STATE OF MICHIGAN

COURT OF APPEALS

ANGELA BARRETT,

Plaintiff-Appellee,

and

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Intervening Plaintiff,

v

MARK ANTHONY MILAI,

Defendant-Appellant.

UNPUBLISHED
December 15, 2011

No. 300968
Oakland Circuit Court
LC No. 2009-098872-NO

Before: O'CONNELL, P.J., and MURRAY and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order denying his motion for summary disposition pursuant to MCR 2.116(C)(7). We reverse and remand for entry of an order granting defendant's motion for summary disposition.

I. BACKGROUND

This case arises out of an accident on a hay ride during a yearly family party at Camp Dearborn. As was typical in years past, on October 6, 2007, plaintiff's group met at a reserved pavilion within Camp Dearborn about an hour and a half before the scheduled hay ride to enjoy food, drinks, and socialization.[1] Defendant was the driver of the tractor pulling the wagon for the hay ride. When defendant arrived at the pavilion, about 30 people boarded the wagon for the hay ride. Defendant drove through Camp Dearborn along the normal route while weaving and

[1] Although plaintiff's blood alcohol level was a .19 about an hour after the accident, we do not consider whether plaintiff's intoxication contributed to her accident.

completing figure eights.[2] Towards the end of the hay ride plaintiff, who was sitting at the edge of the wagon, fell out and sustained serious bodily injury.[3] According to Russell Swinson, plaintiff's husband, the accident occurred when the wagon made a sharp turn:

> *[Mr. Swinson]*: We got back – everybody got back on the wagon and we started – we went down a side hill, pretty good slope, and then we got on to concrete or pavement, wherever we were, and he was swerving around; swerving left, swerving right. And then he started going straight for a while, so I let go of Angela thinking it was a little break time since we were on concrete.
>
> And then he swerved slowly to the right and *then whipped the wheel to the left. That's when the trailer jerked and that's when she flew off.*
>
> *[Mr. Irving]*: So at some point after leaving the grassy area where the smoke break was, the ride drove out on to regular roadway?
>
> *[Mr. Swinson]*: I think it was some type of parking lot, but I'm not sure. It was something concrete, yes.
>
> *[Mr. Irving]*: And your testimony is that the driver was turning the wheel while going through that road area?
>
> *[Mr. Swinson]*: When we were in the parking lot area?
>
> *[Mr. Irving]*: After you got on the -
>
> *[Mr. Swinson]*: Yes, he was going straight. Then he was swerving left and right very, very little. Whatever you want to call that.
>
> And then he was just kind of going straight, so I let go of Angela for a minute so my finger could rest and regrip my shoes. And about probably 15 seconds after I let go of Angela's belt buckle that's when he started going a little bit to the right *and then he whipped the wheel left and she flew right off.* [Emphasis added.]

Plaintiff filed her complaint against defendant alleging that he was grossly negligent in driving the wagon during the hay ride and, after discovery concluded, defendant filed a motion

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[2] Apparently these hay rides were not your typical hay ride. According to most witnesses, the attraction of these hay rides was the fact that they swerved and moved around a lot, causing more excitement for riders than attained in a typical hay ride. In addition, passengers were permitted to drink alcohol and throw hay at each other during the hay ride.

[3] Even though plaintiff attached numerous medical records highlighting her injury, we note that the nature of the injury does not impact the determination of liability, which is the only issue on appeal. See *Maiden v Rozwood*, 461 Mich 109, 127 n 10; 597 NW2d 817 (1999).

for summary disposition asserting governmental immunity. Ultimately, the trial court determined that there was a question of fact regarding whether defendant operated the wagon in a grossly negligent manner because of the disputed testimony regarding how fast the tractor was going at the time of the accident. From this order, defendant now appeals as of right.

II. ANALYSIS

Defendant argues that he is entitled to governmental immunity pursuant to MCL 691.1407 because plaintiff failed to prove that his conduct was grossly negligent. The trial court's granting or denial of a motion for summary disposition under MCR 2.116(C)(7) is reviewed de novo. *Grimes v Mich Dep't of Transp*, 475 Mich 72, 76; 715 NW2d 275 (2006). "Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by immunity granted by law. To survive such a motion, the plaintiff must allege facts justifying the application of an exception to governmental immunity." *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). When determining whether summary disposition is appropriate under MCR 2.116(C)(7), this Court "consider[s] all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Id*. "If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred." *Holmes v Mich Capital Med Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000). Plaintiff bears the burden of proving the claimed exception to governmental immunity. *Michonski v Detroit*, 162 Mich App 485, 490; 413 NW2d 438 (1987).

As defined by the Legislature, "'"[g]ross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.'" *Odom v Wayne Co*, 482 Mich 459, 469; 760 NW2d 217 (2008), quoting MCL 691.1407(7)(a). Gross negligence involves "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). Typically, a genuine issue of material fact regarding gross negligence may be raised through evidence of a disregard of a known danger, or proceeding in the same manner as before when an injury occurred. See, e.g., *id*; *LaMeau v Royal Oak*, 289 Mich App 153, 180; 796 NW2d 106 (2010) (because defendants were warned about dangerous condition and failed to subsequently act, a question of fact existed); *Staton v Battle Creek*, 237 Mich App 366, 375; 603 NW2d 285 (1999) aff'd 466 Mich 611 (2002) (although defendant knew of occasional problems with the forklift brakes before the accident, defendant took appropriate action to notify the department and was otherwise qualified to operate the forklift, no gross negligence).

In looking at the evidence in the light most favorable to plaintiff, plaintiff has failed to establish a genuine issue of material fact regarding whether defendant's conduct was grossly negligent. Plaintiff provided evidence that defendant drove the tractor at around 30 to 40 miles per hour during the hay ride. Plaintiff also provided evidence that defendant drove the wagon in the manner that the passengers expected, i.e., by swerving the wagon and doing figure eights throughout the course. However, this evidence fails to demonstrate that defendant drove the wagon with a singular disregard for a substantial risk of injury to the passengers. There was no evidence that defendant had any prior accidents while driving a hay ride, that he was aware of

any other prior accident occurring from driving in this manner, and he drove the hay ride in the manner anticipated by the other passengers. Importantly, defendant was not warned by the passengers during the hay ride that they believed his driving was dangerous, despite the fact that there were two breaks during the hay ride where passengers could have spoken to defendant.[4]

Moreover, although plaintiff's complaint alleged that the tractor had a mechanical "lurching" problem, plaintiff failed to produce any evidence that the tractor lurched at the time of her accident. The sworn testimony from plaintiff's own witnesses indicated that it was defendant's making a sharp turn that caused (at least in part) plaintiff to fall. Thus, the evidence presented by plaintiff does not raise a genuine issue of material fact that defendant's conduct was so reckless that it demonstrates a substantial lack of concern for the safety of others. *Tarlea*, 263 Mich App at 90.

Reversed and remanded for entry of an order granting summary disposition to defendant pursuant to MCR 2.116(C)(7). We do not retain jurisdiction.

Defendant may tax costs, having prevailed in full. MCR 7.219(A).

/s/ Peter D. O'Connell
/s/ Christopher M. Murray
/s/ Pat M. Donofrio

[4] Indeed, plaintiff's husband took the opportunity during a break to tell plaintiff to "slow down" with her drinking, but, admittedly said nothing to defendant about the speed he allegedly was driving.