

STATE OF MICHIGAN
COURT OF APPEALS

YASSAMIN ABED,

Plaintiff-Appellant,

v

OFFICER JOHN DOE #1, OFFICER JOHN DOE
#2 and OFFICER JOHN DOE #3,

Defendants-Appellees,

and

CITY OF FERNDALE,

Defendant/Cross-Plaintiff-Appellee,

v

DESHAWN OTIS SMITH,

Defendant/Cross-Defendant.

Before: Gribbs, P.J., and O'Connell and R. B. Burns*, JJ.

PER CURIAM.

This is a negligence action by an innocent bystander arising from a police chase. Plaintiff appeals by leave granted from the trial court's order granting defendant City of Ferndale's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

In the early afternoon, on September 16, 1994, a Ferndale police officer was responding to a report of an armed robbery in the parking lot of a nearby bank when he monitored a broadcast from nearby Pleasant Ridge about an armed robbery that had taken place there just minutes earlier. From

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

the radio descriptions, it sounded like the same vehicle was involved. As the officer traveled east on Nine Mile Road toward the bank, he spotted a white car traveling west that matched the suspect's description. The car changed lanes quickly as the police car ahead of our officer passed it. The second officer then made a U-turn, observed the car's license plate and the driver as they went by him, and radioed the information in. The officer followed the car west toward the intersection of Nine Mile Road and Woodward Avenue, where traffic on westbound Nine Mile Road was stopped for a red light. "The vehicle at this time accelerated rapidly and drove up on the sidewalk still [westbound], entered the nine [mile]/[Woodward] intersection against traffic and in doing so blew the left front tire," turned left, and proceeded south on Woodward. The police officer then activated his overhead lights and siren, advised dispatch, and pursued the suspect -- later identified as DeShawn Otis Smith, age seventeen. A second Ferndale police vehicle who was already on Woodward joined the pursuit.

As Smith continued down Woodward Avenue, he reached speeds in excess of sixty miles per hour and "was cutting around traffic." At the intersection of Woodward and Pearson, "Smith had to brake hard and cut vehicles off[,] changing lanes wildly," when his left front tire "came off." According to a witness, Smith was driving on the rim at the time of impact. Smith continued south, "still accelerating at speeds of better th[a]n 70 mph" At the intersection of Eight Mile Road and Woodward, traffic was stopped at a red light and "Smith had to slow down to avoid a collision," but managed to continue through the intersection. As both Ferndale officers continued their pursuit, "traffic was stopped once again in all [southbound] lanes . . . just north of State Fair," waiting for a funeral procession that was entering a cemetery. "Smith could not stop the vehicle at this time and ran into [plaintiff's] vehicle [which was] stopped in front of him."

Smith fled on foot, back and forth across Woodward, with his hand inside his right pant's pocket. Officers pursued him and saw him throw something over the fence into the cemetery. He was apprehended up against the cemetery fence, and a handgun was found in the bushes inside. Smith was identified at the scene by the victims of the attempted armed robberies at Ferndale and Pleasant Ridge. The vehicle Smith was driving had been stolen at gunpoint from a visiting nurse in Detroit just half an hour before the attempted armed robbery in Pleasant Ridge.

According to a witness who was stopped next to plaintiff, at the time of impact, there were Detroit police officers standing outside their patrol cars, which were parked in the median, apparently in connection with the funeral. There were also police officers parked in front of plaintiff and the witness. There is no indication that any of these officers had been alerted to the chase in progress. The witness later stated that an unidentified officer told her that police had shot out the suspect's tire. The weather was clear, sunny and dry; traffic was medium to light.

On appeal, plaintiff argues that the trial court erred when it ruled that, as a matter of law, the Ferndale police officers' pursuit of Smith was reasonable. Specifically, plaintiff claims that there was evidence that the police officers acted unreasonably in pursuing Smith and that the city is therefore liable under the motor vehicle exception to governmental immunity. See MCL 691.1405; MSA 3.996(105); see also MCL 691.1407(1); MSA 3.996(107)(1). We disagree.

When reviewing a motion for summary disposition based on MCR 2.116(C)(10), the court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996); see also *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455 and n 2; ___ NW2d ___ (1999).¹ The nonmoving party has the burden of establishing -- through affidavits, depositions, admissions, or documentary evidence -- that a genuine issue of material disputed fact exists. *Quinto, supra*, 451 Mich at 361-362. The party opposing the motion may not rest on the mere allegations or denials contained in the pleadings but must come forward with evidence of specific facts to establish the existence of a material factual dispute. *Quinto, supra*, 451 Mich at 362, 371. A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence. *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 398-399; 491 NW2d 208 (1992); see also *Quinto, supra*, 451 Mich at 367, 371-372 (a question of fact exists where there is sufficient evidence to allow a reasonable jury to find in the nonmoving party's favor). If the nonmoving party fails to establish that a material fact is at issue, the motion is properly granted. *Quinto, supra*, 451 Mich at 363. The same tests apply to a motion brought on the basis of governmental immunity under MCR 2.116(C)(7). See *Guerra v Garrat*, 222 Mich App 285, 288-289; 564 NW2d 121 (1997).

