STATE OF MICHIGAN

COURT OF APPEALS

DAVID CALVIN HARDY,

Plaintiff-Appellant,

v

THE COUNTY OF OAKLAND,

Defendant-Appellee.

UNPUBLISHED
March 19, 1999

No. 206044
Oakland Circuit Court
LC No. 95-508533 NI

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

PER CURIAM.

Following a jury trial, the jury returned a special verdict finding that defendant's negligent operation of its vehicle was a proximate cause of plaintiff's injury, but that plaintiff had not suffered a serious impairment of body function. On July 2, 1997, the trial court entered a judgment in favor of defendant. Plaintiff now appeals as of right. We affirm.

Plaintiff's claim arose from a collision which occurred around 3:00 a.m. in the City of Pontiac on June 7, 1993. An Oakland County sheriff's deputy was on patrol that morning and driving from five to twenty miles per hour over the forty mile per hour speed limit on Kennett Road when he collided with the rear of plaintiff's automobile. The deputy had been on his way to lunch and had no official reason for speeding. The deputy admitted that his attention had been focused on items within his vehicle's interior and that he had not seen plaintiff's vehicle before impact.

Plaintiff first argues on appeal that the trial court erroneously dismissed the deputy as a party defendant and should have granted plaintiff's motion for reconsideration of that dismissal. The motion to dismiss the deputy was brought pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10), on the theories that plaintiff neither pleaded nor developed facts to overcome the deputy's immunity granted by law. We review the trial court's decision on a motion for summary disposition de novo. *Spikes v Banks*, 231 Mich App 341, 345-346; 586 NW2d 106 (1998). Under both MCR 2.116(C)(7) and (C)(10), we look at all of the documentary evidence, as well as the pleadings, in the light most favorable to the non-moving party, to see if summary disposition is warranted as a matter of law. *Spiek v Transportation Dep't*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Spikes, supra* at 346. Under MCR 2.116(C)(8), we examine only the pleadings, to see if "the claim is so clearly unenforceable as a

matter of law that no factual development could possibly justify the right of recovery." *Kuhn v Secretary of State*, 228 Mich App 319, 323-324; 579 NW2d 101 (1998).

Under § 7 of the Government Tort Liability Act, a government employee is immune from tort liability while acting on behalf of a governmental agency if acting within the scope of his authority, in the discharge of a governmental function, and the conduct at issue does not amount to gross negligence in that it was "so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407; MSA 3.996(107). At issue here is whether the deputy's conduct was grossly negligent.

We conclude that reasonable minds could not differ that the deputy's conduct, as pleaded in plaintiff's complaint, and as opined by plaintiff's expert, while qualifying as negligent, was not so reckless as to demonstrate a substantial lack of concern for whether injury would result. Therefore, summary disposition was appropriate. *Haberl v Rose*, 225 Mich App 254, 265-266; 570 NW2d 664 (1997). Consequently, plaintiff did not demonstrate that the deputy's dismissal was palpable error, and therefore, the court did not err in denying plaintiff's motion for reconsideration. *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997); *Cason v Auto Owners Ins Co*, 181 Mich App 600, 609; 450 NW2d 6 (1989); MCR 2.119(F)(3). Moreover, based on the jury's verdict, any possible error that may have derived from the deputy's dismissal by summary disposition was harmless. MCR 2.613(A).

Plaintiff next argues that the trial court erred by allowing the jury to consider his past convictions for armed robbery, first-degree criminal sexual conduct, and kidnapping, for purposes of assessing his credibility, under MRE 609. We review decisions to admit or exclude a witness' prior convictions under MRE 609 for an abuse of discretion. *Hurt v Michael's Food Center*, 220 Mich App 169, 174; 559 NW2d 660 (1996).

Because armed robbery is a theft crime punishable by imprisonment in excess of one year and the court properly determined that it had significant probative value on the issue of credibility, evidence of that conviction was proper under MRE 609(a)(2).[1] *Hurt*, *supra* at 176-178; *People v Cross*, 202 Mich App 138, 146; 508 NW2d 144 (1993). Although plaintiff argues that the trial court did not properly consider the unfair prejudice stemming from this evidence, the balancing test of MRE 609(a)(2)(B) (i.e., that probative value must outweigh prejudicial effect) only applies when the witness is a defendant in a criminal trial, and the probative value here is not substantially outweighed by unfair prejudice under MRE 403. *Hurt*, *supra* at 176-178.

