STATE OF MICHIGAN

COURT OF APPEALS

DONA REGAN and BRIAN REGAN,

Plaintiffs-Appellees,

v

WASHTENAW COUNTY BOARD OF COUNTY ROAD COMMISSIONERS,

Defendant-Appellant,

and

DAVID CAVANAUGH,

Defendant.

FOR PUBLICATION
January 11, 2002
9:00 a.m.

No. 219761
Washtenaw Circuit Court
LC No. 97-004017-NI

LEONARD ZELANKO,

Plaintiff-Appellee,

v

WASHTENAW COUNTY BOARD OF COUNTY ROAD COMMISSIONERS,

Defendant-Appellant,

and

RICHARD LEE SHEHAN,

Defendant.

No. 220532
Washtenaw Circuit Court
LC No. 98-009848-CZ

Updated Copy
March 15, 2002

Before: Murphy, P.J., and Griffin and Wilder, JJ.

WILDER, J. *(dissenting).*

I respectfully dissent. Because the gravamen of plaintiffs' complaints in these two cases involve challenges to the manner in which the governmental functions were performed, and because plaintiffs' complaints do not allege that their injuries *resulted from* the negligent operation of government motor vehicles, I would hold that defendant was entitled to judgment as a matter of law in both cases.

I. Facts and Procedural Background

A. The Regan case

Plaintiff Dona Regan was involved in a vehicular accident when the vehicle she was driving collided with a broom tractor owned by defendant Washtenaw County Road Commission and operated by David Cavanaugh, an employee of defendant. At the time of the accident, Regan was driving the school bus that she drives professionally west on US-12 between Saline and Clinton. The road commission's broom tractor was the third vehicle in a five-vehicle convoy performing shoulder maintenance in this same stretch of westbound US-12. The first vehicle in the convoy plowed dirt, the second vehicle pushed the dirt away from the road, the third vehicle was Cavanaugh's broom tractor that swept dirt off the roadway and onto the shoulder, the fourth vehicle compacted the dirt on the shoulder, and the fifth vehicle was a truck that pulled a sign depicting an arrow, the purpose of which was to alert traffic to the maintenance work. Stationary signs were placed along the road to warn drivers about the road work ahead, and Regan was admittedly aware of the maintenance project. Regan approached the convoy, moved to the left, and slowed down. The weather was hot and windy. As Regan approached the broom tractor, a cloud of dust enveloped her vehicle and made it impossible for her to see. Regan slammed on her brakes and swerved right, resulting in a collision between the school bus and the broom tractor.

The complaint filed by Regan and her husband, Brian Regan, against Cavanagh and the road commission alleged in part:

> 6. Because she was approaching on a curve, she could not tell that the tractor, unlike the other Defendant WCRC trucks, was actually straddling the fog line and extending several feet into her lane.
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> * * *
>
> 8. Concerned about both oncoming traffic and the cars behind her, Mrs. Regan moved to the left slightly to negotiate her way through the curve and past the tractor. Unfortunately, precisely at this moment the wind suddenly whipped up a dense, blinding dust cloud which literally obliterated Mrs. Regan's vision.
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> * * *
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> 14. Defendant Cavanaugh owed a duty to Plaintiff Dona Regan to use due care and caution in the operation and control of the tractor owned by Defendant WCRC, and to drive with care and circumspection so as to reasonably protect the

safety, health, life and property of Plaintiff and to obey the Motor Vehicle Code of the State of Michigan and the rules of common law.

15. Contrary to the duties or [sic] the Plaintiff, Defendant Cavanaugh was negligent in that he:

a. Failed to pay proper attention to his course of travel and the movement of others upon the roadway;

b. Failed to keep a sharp and careful lookout;

c. Failed to see what there was to be seen;

d. Failed to keep his tractor constantly under control;

e. Operated his vehicle with utter disregard for the rights, safety and position of others on the road; and

f. Failed to operate his tractor in such a manner so as not to endanger Plaintiff Regan, all of which are contrary to common law and the laws governing the operation of motor vehicles within the State of Michigan.

15. [sic] In addition to its liability to Plaintiffs as owner of the vehicle involved, Defendant Washtenaw County Road Commission owed a duty to Plaintiff, Dona Regan, to entrust the vehicle titled in its name to a reasonably prudent person who would drive with due and reasonable care under all of the circumstances.

16. Contrary to these duties owed Plaintiff, Defendant WCRC acted negligently in that it:

a. Permitted David Cavanaugh to operate the motor vehicle owned by Defendant WCRC to regravel a road on a blustery, windy day; and

b. Failed to provide a water truck to hose down the dust and debris stirred up by the tractor, thus enabling both Plaintiff Dona Regan and Mrs. Junkins to be blinded and unable to safely proceed.