To establish a prima facie case of negligence, a plaintiff must prove that: (1) defendants owed a duty to plaintiff; (2) defendants breached that duty; (3) plaintiff suffered damages; and (4) defendants' breach or negligence was the proximate cause of plaintiff's damages. *Rogers v City of Detroit*, 457 Mich 125, 137; 579 NW2d 840 (1998). Police chasing a fleeing vehicle owe innocent bystanders the "duty to exercise . . . that care that a reasonably prudent person would exercise while discharging official duties of a similar nature under similar circumstances." *Rogers, supra*, 457 Mich at 137; see also *Fiser v City of Ann Arbor*, 417 Mich 461, 470; 339 NW2d 413 (1983). Thus, "[g]overnmental agencies shall be liable for personal injury and property damage resulting from the negligent operation by any officer, agent, or employee . . . of a motor vehicle" owned by the agency. MCL 691.1405; MSA 3.996(105); see also MCL 691.1407(1); MSA 3.996(107)(1); *Rogers, supra*, 457 Mich at 146; *Fiser, supra*, 417 Mich at 469. Individual officers who otherwise meet the statutory criteria are personally liable only if their conduct was grossly negligent. See MCL 691.1407(2); MSA 3.996(107)(2).

As they existed in 1994, the statutes governing the operation of emergency vehicles require the use of either warning devices, but allow the responding driver to ignore traffic signals "after slowing down as may be necessary for safe operation;" and to exceed posted speed limits, "so long as he does not endanger life or property." See MCL 257.603; MSA 9.2303. Responding emergency vehicles may therefore exceed posted speeds when operated "with due regard to safety," but "[t]his exemption shall not however protect the driver of the [emergency] vehicle from the consequences of a reckless disregard for the safety of others." MCL 257.632; MSA 9.2332. Defendants' duty of care -- to drive emergency vehicles "with due regard to the safety of others" -- is inferred from these statutes. *Rogers, supra*, 457 Mich at 139 (quoting *Fiser, supra*, 417 Mich at 472).

Several factors are relevant to whether a police officer acted reasonably in pursuing a fleeing motorist, including:

(1) whether there was an emergency, (2) the speed of the pursuit, (3) the area of the pursuit, (4) the weather and road conditions, (5) the presence of pedestrians and other traffic, (6) the presence or absence of audible and visible warnings, and (7) the reason the officers were pursuing the fleeing vehicle. [*Rogers, supra*, 457 Mich at 144 (quoting *Fiser, supra*, 417 Mich at 472).]

In *Rogers*, the chase took place at speeds “variously estimated at sixty to seventy and ninety to one hundred miles an hour,” “(1) across busy major city streets, (2) through densely populated urban residential areas, (3) during a time of day when schools released children, (4) in disregard of traffic and traffic signals, (5) by not fully marked police vehicles, (6) in violation of internal police standards, and (7) in pursuit of a stolen vehicle that the police had been surveilling.” *Rogers, supra*, 457 Mich at 131, 145. “[I]n *Fiser*[,] . . . the police-pursuit situation involved: (1) high speed, (2) disregard of traffic signals, (3) pursuit through residential and business areas, and (4) wet pavement at a well-traveled intersection.” *Rogers, supra*, 457 Mich at 144. The chase in *Fiser* began because the suspect had “run a flashing red light” and attained “speeds of up to 110 miles per hour.” *Fiser, supra*, 417 Mich at 472-473.

In contrast, in the present case, there was an emergency because the suspect was armed and had committed a carjacking and two attempted armed robberies in less than an hour, and had driven over a sidewalk and against the flow of traffic at the mere sight of the police cruiser. Smith had also driven southbound on northbound Woodward while chasing his intended victim in Pleasant Ridge. The pursuit reached “speeds of better th[a]n 70 mph,” although Smith had slowed down at a traffic light about half a mile before plaintiff was struck. The pursuit started in the Ferndale business district and continued down Woodward into Detroit, through a mixed business area. The weather was clear and sunny; the roads were dry. Traffic was light to medium until the chase encountered the funeral procession. The officers were in fully marked squad cars and had turned on their lights and sirens. Lastly, police initiated the pursuit because Smith had committed two attempted armed robberies in less than an hour. In our opinion, the trial court correctly concluded that there was no issue of fact concerning whether the officers were negligent in deciding to pursue the suspect, or in their operation of their police vehicles during the chase.²

We therefore do not need to reach the issue of proximate cause, which we note was not decided by the trial court below.

Affirmed.

/s/ Roman S. Gibbs
/s/ Peter D. O'Connell
/s/ Robert B. Burns

¹ Overruling a line of cases, *Smith* held that the test is *not* whether a record may be developed upon which reasonable minds may differ, *nor* whether the court is satisfied that the nonmoving party cannot prevail at trial because of a deficiency which cannot be overcome. *Smith, supra*, 460 Mich at 454-455 and n 2.

² Although we are clearly bound by *Rogers* and *Fiser*, we note that on July 30, 1999, our Supreme Court has asked the parties in *Robinson v Detroit*, 225 Mich App 14, 21, 23; 571 NW2d 34 (1997) (conflict panel), lv gtd 458 Mich 861 (1998), consolidated with *Cooper v Wade*, 218 Mich App 649; 554 NW2d 919 (1996), lv gtd 456 Mich 905 (1997), to brief the issues of whether it should overrule *Rogers v City of Detroit*, 457 Mich 125; 579 NW2d 840 (1997), *Dedes v Asch*, 446 Mich 99; 521 NW2d 488 (1994), and *Fiser v City of Ann Arbor*, 417 Mich 461; 339 NW2d 413 (1983). The Court also asked the parties to address the issue of whether the officers' decision to pursue, as opposed to the officers' physical handling of the vehicle during the pursuit, can be considered negligent use of a motor vehicle; and whether the phrase "resulting from" in MCL 691.1405; MSA 3.996(105), should be construed as meaning a direct or immediate connection between the negligent operation of the vehicle and the injury. See also *Rogers*, 457 Mich at 158-169 (Taylor, J., dissenting).