STATE OF MICHIGAN

COURT OF APPEALS

THOMAS MICHAEL CURTIS, Plaintiff-Appellant, v CITY OF FLINT and PATRICK LAWSON, Defendant-Appellees.	FOR PUBLICATION October 25, 2002 9:10 a.m. No. 233576 Genesee Circuit Court LC No. 00-067668 Updated Copy January 17, 2003

Before: Fitzgerald, P.J., and Bandstra and Gage, JJ.

FITZGERALD, P.J. (*concurring*).

I concur in the result reached by the majority, albeit for different reasons.

Plaintiff alleged in his complaint that defendant Lawson was negligent in his operation of the Flint Fire Department paramedic unit by failing to follow standard emergency vehicle protocol in approaching and entering an intersection. He alleged that Lawson's negligence caused Thomas Kells to abruptly change lanes, resulting in plaintiff 's vehicle colliding with the rear end of Kells' vehicle. Defendants moved for summary disposition, arguing, in part, that there was not a factual question concerning negligence, MCR 2.116(C)(10).

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). On appeal, a trial court's grant or denial of summary disposition will be reviewed de novo. *Spiek, supra* at 337.

Plaintiff alleged that Lawson was grossly negligent in that he

> failed to operate his motor vehicle with care and in a reasonably prudent manner; failed to observe traffic; failed to drive with due care and caution; operated the motor vehicle in a manner too fast for the conditions then and there existing; endangered life and property with his driving and failed to slow down for the safe operation of the vehicle and disregarded a traffic signal.

Plaintiff also alleged that Lawson

> violated statutory duties and that he failed to slow down as was necessary for the safe operation of the motor vehicle he was operated [sic] and drove over the speed limit in a manner which endangered life and/or property contrary to MCLA 257.603 and further, conducted himself in a grossly negligent manner such as to demonstrate a substantial lack of concern for whether an injury results, so as to except his actions from governmental immunity in accordance with MCLA 691.1407.

Defendants presented the deposition testimony of Kells, who was the only witness who testified about observing Lawson's conduct before Lawson entered the intersection. Kells testified that he observed the emergency vehicle as it approached the Hammerberg intersection in full emergency mode, and that he observed the emergency vehicle come to a complete stop and the driver look both north and south before entering the intersection. Kells testified that he had been slowing down for nearly two hundred feet and had come to a rolling stop before he reached the intersection. He testified that after stopping he

> looked in [his]rearview mirror and noticed that there were no other cars coming in the left lane, there was only a car coming behind me. Assuming that that person was going to stop behind me, I waved him [Lawson] through the intersection when we made eye contact so that he would know that he was clear up toward the north of Hammerberg and that he could come through and that I was not going to proceed into the intersection. . . . I waived [sic] him [Lawson] into the intersection, and within five seconds of that happening, he began to creep out into the northbound lanes. And then I was hit.

Lawson also testified that, pursuant to policy, he came to a complete stop before entering the intersection. These two individuals are the only individuals who testified about having any personal knowledge of Lawson's conduct before and during his entering the intersection.[1] Under

[1] Plaintiff and one other witness both testified that they did not observe the emergency vehicle until it was already at least partially in the intersection. It is the statements of these two people on which a police officer opined that Lawson failed to enter the intersection in a "careful and
(continued…)

these circumstances, plaintiff failed to present sufficient evidence to create an issue of fact with regard to whether Lawson was negligent in operating the emergency vehicle and, therefore, summary disposition pursuant to MCR 2.116(C)(10) is appropriate.

Because plaintiff failed to raise a genuine issue of fact with regard to whether Lawson was negligent in his operation of the emergency vehicle, the question whether injury "resulted from" negligent operation of the motor vehicle is not reached. Therefore, it is not necessary to address *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000), or the issue of the prospective or retroactive application of *Robinson*.[2]

/s/ E. Thomas Fitzgerald

(…continued)

prudent manner." However, no citations were written.

[2] If the facts of this case had warranted application of *Robinson*, I would conclude, for the reasons stated by the majority in *Ewing v Detroit*, 252 Mich App 149, 166-167; 651 NW2d 780 (2002), that *Robinson* should be given only prospective application:

> Initially, we find that *Robinson* established a new rule of law, which now requires a plaintiff who is proceeding pursuant to MCL 691.1405 to show that the police car hit the fleeing car or caused another vehicle or object to hit the vehicle that was being chased or physically forced the vehicle off the road or into another vehicle or object. *Robinson, supra* at 445. Before *Robinson*, there was no such requirement under MCL 691.1405.
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> Next, we find that the purpose of the new rule was to correct an error in the interpretation of MCL 691.1405 and prospective application would further that purpose and failing to apply the new rule retroactively to our specific case would not thwart the purpose. *Pohutski, supra* at 697.

The majority also gave other reasons in support of its holding, none of which is applicable in the present case.