STATE OF MICHIGAN

COURT OF APPEALS

CONRAD NIEDERHOUSE, Plaintiff-Appellant, v A.J. PALMERTON, ROSCOMMON COUNTY, and SHERIFF RANDALL STEVENSON, Defendant-Appellees.	FOR PUBLICATION April 23, 2013 9:05 a.m. No. 310079 Roscommon Circuit Court LC No. 10-728936-NO

Before: BOONSTRA, P.J., and SAAD and HOEKSTRA, JJ.

BOONSTRA, P.J.

Plaintiff appeals from the trial court's grant of summary disposition to defendants on the grounds of governmental immunity. Plaintiff only challenges the trial court's ruling as to defendant Palmerton, and only insofar as the trial court held that Palmerton was acting "in the course of employment" when plaintiff was injured, and therefore was entitled to qualified governmental immunity pursuant to MCL 691.1407(2). For the reasons stated below, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case arises out of an accident that occurred on February 20, 2010, on the frozen surface of Higgins Lake in Roscommon County. Plaintiff was out on the ice of the lake with a small group of people with snowmobiles during the "Winterfest" festival, which they had attended earlier. Plaintiff recalled observing an "airboat" on the ice when they first arrived at the festival, although he did not pay much attention to it.

During Winterfest, the Roscommon County Sheriff's Department provided rides in the airboat to the general public. Defendant Stevenson previously had asked deputies who were trained in the airboat's operation, and who would be off duty that day, whether they would be willing to provide airboat rides at the festival; however, all of the off-duty deputies had declined. Defendant Palmerton was one of those deputies; he declined because he had plans to visit family that day. Eventually Deputy Grieser, an on-duty officer, was chosen to provide the rides.

Palmerton's plans to visit relatives fell through, so he decided to take his family to Winterfest. Palmerton was not on duty that day. Palmerton and his family attended some activities at the festival. At some point, Palmerton stated that he went over to the airboat "to see if Deputy Grieser would need any assistance with" the airboat rides. Palmerton specifically testified that he "showed up to help out anyway." Palmerton brought his wife and son with him.

Palmerton stated that he asked Grieser "Hey, do you need any help?" and that Grieser responded that he was about to give his last ride of the day. Palmerton testified that Grieser appeared willing to give his oldest child a ride in the airboat. Palmerton stated that some neighbors of his, the Schwartzes, who had two young boys, also approached the airboat because their children wanted a ride. Palmerton stated that he told Grieser, "Oh, you've been driving it all day. I can take my family out" and that he told Grieser he would drive the airboat since he wanted to help him that day and "give him a break[.]" Palmerton took his mother, his son, and the two Schwartz boys for an airboat ride.

The airboat in question was gas-powered and propelled forward by a large fan that produces air at the rear; the airboat does not have brakes. The responsiveness of the controls depends on numerous factors, including the type of terrain.

At the time Palmerton took his group out for an airboat ride, plaintiff and members of his group were standing on the ice around their snowmobiles about a quarter-mile away from Winterfest. Plaintiff stated that he had allowed his friend's daughter, Megan, to take his snowmobile for a ride. Plaintiff stated that Megan rode off in a westward direction on the snowmobile, and that he noted that the airboat came between Megan and him. Plaintiff noticed that the airboat began to turn back around, but he did not pay a great deal of attention to the airboat.

Palmerton testified that he took the airboat in a generally southwest direction for about ten to fifteen minutes before deciding to head back. Palmerton began to turn the airboat when he was about 150 feet past plaintiff's group; he stated that this distance was "well past what would normally be safe." As he made the turn, Palmerton stated that the snow "kind of grabbed" the airboat, and the airboat ended up pointed directly at the group. Palmerton stated that he tried to turn the airboat in either direction with no success. As the airboat was still heading toward the group, Palmerton decided to take his foot off the accelerator so that if there was a collision, it would be at a slow speed.

Plaintiff noticed that the airboat was coming closer, but did not feel that he was in any danger. The airboat struck a snowmobile and slid towards plaintiff, pinning his leg between the boat and a snowmobile. Plaintiff stated that the airboat was going no more than five miles per hour; Palmerton estimates that it was no more than four miles per hour. Plaintiff suffered severe injury to his right knee which required two surgeries and resulted in total disability from his job as a Sheriff's Deputy for Crawford County.

Plaintiff filed suit against Deputy Palmerton, Roscommon County, and Sheriff Stevenson. Plaintiff asserted a gross negligence claim against Palmerton and ordinary negligence claims against all named defendants; plaintiff also asserted that his ordinary negligence claim was in avoidance of governmental immunity under the motor vehicle exception to governmental immunity, MCL 691.1405, and further that Roscommon County was not engaged in a "governmental function."

Defendants responded by moving for summary disposition on the grounds of governmental immunity. Defendants principally argued that the airboat was not a "motor vehicle," that Sheriff Stevenson was entitled to absolute immunity as a high-ranking elected official, and that Palmerton was not grossly negligent. In responding to defendants' motion,

plaintiff argued in part that Palmerton was not acting "in the course of his employment" at the time of the accident.

After oral argument, the trial court granted summary disposition in favor of each defendant pursuant to MCR 2.116(C)(7). On appeal, plaintiff challenges only the grant of summary disposition to defendant Palmerton, and specifically limits the appeal to whether Palmerton was acting "in the course of his employment" when the accident occurred.

II. STANDARD OF REVIEW

This Court reviews de novo the trial court's grant of summary disposition under MCR 2.116(C)(7). *Oliver v Smith*, 290 Mich App 678, 683; 810 NW2d 57 (2010). In reviewing a motion for summary disposition under MCR 2.116(C)(7), a court considers the affidavits, pleadings, and other documentary evidence presented by the parties and accepts the plaintiff's well-pleaded allegations, except those contradicted by documentary evidence, as true. *Id.* "[T]he substance or content of the supporting proofs must be admissible in evidence." *Maiden v Rozwood*, 461 Mich 109, 119 (1999). The evidence submitted must be considered "in the light most favorable to the opposing party." *MEEMIC Ins. Co. v DTE Energy Co.*, 292 Mich. App. 278, 807 NW2d 407 (2011).

III. COURSE OF EMPLOYMENT

The governmental immunity act, MCL 691.1401 *et seq.*, generally provides immunity from tort claims to governmental agencies engaged in a governmental function, as well as governmental officers, agents or employees. The relevant statutory provision, MCL 691.1407(2), provides:

> 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, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:
>
> (a) The officer, employee, member, or volunteer 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 officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

Although there was some discussion before the trial court as to whether Palmerton was a "volunteer" pursuant to the statute, neither party argues on appeal that Palmerton was a volunteer for purposes of governmental immunity.[1] Instead, plaintiff presents a very narrow argument: that Palmerton was not acting in the course of his employment with the Roscommon County Sheriff's Department when the accident occurred. The trial court found that "at the point in time when he operated the airboat in question, [Palmerton] undertook that act during the course of his employment." The trial court further found that Palmerton was acting "within the scope of his authority" or reasonably believed he was so acting, at the time of the accident.

This Court and our Supreme Court has often collapsed the "course of employment" and "scope of his or her authority" requirements of MCL 691.1407(2). *Backus v Kauffman*, 238 Mich App 402, 406; 605 NW2d 690 (1999). However, this "does not mean . . . that our courts have concluded that the 'course of employment' and 'scope of his or her authority' requirements are coextensive." *Id.* Such a conclusion would in fact violate the rule of statutory construction that cautions courts to avoid construing statutory provisions so as to render portions of the statute surplusage. *Id.* Rather, courts tend to follow this approach when "the question whether the two requirements have been satisfied is easily disposed of." *Id.*

Here, plaintiff specifically limits his claim of error to the trial court's finding that Palmerton was acting in the course of his employment, not whether he was acting or reasonably believed he was acting within the scope of his authority. Plaintiff is correct that, absent a finding of "course of employment," a court would have no need to reach MCL 691.1407(2)(a). The plain language of the statute applies subsections (a)-(c) only to an "officer, employee, or member while in the course of employment or service" or a "volunteer while acting on behalf of a governmental agency." Clear statutory language must be enforced as written. *Velez v Tuma*, 492 Mich 1, 16-17; 821 NW2d 432 (2012).

