

STATE OF MICHIGAN
COURT OF APPEALS

OLIVER LEE HOWARD,

Plaintiff-Appellee,

UNPUBLISHED
July 1, 2014

v

CHRISTOPHER PENA,

Defendant-Appellant.

No. 314873
Wayne Circuit Court
LC No. 12-004579-NI

Before: SAWYER, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right from an order of the circuit court granting plaintiff's motion for reconsideration of its prior entry of summary disposition to defendant based on governmental immunity. The court vacated its prior order and denied defendant's motion for summary disposition. We affirm.

On the afternoon of January 14, 2011, defendant, a Michigan State Police trooper, crashed his vehicle into plaintiff's vehicle when defendant made a northbound U-turn from Jefferson Avenue onto the southbound lane of the Lodge Freeway in Detroit. Plaintiff claimed that defendant "came off the ramp and he made a left turn, U turn, I should say, directly into me" while plaintiff was traveling in the middle lane. Defendant testified that he "hit [plaintiff's] car with my left driver's side front end on their right passenger side of their vehicle" while defendant slowly attempted to make a left turn onto the Lodge Freeway. Plaintiff suffered serious injuries as a result of the accident.

Defendant contended that he became lost while traveling to provide security at Cobo Hall because he missed his exit from Jefferson Avenue. He said that he turned left at the next exit because he did not know that the Lodge Freeway was a one-way road, even though he did not see any vehicles "coming to my right." Photographs showed that there were certain signs and indicators near the entrance ramp evidencing that the road was one-way only, and defendant acknowledged that his police training and experience on road patrol taught him how to recognize road signs indicating limited-access highways, such as the Lodge Freeway. Defendant also acknowledged that there were white lines on the sides of the Lodge Freeway entrance, which indicated that the freeway was one-way only. He admitted that his actions violated state traffic laws, and during the summary-disposition hearing, defendant's counsel admitted that defendant disregarded traffic-control signs.

In granting plaintiff's motion for reconsideration, the court concluded that because "of the allegation that Defendant ignored traffic control devices such as presented in photographic evidence, reasonable minds could differ" about whether defendant's conduct rose to the level of gross negligence. Defendant argues that the above holding was erroneous.

We review de novo a trial court's grant of summary disposition. *Oliver v Smith*, 290 Mich App 678, 683; 810 NW2d 57 (2010). "With regard to a motion for summary disposition pursuant to MCR 2.116(C)(7), this Court reviews the affidavits, pleadings, and other documentary evidence presented by the parties and accept[s] the plaintiff's well-pleaded allegations, except those contradicted by documentary evidence, as true." *Oliver*, 290 Mich App at 683 (citations and internal quotation marks omitted). "If reasonable jurors could honestly reach different conclusions regarding whether conduct constitutes gross negligence [for purposes of governmental immunity], the issue is a factual question for the jury.¹ However, if reasonable minds could not differ, the issue may be determined by a motion for summary disposition." *Id.* at 685.

The statute controlling governmental immunity from tort liability is MCL 691.1407. Section 7(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.

Neither party disputes the court's findings concerning §§ 7(2)(a) and 7(2)(b), nor do they address proximate cause. They solely contest whether defendant's conduct was sufficiently

¹ This Court has held that other questions surrounding the application of governmental immunity are not to be submitted to a jury. See, e.g., *Dextrom v Wexford Co*, 287 Mich App 406, 431-433; 789 NW2d 211 (2010) (dealing with the "proprietary function" exception to governmental immunity).

egregious to enable a reasonable jury to find that defendant operated his vehicle in a grossly negligent fashion when he struck defendant on the Lodge Freeway.

The statute defines gross negligence as “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.” MCL 691.1407(8)(a). Evidence establishing “ordinary negligence does not create a material question of fact concerning gross negligence.” *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999). Gross negligence is conduct that is “substantially more than negligent.” *Id.* at 122. The doctrine of *res ipsa loquitur* cannot be used to establish gross negligence. *Id.* at 127. Gross negligence

suggests, instead, 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).]

When all the facts are taken in plaintiff’s favor, a reasonable jury could conclude that defendant acted in a grossly negligent fashion. Defendant admittedly made a U-turn down the wrong way of a one-way highway during the middle of the day. There were several indicators that the road was one-way only. In light of this, reasonable minds could differ over whether defendant’s conduct was “so reckless as to demonstrate a substantial lack of concern for whether an injury results.” MCL 691.1407(8)(a).

According to the photographic evidence, the traffic signs were clearly visible on the sides of the road and on an overpass. Defendant offered no evidence that these signs were obstructed at the time of the accident. Even without the road signs, defendant could have observed the flow of traffic to determine, before he moved into the fast-moving traffic, whether it flowed both ways on the freeway. If an objective observer scrutinized defendant’s actions, he or she could conclude that defendant was unconcerned about the well-being of other drivers on the road. Because defendant is a police officer, he presumably has a heightened awareness of traffic rules, yet he turned the wrong way into fast-moving traffic.

Defendant argues that his conduct cannot be grossly negligent because he did not “knowingly” travel in the wrong direction on the Lodge Freeway. Although *Tarlea* referred to “a willful disregard of precautions or measures,” *Tarlea*, 263 Mich App at 90, the case does not stand for the proposition that knowledge is a component of gross negligence. Nor does the statutory language require knowledge. In the context of reckless misconduct, our courts have noted that “willfulness” does not require actual intent, but simply an “indifference to whether harm will result [so] as to be the equivalent of a willingness that it does.” *Burnett v City of Adrian*, 414 Mich 448, 455; 326 NW2d 810 (1982). Notably, the *Burnett* Court reasoned that the difference between willful and wanton conduct and ordinary negligence is the extent to which injury is likely to result under the circumstances, such that the actor’s conduct becomes a product of indifference. *Id.* at 456. Defendant’s conduct was such that a jury could reasonably conclude that defendant was indifferent to whether his actions would cause injury to others.

Defendant also contends that his conduct was not grossly negligent because his violation of provisions in the Michigan Motor Vehicle Code (MVC), MCL 257.1 *et seq.*, only presented

evidence of negligence, not gross negligence. Statutory violations are evidence of negligence. *Poppin v Tovey*, 256 Mich App 351, 358; 664 NW2d 269 (2003), and, as stated earlier, evidence of ordinary negligence is not sufficient to raise a triable issue concerning gross negligence, *Maiden*, 461 Mich at 122-123. Thus, defendant is correct that his violations of the MVC do not establish that he was grossly negligent. However, the law does not support defendant's apparent proposition that the MVC operates as a constructive liability shield by making conduct violative of the MVC *only* evidence of ordinary negligence, regardless of the circumstances surrounding the violations.

Affirmed.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood