STATE OF MICHIGAN

COURT OF APPEALS

DARREN FINDLING, as Special Personal Representative of the ESTATE OF PHILLIP E. WADE II, Plaintiff-Appellant,	UNPUBLISHED December 6, 2012
v	No. 304657 Wayne Circuit Court
CITY OF DETROIT, and SHEILA FAYE WILLIAMS, Defendant-Appellees.	LC No. 10-004443-NI

Before: JANSEN, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

Plaintiff, as special personal representative of the estate of Phillip E. Wade, appeals as of right the trial court's May 31, 2011, order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). For the reasons set forth in this opinion, we affirm in part, reverse in part, and remand for further proceedings.

I. FACTS

On December 20, 2009, defendant Sheila Faye Williams was working the midnight shift at her job as a snowplow truck driver for her employer, defendant City of Detroit (City). Specifically, at about 3:15 a.m. that morning, Williams was driving her truck southbound on Chene Road in Detroit spreading salt. Williams testified that she did not need to plow the road and that the small amount of snow on the road melted when she spread salt on it. Williams explained that Chene has two southbound lanes and two northbound lanes and that the road has two "turnaround" lanes so that motorists can change from traveling north to south etc. Williams testified that she was traveling eight miles-per-hour (mph), and that she had all of the truck's multiple lights on. Williams testified that she did not see plaintiff's decedent while she was salting the roadway. At some point, Williams decided to salt one of the turnaround lanes on Chene and after she checked her mirrors and signaled, she maneuvered her vehicle from the left-hand lane into the turnaround lane. As Williams drove into the turnaround lane, she saw decedent's vehicle and then she and decedent were involved in a collision. The collision occurred while Williams was on the outside of the turnaround lane and decedent was on the

inside of the same lane. A photograph taken after the accident showed that the passenger-side front quarter panel of decedent's vehicle was damaged.

Williams was unclear about the specifics of how the accident occurred and instead she testified at a deposition as follows:

> *Q.* Okay. Before you went into the turn onto northbound Chene, where were you? Where were you making the turn from, which lane?
>
> *A.* The one beside the turnaround, but not as close. I wasn't quite in the lane. I was about halfway, I think.

Williams testified that she was in the second lane on Chene immediately before the collision and stated that decedent hit her in the turnaround lane when decedent was making a turn. She explained, "when he came up, I'm like how did he have that much room and then he wouldn't have it . . . after he got out of the car, he said if he had just a little bit more room, he would have cleared me." Williams testified that decedent was "trying to get around me."

After the accident, both Williams and decedent got out of their vehicle. Decedent told Williams that he was "all right," but he was concerned about the damage to his vehicle because the car belonged to his mother. Two police officers eventually arrived at the scene and one of the officers filled out a police report. Williams did not see any other motorists who witnessed the collision. Williams eventually left the scene before decedent did and she did not know if decedent was able to drive his vehicle away from the scene.

On April 15, 2010, plaintiff's decedent commenced this suit to recover non-economic damages and he alleged that Williams' operated the City's truck in a grossly negligent and negligent manner when she struck his vehicle. Plaintiff's decedent alleged that he suffered a "serious impairment of body function and/or permanent serious disfigurement" when he suffered injuries to his neck, back, head, shoulders, arms, knees, chest and other external and internal body parts and injuries to the nervous system and mental anguish. After discovery commenced, plaintiff's counsel deposed Williams, however, after defendants scheduled decedent's deposition, decedent died in an unrelated incident.

Defendants moved for summary disposition on February 24, 2011, pursuant to MCR 2.116(C)(10), arguing that Williams' deposition testimony showed that she was not at fault for the accident and that plaintiff's decedent failed to produce any evidence to counter Williams' testimony. In a supporting brief, defendants noted that decedent needed to show that his injuries "rise to the level of a serious impairment of an important body function" under MCL 500.3135(1), a subsection of the no fault act.[1] However, defendants did not elaborate on this aspect of their brief.

[1] MCL 500.3101 *et seq.*

In response to defendants' motion, plaintiff's counsel submitted the following: (1) the police report from the accident scene; (2) decedent's hand-written responses to defendants' interrogatories; (3) an affidavit of Erma Kelker, decedent's mother; and (4) a photograph purportedly showing damage to decedent's vehicle. The police report included a diagram that appeared to show a collision where a "vehicle 1" changed lanes and hit the front passenger quarter panel of a "vehicle 2." A note above the diagram appeared to state, "[b]oth vehicles traveling N/B on Chene, collided V1 when changing lanes, into V2." In his responses to defendants' interrogatories, decedent stated that Williams' turned her truck into him; the interrogatories were unsworn and decedent did not sign them.

