STATE OF MICHIGAN

COURT OF APPEALS

DANIEL MOORE,

Plaintiff-Appellant,

v

ADAM WHITING and OAKLAND COUNTY,

Defendants-Appellees

and

THE TRAVELER'S INDEMNITY COMPANY,

Defendant.

UNPUBLISHED
November 10, 2015

No. 323697
Oakland Circuit Court
LC No. 2013-135917-NF

Before: SAWYER, P.J., and K. F. KELLY and FORT HOOD, JJ.

PER CURIAM.

In this action involving a motor vehicle accident, plaintiff Daniel Moore appeals as of right the trial court's order denying plaintiff's motion to accept a late-filed brief in response to defendants Oakland County and Adam Whiting's motion for summary disposition and its order granting summary disposition in favor of Oakland and Whiting pursuant to MCR 2.116(C)(7).[1] We affirm.

Late one night, plaintiff was walking down a poorly lit road with a gravel shoulder. Plaintiff stated during his deposition that he was walking on the gravel shoulder on the right-hand side of the road, walking with traffic. Whiting, an on-duty Oakland County Sheriff driving his patrol car, was in the same area. Uncontroverted testimony established that Whiting was driving the speed limit with his headlights engaged. At some point, Whiting's vehicle struck plaintiff causing him injury. Whiting stated that his vehicle never left the road while plaintiff said he never left the shoulder of the road. Plaintiff also stated, however, that he did not hear

[1] The trial court subsequently entered an order dismissing defendant Traveler's Insurance Company as the final remaining party and closing the case, which is not at issue in this appeal.

Whiting's vehicle move from the road and hit gravel before hitting him. Plaintiff admitted to drinking alcohol that night, and an on-scene breathalyzer read 0.081 BAC.

Later, plaintiff filed the instant suit alleging that Whiting was both negligent and grossly negligent and the proximate cause of plaintiff's injury, thereby arguing that Whiting and Oakland were not protected by governmental immunity. Oakland and Whiting moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that they were protected by governmental immunity because plaintiff had not provided sufficient evidence that Whiting was either negligent or grossly negligent. The trial court entered a scheduling order, which ordered that plaintiff's response was required to be filed and served by 4:30 p.m. on May 19, 2014. The order also included the following bolded and underlined warning regarding late-filed briefs: "**If briefs are not timely filed, the Court SHALL assume that the party, whether or not represented by counsel, does not have any authority for his/her/its position(s). Failure to timely file briefs also will result in that party's waiver of oral argument.**"

On May 15, 2014, the trial court entered a stipulated order that extended the time for plaintiff to file his response. The order noted that plaintiff's counsel had a death in the family, necessitating the extension, and that the response brief would be due on May 26, 2014. The order eventually entered by the trial court, however, changed the due date to May 27, 2014, because May 26, 2014, was Memorial Day and the trial court was closed. The order also stated that the brief was due at 10:00 a.m.

Plaintiff failed to abide by the amended schedule, filing his response brief on May 27, 2014, at 5:08 p.m., after close of business. Plaintiff moved the trial court to accept his late-filed brief, arguing that it would be unjust to refuse. The trial court denied the motion, holding that it was permitted to strictly enforce its scheduling orders and it need not consider the excuses provided by plaintiff. Subsequently, the trial court entered an order granting Oakland and Whiting's motion for summary disposition. The trial court stated that it was required to accept Oakland and Whiting's uncontroverted evidence, considering plaintiff had not filed a response. As such, no reasonable juror could determine that Whiting was either negligent or grossly negligent, or that his actions were the proximate cause of plaintiff's injuries, and Oakland and Whiting were protected by governmental immunity. Plaintiff now appeals those orders.

Plaintiff first argues that the trial court abused its discretion in refusing to accept his late-filed response brief. We disagree.

"This Court reviews for an abuse of discretion a trial court's decision to decline to entertain motions filed after the deadline set forth in its scheduling order." *Kemerko Clawson LLC v RXIV Inc*, 269 Mich App 347, 349; 711 NW2d 801 (2005). A trial court is permitted to set scheduling deadlines when it "concludes that such an order would facilitate the progress of the case." MCR 2.401(B)(2)(a). "The trial court also has the discretion to decline to consider motions filed after the deadline." *Velez v Tuma*, 283 Mich App 396, 409; 770 NW2d 89 (2009), rev'd in part on other grounds 492 Mich 1 (2012). When a trial court uses its discretion to determine whether it should consider late-filed briefs, it has "no such obligation" to determine whether its decision is "just under the circumstances." *Kemerko Clawson LLC*, 269 Mich App at 352-353. See also *EDI Holdings LLC v Lear Corp*, 469 Mich 1021; 678 NW2d 440 (2004).

Plaintiff argues that the trial court's refusal to consider the late-filed brief was too severe a sanction against plaintiff for a brief filed only seven hours too late. First, however, plaintiff misconstrues the trial court's action. This was not a sanction. It was merely the trial court abiding by its own scheduling order. Further, the trial court is permitted to enforce its scheduling order without the obligation of determining whether that decision is "just under the circumstances." *Kemerko Clawson LLC*, 269 Mich App at 352-353. As such, the trial court's refusal to consider the brief, or plaintiff's excuses regarding the brief's tardiness, was not an abuse of discretion. *Id*.