The necessary requirements for a course of employment are (1) the existence of an employment relationship, (2) the circumstances of the work environment created by the employment relationship, including the "temporal and spatial boundaries established" and (3) "the notion that the act in question was undertaken in furtherance of the employer's purpose." *Backus*, 238 Mich App at 408, citing 2 Restatement Agency, 2d, §§ 228(1)(b)-(c), 233-235, pp 504, 516, 518, 520, and Black's Law Dictionary (7th ed.), p 356.

We find that defendant was acting in the course of his employment at the time of the accident. It is undisputed that an employment relationship existed between Roscommon County Sheriff's Department, a governmental agency, and Palmerton.

Further, the circumstances of the work environment created by the employment relationship encompassed Palmerton's act of giving airboat rides at Winterfest. Although Winterfest was perhaps not within the typical "temporal and spatial boundaries" of Palmerton's

[1] Under the governmental immunity statute, "'[v]olunteer' means an individual who is specifically designated as a volunteer and who is acting solely on behalf of a governmental agency." MCL 691.1401(i). The trial court held that Palmerton did not meet this statutory definition, and that ruling is not contested on appeal.

employment, it is undisputed that his employer requested that qualified deputies provide airboat rides to the public that day as part of the public relations activities of the Sheriff's Department. Relevant to this factor is whether the employee is "performing work assigned by the employer or engaging in a course of conduct subject to the employer's control." See 2 Restatement Agency, 3d § 7.07(2), pp 198. We find that Palmerton was. Further, had Palmerton not been in an employment relationship with the Sheriff's Department, he would not have been driving the airboat at the time of the accident. "An injury arises out of the course of employment when it occurs as a circumstance of or incident to the employment relationship." *Calovecchi v State*, 223 Mich App 349, 352; 566 NW2d 40 (1997). For these reasons, we hold that Palmerton's operation of the airboat to give rides to members of the public was within the circumstances of the work environment created by his employment relationship.

Finally, the record before this Court demonstrates that Palmerton undertook driving the airboat in furtherance of his employer's purpose. Palmerton stated that he approached Grieser to see if he needed any assistance with the airboat rides, and asked him if he needed help. Further, as a qualified airboat operator, Palmerton previously had been asked by his employer to assist with giving rides at the festival. In fact, Sheriff Stevenson indicated that he would have preferred to use one of the off-duty deputies rather than Grieser, who was on duty. Additionally, Palmerton's deposition testimony supports the inference that Grieser would have given the airboat ride had Palmerton not offered to do so.

We do not find it dispositive that Palmerton was not specifically instructed by his employer to provide airboat rides that day. Indeed, even if an act is *contrary* to an employer's instructions, it may be within the course of employment if "the employee accomplished the act in furtherance, or [in] the interest, of the employer's business." *Hamed v Wayne County*, 490 Mich 1, 11; 803 NW2d 237 (2011). Further, it is not dispositive that Palmerton was not compensated for his service, as an employee's gratuitous work may still be within the course of his employment. See 2 Restatement Agency, 3d § 7.07(2), pp 198. We therefore hold that Palmerton's operation of the airboat was in furtherance of his employer's purpose.