However, the crimes of first-degree criminal sexual conduct and kidnapping do not contain elements of dishonesty or false statement, or theft, as those elements are contemplated by MRE 609. Consequently, plaintiff's convictions for those crimes were improperly admitted under that rule. *People v Allen*, 429 Mich 558, 605; 420 NW2d 499 (1988). The erroneous admission of plaintiff's kidnapping and CSC convictions was harmless, however, in light of the jury's findings that the deputy's negligence was a proximate cause of plaintiff's injuries and that plaintiff suffered no serious impairment of body function. A review of the record indicates that the jury's finding on this issue did not hinge

solely on plaintiff's credibility, but rather on the shortfalls of plaintiff's medical testimony (see discussion, *infra*).

Plaintiff next contends that his claim should not have been subject to tort limitations imposed by the no-fault act;[2] instead, he should have been allowed to recover for damage to his property and person strictly under § 5 of the government tort liability act, which provides a "motor vehicle exception" to governmental immunity, MCL 691.1405; MSA 3.996(105).[3] Plaintiff argues that the trial court erred in refusing to allow him to amend his pleadings to state a claim outside of the no-fault act and in declining to provide the jury with a special instruction in that regard.

We review the trial court's determinations with regard to plaintiff's motions to amend the pleadings and for a special jury instruction only for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 666; 563 NW2d 647 (1997) (motion to amend); *Mills v White Castle Systems, Inc*, 199 Mich App 588, 592; 502 NW2d 331 (1992) (jury instruction).

This Court undertakes statutory interpretation de novo. *Professional Rehabilitation Associates v State Farm*, 228 Mich App 167, 171; 577 NW2d 909 (1998). The fundamental aim of statutory interpretation is to give effect to the intention of the Legislature. *Frankenmuth Mutual Ins v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1997). The Legislature is presumed to have intended the plain meaning of a statute's express language. *Nation v WDE Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997). Statutes addressing the same subject matter (i.e., in pari materia) must be read together, as if they were one law, even though they make no mention of each other. *State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998). Among statutes which are in pari materia, the more recently enacted law is favored. *Malcolm v City of East Detroit*, 437 Mich 132, 139; 468 NW2d 479 (1991).

Applying these rules to the instant case, the plain meaning of the more recently enacted no-fault statute clearly encompasses governmental liability arising from its ownership of a motor vehicle by the following language: "*Notwithstanding any other provision of law* tort liability arising from the ownership . . . of a motor vehicle. . . is abolished . . ." MCL 500.3135(3): MSA 24.13135(3) (emphasis added).

Moreover, this Court has held that the motor vehicle exception to governmental immunity serves the same purpose, with respect to governmental owners of motor vehicles, as does the owner civil liability statute, MCL 257.401; MSA 9.2101[4], with respect to private owners of motor vehicles. *Haberl, supra* at 263; *Trommater v Michigan*, 112 Mich App 459, 467; 316 NW2d 459 (1982). There is no question that tort liability under the owner civil liability statute is limited to the exceptions, or residual liability, under § 3135 of the no-fault act. *Smith v Sutherland*, 93 Mich App 24, 28-30; 285 NW2d 784 (1979). Since the motor vehicle exception to governmental immunity serves the same purpose as the owner civil liability statute, there is no basis to conclude that one would be encompassed by tort liability limitations of the no-fault act while the other would not.

Even though MCL 691.1405; MSA 3.996(105) "provides a basis for imposing liability where none would exist in the absence of the statute, . . . the standard under which liability is imposed is

furnished by § 3135 of the no-fault act." *Smith*, *supra* at 29-30 (referring to the civil liability statute). Hence, the trial court applied the law correctly and did not abuse its discretion by declining to permit plaintiff to state a claim on a theory interpreting these statutes to the contrary, nor by declining to submit an instruction to the jury in that same regard.

Lastly, plaintiff contends that the court erred in not granting JNOV or a new trial because the jury's verdict was against the great weight of the evidence. This Court reviews a trial court's decision with regard to a motion for JNOV de novo in that, like the trial court, this Court must examine the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Hord v ERIM*, 228 Mich App 638, 641; 579 NW2d 133 (1998). "If the evidence is such that reasonable jurors could have found [as they did], neither the trial court nor this Court may substitute its judgment for that of the jury." *Carpenter v Consumers Power Co*, 230 Mich App 547, 553; 584 NW2d 375 (1998). This Court reviews a trial court's decision on a motion for a new trial for an abuse of discretion. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 511; 556 NW2d 528 (1996), aff'd 458 Mich 582 (1998). See also *Watkins v Manchester*, 220 Mich App 337, 341; 559 NW2d 81 (1996). For this Court to reverse, the verdict must be "manifestly against the clear weight of the evidence, and substantial deference will be given by this Court to a trial court's determination that a verdict is not against the great weight of the evidence." *Id.* at 340.