In her affidavit, Kelker averred that plaintiff's decedent called her immediately after the accident and informed her about the collision. Kelker asserted that while she was on the telephone she "heard the other driver talking to him" and that "she was telling [decedent] that she was sorry for hitting him" and that "the collision was her fault." Kelker stated, "I later found out the other driver's name was Sheila Faye Williams." Kelker averred that decedent handwrote the answers to defendants' interrogatories and stated "it is his signature on the last page" even though the only signature on the interrogatories was that of plaintiff's counsel.

In his reply brief, plaintiff's counsel argued that the affidavit, police report, interrogatories and the photograph were sufficient to create a genuine issue of material fact. Plaintiff's counsel argued that the fact that the front of decedent's vehicle was not damaged showed that decedent did not run into Williams. Counsel also noted that Williams admitted she did not know where decedent was prior to the accident and that Williams testified she was halfway in the lane next to the turnaround lane immediately before the collision. Plaintiff's counsel argued that this testimony showed Williams was at fault for the collision.

On May 17, 2011, the trial court held a motion hearing where defendants argued that the trial court should not consider decedent's answers to the interrogatories, the police report, or the Kelker affidavit because all of the evidence amounted to inadmissible hearsay. Defendants argued that the trial court should only consider Williams' deposition testimony. Plaintiff's counsel responded and argued that Williams' deposition testimony created a genuine issue of material fact because Williams testified that she was not all the way in the left lane when she moved into the turnaround lane. Plaintiff's counsel argued that the damage to the left side of decedent's vehicle was consistent with Williams moving into the left lane and hitting decedent.

The trial court refused to consider Kelker's affidavit because the court noted that the affidavit was incorrect in that Kelker averred that decedent signed his interrogatories when he plainly had not done so. The trial court then granted defendants' motion on the record. On May 31, 2011, the trial court entered a written order granting defendants' motion. This appeal ensued.

II. ANALYSIS

Plaintiff contends that the trial court erred in granting defendants' motion for summary disposition because there was a question of fact for the jury concerning Williams' negligence and because the trial court erred in refusing to consider evidence offered in opposition to defendants' motion.

We review de novo a trial court's decision on a motion for summary disposition. *Brown v Brown*, 478 Mich 545, 551; 739 NW2d 313 (2007). In reviewing a motion brought under MCR 2.116(C)(10), we consider "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Id.* at 551-552. A moving party is entitled to summary disposition under MCR 2.116(C)(10) when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." *Id*. at 552. "A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue on which reasonable minds could differ." *Campbell v Kovich*, 273 Mich App 227, 229; 731 NW2d 112 (2006). The existence of a disputed fact must be established by substantively admissible evidence as opposed to a mere possibility that the claim might be supported by evidence at trial. *Maiden v Rozwood*, 461 Mich 109, 121, 597 NW2d 817 (1999).

A. NEGLIGENCE

Plaintiff's decedent brought suit to recover non-economic damages arising from Williams' operation of a motor vehicle owned by the City, a local unit of government. In order to recover on a negligence theory, plaintiff's decedent needed to meet the applicable exceptions under the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq.* Generally, a governmental entity can be liable for the negligent acts of its employees under the vehicle exception to governmental immunity as follows:

> Governmental 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. . . . [MCL 691.1405.]

In this case, neither party disputes that defendant City of Detroit is a governmental agency, that Williams was an employee of the City, or that the City owned the salt truck that Williams was driving. MCL 691.1405. The only issue is whether there was sufficient evidence to create a genuine issue of material fact concerning whether Williams' was negligent. In order to establish a prima facie case of negligence, a plaintiff must show: "(1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). In this case, Williams had a duty to operate her vehicle with a degree of "reasonable care that would be exercised by a person of ordinary prudence" and in a manner prescribed by the motor vehicle code. See *id*. at 6-7.

Plaintiff contends that the following evidence was substantively admissible and sufficient to create a genuine issue of material fact: (1) decedent's answers to defendants' interrogatories, (2) Kelker's affidavit wherein Kelker averred that she heard Williams take responsibility for the accident; and (3) the police report.

Decedent's answers to defendants' interrogatories were not substantively admissible because they amounted to out of court statements offered for the truth of the matter asserted. See MRE 801(c). Plaintiff argues that the interrogatories were substantively admissible under MRE 804(7), which provides an exception to the hearsay rule for an unavailable declarant in relevant part as follows:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. . . .

MRE 803(24) provides the same exception to the hearsay rule, but unlike MRE 804(7), the availability of the declarant is immaterial. This Court has addressed the admissibility of evidence under MRE 803(24) as follows:

> [I]n order to be admissible under the exception found in MRE 803(24), a hearsay statement must: (1) demonstrate circumstantial guarantees of trustworthiness equivalent to the categorical exceptions, (2) be relevant to a material fact, (3) be the most probative evidence of that fact reasonably available, and (4) serve the interests of justice by its admission. There is no complete list of factors to consider when determining whether a statement has particularized guarantees of trustworthiness. [*Augustine v Allstate Ins Co*, 292 Mich App 408, 430; 807 NW2d 77 (2011) (quotations omitted).]