Next, plaintiff argues that the trial court improperly granted summary disposition in favor of Oakland and Whiting. Once again, we disagree.

"This Court reviews decisions on motions for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law." *Alcona Co v Wolverine Environmental Prod, Inc*, 233 Mich App 238, 245; 590 NW2d 586 (1998). "When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them." *Dextrom v Wexford Co*, 287 Mich App 406, 428; 789 NW2d 211 (2010). "Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by immunity granted by law." *State Farm Fire & Cas Co v Corby Energy Servs, Inc*, 271 Mich App 480, 482; 722 NW2d 906 (2006). The applicability of governmental immunity and its statutory exceptions are also reviewed de novo. *Moraccini v Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012). Summary disposition is proper where no relevant factual dispute exists regarding whether a claim is barred pursuant to MCR 2.116(C)(7). *Id*.

The governmental tort liability act (GTLA) provides immunity for governmental agencies where "the governmental agency is engaged in the exercise or discharge of a governmental function[,]" except where otherwise provided within the act. MCL 691.1407(1). "The term 'governmental function' is to be broadly construed, and the statutory exceptions are to be narrowly construed." *Maskery v Bd of Regents of Univ of Michigan*, 468 Mich 609, 614; 664 NW2d 165 (2003). One such exception is found in MCL 691.1405, which, in pertinent part, states that "[g]overnmental agencies 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[.]" Another exception to the GTLA, codified at MCL 691.1407(2), considers immunity for governmental employees:

> (2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency . . . is immune from tort liability for an injury to a person or damage to property caused by the . . . employee . . . while acting on behalf of a governmental agency if all of the following are met:
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> (a) The . . . employee . . . is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) The . . . employee's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

Considering the plain and unambiguous language of the statutes, as this Court must, *Bloomfield Twp v Kane*, 302 Mich App 170, 174; 839 NW2d 505 (2013), MCL 691.1405 provides an exception to governmental immunity for a governmental agency when bodily injury results from the agency's employee's negligent operation of a motor vehicle owned by the agency. In other words, Oakland loses its governmental immunity if Whiting's operation of the patrol car was negligent and resulted in plaintiff's injuries. See MCL 691.1405. The plain and unambiguous language of MCL 691.1407(2) provides an exception to the immunity of a governmental employee where an employee's gross negligence proximately causes an individual's injury. Thus, Whiting maintains governmental immunity for plaintiff's injuries unless there is evidence that Whiting's conduct amounted to gross negligence, and that conduct was the proximate cause of plaintiff's injury. See MCL 691.1407(2). The only disputed issues in the present case revolve around the alleged negligence or gross negligence of Whiting and whether his action was the proximate cause of plaintiff's injuries.

Because no reasonable juror could determine that Whiting was negligent or grossly negligent, summary disposition was proper. Because plaintiff did not file a response brief, he is left only with the well-pleaded allegations of his complaint, and only to the extent that evidence provided by Oakland and Whiting has not specifically contradicted those allegations. *Dextrom*, 287 Mich App at 428. In his complaint, plaintiff alleged that Whiting was negligent when he operated his vehicle without proper brakes or observation; that he drove in a negligent, careless, or reckless manner; that he operated the vehicle at a high, dangerous, and unlawful rate of speed; and that he caused the vehicle to collide with a pedestrian lawfully on the shoulder of the roadway.

Oakland and Whiting provided the trial court with adequate evidence to contradict plaintiff's claims. The evidence showed that Whiting was driving the speed limit with his headlights on. Further, Whiting testified that he never left the road and that investigation of the gravel shoulder showed no tire tracks or footprints. Further, plaintiff testified that he did not hear the vehicle enter the gravel portion of the roadway. As such, all plaintiff's allegations of negligence or gross negligence were negated by evidence provided by Oakland and Whiting. "The mere occurrence of an accident is not, in and of itself, evidence of negligence. The plaintiff must present some facts that either directly or circumstantially establish negligence." *Clark v Kmart Corp*, 242 Mich App 137, 140; 617 NW2d 729 (2000), rev'd on other grounds by 465 Mich 416 (2001), citing *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 9; 279 NW2d 318 (1979).

Plaintiff argues that the trial court should have considered cellular telephone evidence that suggested Whiting was texting while driving at the time of the accident, because that documentary evidence was supplied in plaintiff's response to defendant's motion in limine. However, a trial court is "not obligated under MCR 2.116(G)(5) to scour the record to determine whether there exists a general issue of fact to preclude summary disposition." *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 381; 775 NW2d 618 (2009) (citation and internal quotation marks omitted). Plaintiff should have raised the argument in a

timely filed response brief. It was not the trial court's duty to "scour the record" and make plaintiff's argument for him. See *id*.

Therefore, because there are no uncontroverted allegations of negligence or gross negligence on the part of Whiting, Oakland and Whiting are entitled to the protection of governmental immunity and summary disposition pursuant to MCR 2.116(C)(7).

Affirmed. Defendants, the prevailing parties, may tax costs. MCR 7.219.

/s/ David H. Sawyer
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood