STATE OF MICHIGAN

COURT OF APPEALS

KIMBERLY BERMUDEZ, Personal Representative for the Estate of ANTHONY BERMUDEZ, DIANE CRANMER, Next Friend of Shaun Cranmer and Kyle Cranmer, Minors, and GLENN T. HEINTZELMAN, Personal Representative for the Estate of JARED A. HEINTZELMAN,

Plaintiffs-Appellees,

v

JANET A. LEE,

Defendant-Appellant,

and

CAPITAL AREA TRANSPORTATION AUTHORITY, GLENN T. HEINTZELMAN and KATHY L. HEINTZELMAN,

Defendants.

UNPUBLISHED
August 17, 2004

No. 249609
Ingham Circuit Court
LC No. 02-000384-NI

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

FITZGERALD, J. (*dissenting*).

The majority concludes that it need not decide whether plaintiffs came forward with sufficient evidence to support a finding that defendant Lee's conduct amounted to gross negligence because they conclude that plaintiffs did not come forward with sufficient evidence to support a finding that Lee's actions were "the" proximate cause of the accident. I disagree.

In denying Lee's motion for summary disposition, the trial court concluded that there was a factual issue with regard to whether Lee's conduct amounted to gross negligence. I agree with this conclusion.

Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c). If reasonable jurors could honestly reach different conclusions as to whether conduct constitutes gross negligence under

MCL 691.1407(2)(c), the issue is a factual question for the jury. *Jackson v Saginaw County*, 458 Mich 141, 146-147; 580 NW2d 870 (1998).

In this case, plaintiffs alleged that defendant Lee operated the CATA bus in a reckless manner by failing to keep the bus under control, failing to maintain a proper look-out for other traffic and traffic conditions, failing to obey traffic devices, failing to yield to traffic with the right-of-way, and failing to operate the bus at a careful and prudent speed. Viewing the facts in the light most favorable to plaintiffs, defendant Lee expressed that she was in a hurry to run her route, she went through an amber light at the intersection immediately preceding the intersection where the collision occurred, she was traveling in excess of the posted speed limit, and she passed through a red light when proceeding through the intersection where the collision occurred. Reasonable minds could conclude that defendant Lee should have recognized that speeding in a bus through an intersection without the right of way could result in a collision.[1] Reasonable minds could disagree about whether such conduct demonstrated "a substantial lack of concern for whether an injury results." MCL 691.1407(2).

The trial court did not address the issue of whether Lee's actions were "the" proximate cause of the injuries. The majority states that "even considering the evidence in a light most favorable to the plaintiffs, the light was not red on Shiawassee when the bus entered the intersection," and that "a reasonable fact finder would almost certainly conclude that, when plaintiffs' car entered the intersection, the light on Larch was red." Thus, the majority concludes that Lee's actions were at most "a" proximate cause of the accident. I disagree.

Defendant Lee argues on appeal, consistent with the argument at the hearing on the motion, that Lee could not be "the" proximate cause of the accident because the plaintiffs alleged in their complaint that the conduct of Jerald Heintzelman was a proximate cause of the accident. However, an accident can have more than one proximate cause. The issue is whether Lee was "the" proximate cause of the accident. At the hearing on the motion, counsel for plaintiffs and defendant Lee agreed that there was conflicting testimony, and that a credibility contest would be presented, with regard to the color of the lights on both Larch and Shiawassee at the time the parties entered the intersection. Under these circumstances, I would affirm the order denying Lee's motion for summary disposition.

/s/ E. Thomas Fitzgerald

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[1] I am cognizant of past Supreme Court decisions holding that "mere excessive speed by itself does not constitute willful and wanton misconduct in the operation of an automobile" or gross negligence. See, e.g., *Piscopo v Fruciano*, 307 Mich 433, 437; 12 NW2d 329 (1943); *Bielawaski v Nicks*, 290 Mich 401; 287 NW 560 (1939). The present case is factually distinguishable in that it involves a city bus, as well as additional allegations of negligence beyond mere excessive speed.