In this case, decedent's answers to the interrogatories lacked "circumstantial guarantees of trustworthiness." *Id*. Here, decedent's answers were prepared for the purposes of and in preparation for litigation. Plaintiff's decedent had a self-serving interest to provide responses that were favorable to his case, and defendants did not have an opportunity to cross-examine decedent. In addition, the interrogatories were unsworn and unsigned. Hence, the interrogatories were not substantively admissible under MRE 804(7) and were insufficient to create a genuine issue of material fact.[2] *Maiden*, 461 Mich at 120-121.

Kelker's affidavit did not contain substantively admissible evidence because Kelker's proffered testimony that she heard Williams take responsibility for the accident amounted to inadmissible hearsay. In particular, Kelker admitted in the affidavit and counsel admitted on the record that Kelker did not have first-hand knowledge concerning the identity of the person who allegedly took responsibility for the accident. Instead, Kelker stated that sometime after the accident, she learned of Williams' identity, i.e. through an out of court statement. Hence, the proffered testimony concerning Williams' statement amounted to inadmissible hearsay and was insufficient to create a genuine issue of material fact. See MRE 801(c); *Maiden*, 461 Mich at 120-121.

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[2] Plaintiff also contends that decedent's answers to the interrogatories were admissible under *Rockwell v Vandenbosch*, 27 Mich App 583; 183 NW2d 900 (1970). However, *Rockwell* is not binding precedent, MCR 7.215(J)(1), and it is of low persuasive value given that it was issued before the Michigan Court Rules took effect in 1985. See MCR 1.101 (the court rules took effect March 1, 1985). Furthermore, unlike the answers to interrogatories in *Rockwell*, the interrogatories in this case were unsworn. See *Rockwell*, 27 Mich App at 588-589.

Furthermore, to the extent plaintiff argues that the contents of the police report would be admissible through the testimony of a police officer, plaintiff did not offer either the deposition testimony of or an affidavit from the police officer in the lower court, and a mere promise to create a genuine issue of material fact is insufficient to oppose a motion for summary disposition. Hence, with respect to the police report, plaintiff's counsel needed to establish a foundation regarding the source of the report to allow its admission. See, generally, *Merrow v Bofferding*, 458 Mich 617, 627-628; 581 NW2d 696 (1998). Counsel failed to do so; therefore, to the extent the trial court refused to consider the police report, it did not err in doing so. *Maiden*, 461 Mich at 120-121.

Although the answers to the interrogatories, Kelker's affidavit, and the police report were not substantively admissible, Williams' deposition testimony created a genuine issue of material fact regarding whether she operated her vehicle in a negligent manner. Here, Williams testified that immediately before she maneuvered her vehicle into the turnaround lane, she was driving in the lane "beside the turnaround, but not as close. I wasn't quite in the lane. I was about halfway, I think." Williams testified that she did not see decedent immediately before changing lanes but she stated that decedent hit her in the turnaround lane. A photograph showed that the passenger-side front quarter-panel of decedent's vehicle was damaged, which was consistent with plaintiff's theory that Williams hit decedent on that side.[3] Viewing this evidence in a light most favorable to the non-moving party, we find that a rational trier of fact could conclude that Williams was negligent when she moved into the turnaround lane without assuring that there were no vehicles in that lane. *Campbell*, 273 Mich App at 229-230. Therefore, on this legal basis, the trial court erred when it granted summary disposition as to defendant City of Detroit.

B. GROSS NEGLIGENCE

A governmental employee is generally immune from damages arising from ordinary negligence pursuant to MCL 691.1407(2), which provides as follows:

> (2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each . . . employee of a governmental agency . . . is immune from tort liability for an injury to a

[3] Williams testified that the first time she actually saw decedent's car was when it was in the turnaround lane. She admitted that she never saw decedent's car before that time, never saw it behind her truck in either lane, and that she would just be speculating as to where the car had been before she first noticed it in the turnaround lane. Rather, Williams simply "assume[d] he just came from nowhere from behind the truck" because she was driving slowly. She admitted that despite indicating in her report (which she wrote a month after the accident) that decedent was traveling at 35 miles per hour, she was simply guessing because she did not notice decedent's car until immediately prior to impact, when she saw him in the turnaround lane. At that time, decedent's car was on the inside portion of the flare lane of the turnaround and Williams was on the outside portion, to the right of decedent. A reasonable juror could conclude from the evidence that Williams simply failed to notice decedent's car to the left of her before she merged from the travel lane into the turnaround lane.