Cavanaugh and the road commission moved for summary disposition under MCR 2.116(C)(7) and (10). The trial court granted Cavanaugh's motion, finding that no reasonable trier of fact could conclude that Cavanaugh engaged in gross negligence and, thus, the suit against him was barred by governmental immunity.[1] The trial court denied the road commission's motion, finding that the allegations in the Regans' complaint could lead to a finding

[1] The Regans have not challenged the trial court's dismissal of the claim against Cavanaugh and thus Cavanaugh is not a party to this appeal.

that the broom tractor itself was negligently operated and there were questions of fact regarding whether the alleged actions fell within the motor vehicle exception to governmental immunity. The trial court also denied the road commission's motion for reconsideration, finding "no palpable error" in the original ruling. The road commission filed an interlocutory appeal, and this Court granted leave.

B. The Zelanko case

Plaintiff Leonard Zelanko was driving a tractor-trailer rig in the course of his employment along eastbound I-94 in Washtenaw County. At the same time, Richard Lee Shehan, an employee of defendant, was operating a tractor mower along I-94, cutting the grass along the south side of the embankment. Shehan ran over a piece of tire tread and the mower propelled it toward the freeway, where it hit the windshield of Zelanko's truck, shattering the windshield and causing injuries to Zelanko. Zelanko's complaint against Shehan and the road commission alleged in part:

> 7. On or about September 12, 1996, at approximately 1:00 p.m., Defendant, SHEHAN, was operating a tractor with an attached lawnmower and was also traveling eastbound along I-94, on the side of the road, when he drove over a piece of rubber tire, causing the lawnmower to throw it into the air, whereby it struck and shattered the windshield of Plaintiff, ZELANKO's, motor vehicle, and caused severe injuries to Plaintiff, ZELANKO, as more particularly stated hereinafter.
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> * * *
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> 10. Defendant, SHEHAN, breached his duties to Plaintiff in the following particulars:
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> a. Failing to operate the tractor and attached lawnmower with due care and caution;
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> b. Failing to maintain control at all times while upon the highways;
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> c. Failing to exercise reasonable and ordinary care;
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> d. Failing to avoid driving over the piece of rubber and/or other debris when Defendant knew or should have known that the failure to do so would naturally and probably result in injury to the Plaintiff;
>
> e. Failing to exercise reasonable and ordinary care to keep a sharp lookout so as to avoid injuring the Plaintiff;
>
> f. Other acts and/or omissions which shall become known during discovery.

> 11. Notwithstanding the duties and obligations imposed upon Defendant, SHEHAN, by the statutes of the State of Michigan and the rules of common law, as hereinbefore stated, said Defendant omitted and neglected each and every particular and as a true and proximate result of the violations thereof, Defendant, SHEHAN, cause[d] the tractor and attached lawnmower which he was operating to drive over a piece of rubber, causing the lawnmower [to] throw the piece of rubber tire into the air and strike and shatter the windshield of Plaintiff, ZELANKO's, motor vehicle.
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> * * *
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> 13. Defendant, ROAD COMMISSION, is liable for negligent entrustment of its tractor and lawnmower to Defendant, SHEHAN, and knew or should have known at the time of the entrustment that Defendant, SHEHAN, was an incompetent driver and/or was incompetent or unqualified to operate the tractor and attached lawnmower.

Shehan and the road commission moved for summary disposition under MCR 2.116(C)(7) and (10) The trial court ruled that Shehan should be dismissed from the suit, finding that plaintiff failed to allege or present any facts that Shehan was grossly negligent at the time of the incident.[2] The trial court denied the road commission's motion, apparently finding that there were genuine issues of material fact regarding whether Shehan or the road commission were negligent.[3] The road commission filed an interlocutory appeal, and this Court granted leave and, on its own motion, consolidated the case with Docket No. 219761, the case involving the Regans.

II. Standard of Review

Under MCR 2.116(C)(7), summary disposition may be granted when a claim is barred because of, among other things, immunity granted by law. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). The applicability of governmental immunity is a question of law that is reviewed de novo on appeal. *Cain v Lansing Housing Comm*, 235 Mich App 566, 568; 599 NW2d 516 (1999).[4]

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[2] Zelanko has not challenged the trial court's dismissal of the claim against Shehan and thus Shehan is not a party to this appeal.

[3] In its order, the trial court simply stated that it was denying the motion "for the reasons stated on the record." A review of the record indicates that the trial court simply stated that, "[a]s to the defendant Washtenaw County Road Commission, the motion's denied." Nonetheless, because the trial court specifically found that Shehan was not grossly negligent, and did not comment regarding whether Shehan was negligent, it appears as if the trial court found that there was a genuine issue of material fact regarding negligence. See MCL 691.1405.