As mentioned, an individual's remedies in tort against the owner of a negligently operated motor vehicle are limited to the recovery of noneconomic damages in cases where the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. MCL 500.3135(1); MSA 24.13135(1). In the instant case, plaintiff alleged injuries to his back and neck, arguing that such constituted a serious impairment of body function. Because plaintiff's claim was filed on November 20, 1995 (i.e., before the effective date of the 1996 amendment to § 3135), plaintiff's burden of establishing a serious impairment of body function is governed by the test enunciated in *DiFranco v Pickard*, 427 Mich 32, 39; 398 NW2d 896 (1986).

The two-part *DiFranco* test asks: (1) "What body function, if any, was impaired . . . ?" and (2) "Was the impairment serious?" *Id.* at 39, 67. In applying this test, the Court said:

> Generally, medical testimony will be needed to establish the existence, extent, and permanency of the impairment . . .
>
> The extent of an impairment is often expressed in numerical terms. A person who suffers a permanent seventy-five percent limitation in back movement has clearly suffered a serious impairment of back function, while a person with a permanent five-percent limitation probably has not. However, the particular body function impaired may also make a difference. A ten-percent permanent reduction in brain functioning is a more serious impairment of body function than a ten-percent limitation in neck motion. [*Id.* at 67.]

In this case, the jury was presented with the deposition testimony of doctors who gave conflicting opinions. One doctor asserted that plaintiff had fully recovered from any injury he sustained in the

collision, while another doctor opined that plaintiff suffered from cervical and lumbar muscle strains and pinched nerves. While plaintiff claimed to suffer difficulty with extended walking or sitting, there was testimony that he had been able to deliver newspapers regularly for seven months and that he had assisted in the installation of lawn sprinklers for a month. On this record, there were clearly factual issues for the jury both as to whether plaintiff had suffered permanent injuries as well as whether those injuries, if any, constituted a serious impairment of body function under the *DiFranco* test.

The jury's verdict cannot be manifestly against the clear weight of the evidence, because there is no clear weight of the evidence. Moreover, since "material factual dispute[s] existed, [and] reasonable minds could have differed on whether the plaintiff sustained a serious impairment of body function" the issue was properly submitted to the jury and its verdict "should not be disturbed." *DiFranco, supra* at 59; *Beard v Detroit*, 158 Mich App 441, 449; 404 NW2d 770 (1987).

Affirmed.

/s/ Roman S. Gribbs
/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder

[1] Impeachment of a witness by use of prior convictions is permitted, subject to certain restrictions, when:

> . . . the evidence has been elicited from the witness or established by public record during cross examination, and
>
> (1) the crime contained an element of dishonesty or false statement, or
>
> (2) the crime contained an element of theft, and
>
> (A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and
>
> (B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect. [MRE 609(a).]

[2] The pertinent language of the appropriate version of the applicable statute reads:

> (1) A person remains subject to tort liability for noneconomic loss caused by his or her ownership maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.

(2) Notwithstanding any other provision of law, tort liability arising from the ownership . . . of a motor vehicle with respect to which the security required by section 3101(3) and (4) was in effect is abolished except as to:

(a) Intentionally caused harm to persons or property. . . .

(b) Damages for noneconomic loss as provided and limited in subsection (1). [MCL 500.3135; MSA 24.13135 (amended by 1995 PA 222, § 1, effective March 28, 1996).]

[3] The motor vehicle exception to governmental immunity reads:

Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any . . . employee of the governmental agency, of a motor vehicle of which the governmental agency is owner . . . [MCL 691.1405; MSA 3.996(105).]

[4] The owner civil liability statute, in relevant part, reads:

. . . The owner of a motor vehicle shall be liable for any injury occasioned by the negligent operation of the motor vehicle whether the negligence consists of a violation of the provisions of the statutes of the state or in the failure to observe such ordinary care in the operation of the motor vehicle as the rules of the common law requires. . . . [MCL 257.401(1); MSA 9.2101(1).]