> person or damage to property caused by the . . . employee . . . while in the course of employment . . . if all of the following are met:
>
> (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. [MCL 691.1407(2) (emphasis added).]

In other words, to recover from a governmental employee in tort for acts committed within the scope of the employee's authority, a claimant must prove that the employee's conduct amounted to gross negligence. MCL 691.1407(2). "Gross negligence" is defined as "conduct that is so reckless that it demonstrates a substantial lack of concern for whether an injury results." *Woodman v Kera, LLC*, 280 Mich App 125, 152; 760 NW2d 641 (2008).

In this case, neither party disputes that Williams was acting within the scope of her authority on the night of the accident, or that the City was engaged in a governmental function in salting the roads. MCL 691.1407(2). Hence, the only issue remaining as to Williams' liability is whether there was a genuine issue of material fact regarding whether Williams acted in a grossly negligent manner. MCL 691.1407(2). We find that, although there was a question of fact concerning whether Williams was negligent, the evidence was insufficient to create a genuine issue of fact as to whether Williams was grossly negligent. Here, Williams testified that she checked her mirrors, used her turn signal, and looked back before she moved from the left lane into the turnaround lane. She had all of the truck's lights on and was only traveling eight miles-per-hour. Williams testified that she did not see plaintiff's decedent until she changed lanes and collided with decedent. On this record, we find that a rational trier of fact could not conclude that Williams engaged in reckless conduct that demonstrated a substantial lack of concern for whether an injury resulted from her operation of the salt truck. *Woodman*, 280 Mich App at 152; *Campbell*, 273 Mich App at 229-230. As such, summary disposition as to defendant Williams was appropriate and we affirm the trial court's order to the extent it granted summary disposition in favor of Williams. See MCL 2.116(C)(7) (summary disposition is appropriate where a claim is barred by immunity granted by law); *Klooster v City of Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011) ("an appellate court may uphold a lower tribunal's decision that reached the correct result, even if for an incorrect reason").

III. CONCLUSION

In sum, the trial court erred in concluding that there was no genuine issue of material fact regarding whether Williams was negligent in operating her vehicle; however, there was no genuine issue of fact regarding whether Williams was grossly negligent. Therefore, we affirm that part of the trial court's order granting summary disposition in favor of Williams, and reverse the trial court's order granting summary disposition in favor of defendant City of Detroit and we remand for further proceedings consistent with this opinion.

Affirmed in part, reversed in part and remanded for further proceedings. No costs awarded to either party. MCR 7.219.

/s/ Stephen L. Borrello
/s/ Jane M. Beckering

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JANSEN, P.J. (*concurring in part and dissenting in part*).

I concur with the majority's conclusion that there was no genuine issue of material fact concerning whether defendant Sheila Williams was grossly negligent. I also concur with the majority's conclusion that much of the evidentiary material proffered in this case was inadmissible hearsay and that the only admissible documentary evidence was Williams's deposition testimony.

However, I respectfully dissent from the majority's conclusion that the deposition testimony created a genuine issue of material fact concerning whether Williams operated her salt truck in a negligent manner for purposes of the motor vehicle exception to governmental immunity, MCL 691.1405. Williams testified that plaintiff's decedent "came from nowhere," quickly approached her salt truck from behind, and attempted to "beat" her to a turnaround lane because she was driving too slowly. Williams testified that she had been checking her mirrors regularly but had never even seen plaintiff's decedent until his vehicle was directly behind hers. At that point, as Williams was turning from southbound Chene onto northbound Chene, plaintiff's decedent collided with the salt truck in the turnaround lane. Williams testified that she "had all the lights on" on her salt truck and that she had used her turn signal before entering the turnaround lane. Specifically, Williams testified that her salt truck was equipped with "spread lights all around," "hazard lights," "left and right lights at the top," "strobe lights on the top," and blinking lights on either side. Williams estimated that she had been driving about eight miles per hour and that plaintiff's decedent had come up behind her at about 35 miles per hour.

I have reviewed Williams's deposition testimony in full. There is no suggestion that Williams was at fault or that Williams was in any way negligent when she drove her salt truck during the period in question. The admissible documentary evidence indicates that plaintiff's decedent collided with Williams, and there is no other admissible evidence to rebut this point. On the basis of the limited, admissible evidence presented below, reasonable minds simply could not conclude that Williams was at fault or that she drove her salt truck in a negligent manner. See *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Accordingly, the motor vehicle exception to governmental immunity cannot apply to create liability on the part of the City of Detroit in this case. See MCL 691.1405 (requiring "negligent operation" of a motor vehicle). I would affirm the trial court's grant of summary disposition for defendants in its entirety.

/s/ Kathleen Jansen