[4] It is unclear in the record whether the trial court's ruling was made pursuant to MCR 2.116(C)(7) or MCR 2.116(C)(10). Because the standards under each subrule are essentially the same, and because the issue on appeal is whether governmental immunity precludes plaintiff's

(continued…)

III. Discussion

A. Legal principles common to both cases

The Legislature's grant of immunity from tort liability in MCL 691.1407(1)[5] to governmental agencies and their officers, agents, or employees is to be interpreted broadly and exceptions to this rule are to be narrowly drawn and strictly construed. *McIntosh v Dep't of Transportation*, 234 Mich App 379, 382; 594 NW2d 103 (1999); *Richardson v Warren Consolidated School Dist*, 197 Mich App. 697, 699; 496 NW2d 380 (1992). See also *Zyskowski v Habelmann (On Remand)*, 169 Mich App 98, 103; 425 NW2d 711 (1988). To defeat a motion for summary disposition, the plaintiff must allege facts giving rise to an exception to governmental immunity. *Terry v Detroit*, 226 Mich App 418, 428; 573 NW2d 348 (1997); *Hunley v Phillips*, 164 Mich App 517, 524; 417 NW2d 485 (1987).

MCL 691.1405 provides an exception to the general rule of governmental immunity in cases involving the negligent operation of a government-owned vehicle by an officer, agent, or employee of a governmental agency:

> 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[.]

In *Bakun v Sanilac Co Rd Comm*, 419 Mich 202, 204; 351 NW2d 810 (1984), the plaintiff was driving a truck along highway M-25 when his truck struck a salt-spreading vehicle owned and operated by the defendant. The trial court granted the defendant's motion for summary disposition on the ground that the accident occurred while the defendant was maintaining a state trunk line highway; thus, the defendant was relieved of liability under MCL 250.61. *Id.* On appeal, our Supreme Court held, in pertinent part, that MCL 691.1405 "effectively amended" MCL 250.61 to the extent they conflict, and "county road commissions are liable for the negligent operation of their motor vehicles." *Bakun, supra* at 208. The Court noted that "[t]he fact that such causes of action arise in connection with the construction, improvement, or maintenance of trunk line highways is of no significance." *Id.*

(…continued)

claims against the road commission, we will review the matter de novo as though the trial court decided the motion pursuant to MCR 2.116(C)(7).

[5] This statute provides in pertinent part:

> Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function.

A few months later, this Court decided *Peterson v Muskegon Co Bd of Co Rd Comm'rs*, 137 Mich App 210; 358 NW2d 28 (1984), in which the plaintiff was injured when his vehicle hit a patch of ice and snow on US-31. The plaintiff filed suit, alleging that the snow and ice had been negligently plowed off an overpass and onto the highway below by one of the defendant's employees. *Id.* at 211-212. The trial court granted the defendant's motion for summary disposition based on governmental immunity, concluding that the injuries sustained by the plaintiff did not result from the negligent operation of a motor vehicle. *Id.* The trial court found that, because the snowplow that moved the ice and snow was not at the scene and had not thrown the ice and snow onto the highway immediately before the accident, factually the allegation did not describe the operation of a motor vehicle. *Id.* at 213. On appeal, this Court affirmed the grant of summary disposition in favor of the defendant on different grounds:

> The proper question . . . is whether, under all the facts alleged by a plaintiff, the injuries suffered by the plaintiff may, in fact, be said to have resulted from the negligent operation of a motor vehicle. Under the facts alleged in this case, we find that the trial court correctly concluded that plaintiff had not sufficiently alleged such an injury. The gravamen of plaintiff 's complaint is not that a snowplow was negligently operated, but rather that snowplowing was negligently performed. The complaint does not sufficiently allege that the accident and subsequent injury to plaintiff were caused by the negligent operation of the snowplow. [*Id.* at 213-214 (citations omitted).]

In *Michigan N R Co v Auto-Owners Ins Co*, 176 Mich App 706; 440 NW2d 108 (1989), a no-fault case, this Court applied the test enunciated in *Peterson* to find that summary disposition should have been granted in favor of the defendant. In *Michigan N R Co*, the plaintiff was injured when a train owned by the plaintiff derailed after passing through a crossing into a pile of dirt left on the tracks. An employee of the defendant had plowed the road adjacent to the railroad track, allegedly leaving dirt and gravel on the tracks. *Id.* at 708. The plaintiff and its insurer sued the defendant and its no-fault insurance carrier under the no-fault act. *Id.* This Court acknowledged that a finding that an accident arose out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle required a showing that there was some causal connection between the injury and the use of a motor vehicle that is more than incidental, fortuitous, or "but for." *Id.* at 711. We then held:

> [I]t was not the operation of defendant's vehicle that caused the accident, but the residual effect of the act of plowing or grading the road. This distinction is crucial to the resolution of this issue. The operation of the blade truck was not the cause of plaintiff 's property damage. Rather, it was the end result of the act of plowing the road that caused the train to derail. Therefore, plaintiff 's damages do not arise out of the ownership, operation, maintenance or use of a motor vehicle . . . . [*Id.* at 712-713.]

