STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF MAX LEROY YOUNG, by SUSAN GROENDAL and PATRICIA PICARD, Co-Personal Representatives,

Plaintiffs-Appellees,

v

RICHARD WAYNE PIERCE,

Defendant-Appellant,

and

MONTCALM COUNTY and MONTCALM COUNTY EMERGENCY SERVICES,

Defendants.

UNPUBLISHED
July 15, 2014

No. 315317
Montcalm Circuit Court
LC No. 2011-014569-NI

ESTATE OF SHIRLEY M. NARLOCH, by STEVEN JORDAN, Personal Representative,

Plaintiff-Appellee,

v

MONTCALM COUNTY and MONTCALM COUNTY EMERGENCY SERVICES,

Defendants,

and

RICHARD WAYNE PIERCE,

Defendant-Appellant.

No. 315318
Montcalm Circuit Court
LC No. 2011-014641-NI

Before: FITZGERALD, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

In these consolidated appeals, defendant Richard Wayne Pierce appeals as of right the trial court orders denying his motions for partial summary disposition pursuant to MCR 2.116(C)(7) as to plaintiffs' claims of gross negligence against him in both lower court cases. We affirm.

These actions arise out of an accident that occurred on October 4, 2010, shortly after 11:00 a.m., at the intersection of West County Line Road and Kendaville Road in Montcalm County. Pierce was employed by defendant Montcalm County as a first responder, and on the date and time in question he was driving north on West County Line Road in response to an emergency dispatch. He was operating a vehicle owned by the county. At the same time, decedent Max Leroy Young was driving east on Kendaville Road, and decedent Shirley M. Narloch was a passenger in Young's vehicle. It is undisputed that Pierce encountered a stop sign at the intersection of the two roads, but that he did not stop at the stop sign. It is also undisputed that there is not a stop sign on Kendaville Road at this intersection and that the traffic on Kendaville Road has the right-of-way at the intersection.

Plaintiffs, as the personal representatives of the estates of Young and Narloch, brought various claims against defendants, including claims of gross negligence against Pierce. Pierce moved for summary disposition as to the claims of gross negligence against him pursuant to MCR 2.116(C)(7); plaintiffs responded by invoking MCR 2.116(I)(2) and moved for summary disposition as to these claims pursuant to MCR 2.116(C)(7) and (10). The trial court denied all of the motions and found that a genuine issue of fact existed as to whether Pierce was grossly negligent under the facts of these cases.

The applicability of governmental immunity is a question of law that is reviewed de novo on appeal. *County Rd Ass'n of Mich v Governor*, 287 Mich App 95, 118; 782 NW2d 784 (2010). In addition, a trial court's decision on a motion for summary disposition is a question of law that is reviewed de novo. *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013). Pursuant to MCR 2.116(C)(7), summary disposition is required when dismissal of claims is appropriate because of immunity granted by law. As an employee of Montcalm County at the time of the accident, Pierce claimed governmental immunity pursuant to MCL 691.1407(2), which states that a governmental agency's employee is "immune from tort liability" caused by the employee "while in the course of employment" if all of the following are true: (1) the employee is acting, or reasonably believes he is acting, within the scope of his or her authority; (2) the governmental agency is engaged in the exercise or discharge of a governmental function; and (3) the employee's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. MCL 691.1407(2). In the present cases, the only issue is whether Pierce's conduct amounted to gross negligence.

MCL 691.1407(7)(a) states that " '[g]ross negligence' means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." The issue of whether a governmental employee's conduct constituted gross negligence is a question of fact, and in making this determination, the reviewing court must view all of the pleadings and supporting evidence in the light most favorable to the nonmoving party. *Kincaid*, 300 Mich App at 522. If

the *undisputed* facts show that the moving party has immunity, summary disposition is appropriate; however, if the parties present evidence that establishes a question of fact concerning whether a defendant is entitled to immunity as a matter of law, summary disposition is not appropriate. *Id*. at 522-52. Further, if the evidence offered to support a finding of gross negligence is "generally subjective and difficult to verify," and the question of whether a defendant's actions constitute gross negligence turn on an issue of credibility, the question of gross negligence is properly submitted to a jury. *Oliver v Smith*, 290 Mich App 678, 686; 810 NW2d 57 (2010).

The activation of warning devices on an emergency vehicle, the speed of a governmental vehicle just before, and at the time of an accident, and a governmental employee's failure to take precautions required by the particular circumstance of a specific case are all facts that are relevant to a determination of gross negligence. See *Poppen v Tovey*, 256 Mich App 351, 357; 664 NW2d 269 (2003); *Tallman v Markstrom*, 180 Mich App 141, 144; 446 NW2d 618 (1989). Here, the facts that are determinative with regard to whether Pierce's conduct at the time of the accident constituted gross negligence are all in dispute, and several of them will turn on the issue of credibility. First, despite Pierce's assertion that the siren on his emergency vehicle was activated at all times while he was driving on West County Line Road, a witness who lives adjacent to the intersection in question and was at his home at the time of the accident testified that Pierce's siren was not activated at the time of the accident. In addition, although Pierce estimated that he was travelling between 60 and 65 miles per hour at the time of the accident, another witness who lives near the intersection and observed Pierce driving on West County Line Road less than 30 seconds before the crash estimated that Pierce was travelling at least 80 miles per hour. Finally, Pierce testified that as he approached the intersection, he slowed down, looked for traffic on the intersecting road, and kept his foot on the brake pedal as he entered the intersection. However, several individuals familiar with the intersection, including Pierce himself, testified that there were obstructions on West County Line Road that made observing traffic on Kendaville Road difficult, if not impossible, for a driver travelling at a speed of 60 to 65 miles per hour on West County Line Road. Under these circumstances, Pierce may have been required to stop at the intersection, or at least slow to a speed less than 60 or 65 miles per hour.

In summary, viewing all of the disputed evidence in the light most favorable to plaintiffs as the non-moving parties, a genuine issue of fact exists as to whether Pierce's conduct was so reckless as to demonstrate a substantial lack of concern for whether injuries resulted from his conduct; therefore, the trial court properly denied Pierce's motions for summary disposition as to plaintiffs' claims for gross negligence.[1]

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer
/s/ Douglas B. Shapiro

[1] In reaching our conclusion, we decline to address whether Pierce's alleged violations of traffic laws support a finding that he was grossly negligent.