) provides, "Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." A governmental function is "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f). However, a governmental agency is not immune from tort liability if it is engaged in a proprietary function. MCL 691.1413. A proprietary

function is defined as "any activity which is conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding, however, any activity normally supported by taxes or fees." MCL 691.1413. To qualify as a proprietary function, "The activity (1) must be conducted primarily for the purpose of producing a pecuniary profit, and (2) it cannot be normally supported by taxes and fees." *Coleman v Kootsillas*, 456 Mich 615, 621; 575 NW2d 527 (1998). It does appear that the marina generates enough revenue so that it is not supported by city taxes. Thus, resolution of this issue depends on the primary purpose of the enterprise.

Two considerations must be taken into account to determine whether an agency's primary purpose is to produce a pecuniary profit: (1) whether a profit is actually generated, and (2) where the profit (if any) is deposited and how it is spent. *Id.*

> "If the profit is deposited in the governmental agency's general fund or used to finance unrelated functions, this could indicate that the activity at issue was intended to be a general revenue-raising device. If the revenue is used only to pay current and long-range expenses involved in operating the activity, this could indicate that the primary purpose of the activity was not to produce a pecuniary profit." [*Id*. at 621-622, quoting *Hyde v Univ of Mich Bd of Regents*, 426 Mich 223, 259; 393 NW2d 847 (1986).]

Plaintiffs rely on the affidavit testimony of economist Michael H. Thomson, who opines that the marina is a "business activity which has economic, or 'pecuniary' benefits." Thomson's analysis is based on city financial documents and an economic impact model. However, whether the marina has an economic impact is not on point. The focus is on whether the marina's primary purpose is to produce a pecuniary profit—whether the marina has a positive economic impact on area businesses might be correlated to this consideration, but it is not coextensive. Thomson states, "Marinas provide significant economic benefits to their adjacent local community. . . . [T]he boating public will be drawn to the downtown area of Traverse City, and this will contribute to increased economic activity for Traverse City restaurants, grocery stores, other retail shops, and local hotels/motels." The same, however, could be said about a city's efforts to maintain adequate roadways and streetlights. A city's road commission is not transformed into a proprietary function simply because good roads provide an economic benefit to local businesses. On the contrary, providing and maintaining infrastructure to support the local economy is precisely what we expect municipal governments to do.

Thomson also opines that the marina is operating at a profit because "marina revenues (generated by user fees) were more than enough to cover all (non-depreciation) operating costs for each of the last 6 years." On the other hand, Thomson recognizes that when depreciation is factored in, the marina "has lost money in 4 of the last 6 years." Plaintiffs offer no principled reason why depreciation should be excluded from the calculation of the marina's profit. Depreciation of a capital expenditure (such as equipment) is commonly understood as a method for spreading the cost of the expenditure over its useful life. It is, therefore, proper to include depreciation in calculating business profits. See *Prod Credit Ass'ns of Lansing v State, Dep't of Treasury, Revenue Div*, 404 Mich 301, 321; 273 NW2d 10 (1978) (stating that "the depreciation allowance is part of the computation of net profits").

Rather than making a profit, it appears that the marina has just barely been breaking even. Chart 1 attached to Thomson's affidavit shows that (based on net income including depreciation) the marina lost close to $85,000 over the 6 years between 2006 and 2011. Charts 2, 3, and 4 reflect strong cash flows, but also indicate that a large portion of the revenue generated by the marina went to paying down the marina's loans.

The second factor, where the profit (if any) is deposited and how it is spent, also weighs against holding that the marina is operated primarily for profit. According to chart 5 attached to Thomson's affidavit, the marina transferred $23,900 to the city's general fund in 2010 and $21,900 in 2011. This is described in the chart as "City Fees" equal to 5% of revenue. Thomson challenges the characterization of this 5% transfer as a fee because it is "not based upon a reliable estimate of actual administrative costs" but rather on the revenues generated by the marina. Plaintiffs provide no authority for the proposition that a city fee must be based on reasonable estimates of actual costs. In considering the issue of whether a municipal fee is so excessive that it constitutes a tax, this Court stated that "[f]ees charged by a municipality must be reasonably proportionate to the direct and indirect costs of providing the service for which the fee is charged." *Dawson v Secretary of State*, 274 Mich App 723, 743; 739 NW2d 339 (2007) (quotation marks and citation omitted). This suggests a type of rational basis approach rather than one that requires municipalities to conform their fees to actual costs of administration. The marina's revenue comes primarily from renting slips to boaters. Revenue is, therefore, a somewhat accurate measure of how much business activity the marina engages in from year to year. That the marina transferred 5% of its revenue in the years 2010 and 2011 does not weigh in favor of holding that the marina is primarily run for profit.

Plaintiff argues that there is, at the very least, a genuine issue of material fact as to whether the marina is a proprietary function. Whether immunity applies, however, is not a jury question, but rather a question of law for the court to decide. *Seldon*, 297 Mich App at 433. Accordingly, we conclude that the trial court did not err in granting the marina summary disposition based on governmental immunity.

IV. CONCLUSION

In Docket Nos. 314971 and 314975, we reverse the trial court's order denying defendant Smith's motion for summary disposition and remand to the trial court for entry of summary disposition in favor of Smith.

In Docket Nos. 315043 and 315044, we affirm the trial court's order granting summary disposition to defendants Cole, the marina, and the city.

/s/ Mark J. Cavanagh
/s/ Donald S. Owens
/s/ Michael J. Kelly