In *Nolan v Bronson*, 185 Mich App 163; 460 NW2d 284 (1990), this Court found that the negligent discharging of passengers from a school bus is part of operating the bus and falls within the motor vehicle exception to governmental immunity. Similarly, in *Orlowski v Jackson State Prison*, 36 Mich App 113; 193 NW2d 206 (1971), we held that the negligent fastening of a latch

securing the tailgate of a truck is part of the operation of the motor vehicle, even if it is standing still, as long as it is being used or employed in some specific function or to produce some desired work or effect.

In *Robinson v Detroit,* 462 Mich 439; 613 NW2d 307 (2000), our Supreme Court held that the city of Detroit was not liable for injuries to passengers of a vehicle being pursued by police, when the pursuing police vehicle did not hit the passenger's vehicle or otherwise physically force it off the road or into another vehicle or object. The Court stated that because the motor vehicle exception must be narrowly construed, the allegations did not satisfy the statutory requirement that the injuries "resulted from" the operation of the police vehicle. *Id*. at 457.

From these cases, I would conclude that in determining whether the exception to governmental immunity for negligent operation of a motor vehicle applies, the Court must first look beyond the mere allegations to the gravamen of the complaint. Where the conduct being challenged is more properly construed as involving the performance of a governmental function rather than the operation of a motor vehicle, the exception to governmental immunity does not apply. Second, the facts pleaded in the plaintiff 's complaint must show that the alleged injuries "resulted from" the negligent operation of a government vehicle. The fact that there is an alleged casual link between the operation of the vehicle and the plaintiff 's injuries is insufficient. *Id*. at 457, n 14.

B. Application of law to the facts in Regan and Zelanko

Applying the foregoing principles to the facts in Regan, I would conclude that the trial court erred in denying defendant's motion for summary disposition. The gravamen of the Regans' complaint is found in paragraphs six and sixteen: the road commission broom tractor was sweeping dirt off the roadway on a blustery, windy day, and the performance of this governmental function on such a day was negligent.

It is undisputed that in order for the broom tractor to perform its function, sweeping dirt off the roadway, it necessarily was required to be at least partially in the roadway. At their core, then, plaintiffs' allegations challenge not the operation of the broom tractor, but the fact that the broom tractor was operated under weather conditions that resulted in zero visibility at the time Regan drove through the work area. The decision to perform the dirt-sweeping function under such weather conditions is a matter of discretion protected by governmental immunity, see *Peterson, supra,* and summary disposition should have been granted. In addition, the allegations in the Regans' complaint clearly state no more than a casual link between the operation of the broom tractor and Dona Regan's injuries. Construing the motor vehicle exception narrowly, the Regans' allegations do not satisfy the "resulting from" language of the statute. *Robinson, supra.*

I would also conclude that the trial court erred in denying defendant's motion for summary disposition in the Zelanko matter. The gravamen of Zelanko's complaint is that the road commission employee negligently performed the governmental function of mowing the grass along the side of the highway because he failed to remove debris from the grass before mowing. At its core, the complaint challenges not the operation of the tractor mower as a motor vehicle but instead the manner in which the governmental function of highway maintenance was

performed. Moreover, paragraphs 7 and 11 of Zelanko's complaint do not assert that Zelanko's injuries resulted from the operation of the defendant's tractor. Instead, Zelanko merely asserts a casual link between the airborne tire tread that struck his vehicle and the operation of the tractor that caused the tread to become airborne. The fact that Zelanko's injuries were proximately caused by the operation of the tractor is insufficient under *Robinson* to meet the narrow statutory exception. As such, Zelanko's claim against the road commission was barred by governmental immunity and the motion for summary disposition under MCR 2.116(C)(7) should have been granted.[6]

I agree with the majority that the words "resulting from" do not carry some magical quality such that these precise words must be pleaded in order to establish an exception to governmental immunity. Rather, as I assert previously, the gravamen of the complaint and the facts pleaded must show more than a casual link. I would find that the pleadings here fall short of this requirement.

IV. Conclusion

The trial courts erred in both cases by denying defendant's motions for summary disposition under MCR 2.116(C)(7) because both the Regans and Zelanko failed to allege sufficient facts to establish that their respective accidents resulted from the negligent operation of a motor vehicle. Accordingly, the motor vehicle exception to governmental immunity, MCL 691.1405, does not apply and defendant is immune from liability.

/s/ Kurtis T. Wilder

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[6] Zelanko also contends that a genuine issue of material fact exists regarding whether the tractor mower was equipped with the proper number of chain guards, which falls within operation of a motor vehicle. However, Zelanko did not include this allegation, or any other allegation that the tractor mower itself was defective, in his complaint. Accordingly, we decline to consider this claim.