In so holding, we find plaintiff's citation to *Saily v 500 Bushel Club*, 332 Mich 286; 50 NW2d 781 (1952), unpersuasive. In *Saily*, the employee in question was explicitly *not* acting in furtherance of her employer's purpose when she was attacked by a deer; in addition to being "off duty" she was also "not engaged in anything for the benefit of the employer or incident to the employment" and was not, by virtue of her employment, "exposed to greater hazards of attacks by the deer than was common to any one happening in that locality for whatever purpose." *Id.* at 288. Here, as stated above, Palmerton's activity was in furtherance of his employer's purpose, and he would not have been involved in the accident had he not been in an employment relationship with the Sheriff's Department. Similarly, plaintiff's comparison to the unpublished case of *Bukowski v Michigan Twp Participating plan*, unpublished opinion per curiam of the Court of Appeals, decided October 18, 2005 (Docket No. 262564), is unpersuasive, because this Court found, under the circumstances of that case, that no benefit accrued to the plaintiff's employer when he was driving to work off duty and was not required to carry his weapon or required to respond to situations requiring police intervention. *Id.*, slip op at 3. Thus, this Court found no reason not to apply the general rule that "an employee who is merely driving to work is not considered to be within the scope of his employment." *Id.*, slip op at 2, citing *Cambrun v Northwest School Dist/Jackson Community Schools (On Remand)*, 220 Mich App 358, 365; 559 NW2d 370 (1996). Here, Palmerton, although off duty, was not merely driving to work, and not

merely entertaining himself while off duty, but rather was assisting Grieser in giving airboat rides in furtherance of his employer's purpose.

The basis of plaintiff's analogy to *Saily* and *Bukowski* is that Palmerton was merely "giving his family a ride" and was not acting in furtherance of his employer's goals. We disagree. As stated, Palmerton testified that he asked Grieser if he needed help with his task of giving airboat rides to the public. Palmerton eventually gave a ride to not only his own family, but two other children. Palmerton's relatives were members of the general public, as were the other children. The fact that Palmerton may have been *motivated*, at least in part, by a desire to give his family a ride on the airboat does not change the fact that the *act performed* was in furtherance of his employer's purpose.

Because all of the factors elucidated in *Backus* were met here, we hold that the trial court correctly determined that Palmerton was acting in the course of his employment when the accident occurred.[2]

Affirmed.

/s/ Mark T. Boonstra
/s/ Henry William Saad
/s/ Joel P. Hoekstra

[2] Because plaintiff has expressly limited his appeal to this issue, we need not address other aspects of the trial court's ruling. See *MEA v SOS*, 280 Mich App 477, 488; 761 NW2d 234 (2008), aff'd 489 Mich 194; 801 NW2d 35 (2011) (this Court will generally limit review to issues set forth in the appellant's questions presented). We therefore do not disturb the trial court's holding that Palmerton's decisions to operate the airboat, and his actual operation of the airboat, did not constitute gross negligence. We also do not disturb the finding that Palmerton was acting within the scope of his authority, or at least that he reasonably believed he was so acting. Finally, we do not disturb the trial court's holding that the Roscommon County Sheriff's department was engaged in a governmental function. In that regard, we note that plaintiff alleged in his complaint that defendants were not engaged in a governmental function. Defendants briefly argued below in their summary disposition motion that "Plaintiff cannot properly dispute that the operation of a police department is a governmental function." As an addendum to their summary disposition motion, defendants submitted the affidavit of Sheriff Stevenson, which attested that the airboat was "primarily used for the purpose of ice rescues," and was being used at Winterfest "for the purpose of giving rides to members of the general public," "[a]s a public relations matter." While plaintiff's written response to the motion did not address the "governmental function" issue, the trial court engaged in a colloquy with counsel for the parties specifically on the question of whether public relations was a governmental function of a sheriff's office. The trial court held that it was. On appeal, plaintiff raised only the "course of employment" issue. In response, defendants nonetheless in part argued that plaintiff "cannot properly dispute that the use of the airboat for public relations constitutes a governmental function." In reply, plaintiff reiterated that the governmental function is "not raised" on appeal, and "need not be addressed by this Court."