STATE OF MICHIGAN

COURT OF APPEALS

DANIEL SINACOLA,

Plaintiff-Appellee,

v

TOWNSHIP OF LELAND, JOHN DAVID REENS, ROBERT BABICH, TIMOTHY JOHN KEILTY, and CARL MYERS,

Defendants,

and

RUSSELL DZUBA,

Defendant-Appellant.

UNPUBLISHED
November 18, 2004

No. 248068
Leelanau Circuit Court
LC No. 02-006119-NI

DANIEL SINACOLA,

Plaintiff-Appellee,

v

LELAND TOWNSHIP, RUSSELL DZUBA, JOHN DAVID REENS, ROBERT BABICH, and CARL G. MYERS,

Defendants,

and

TIMOTHY JOHN KEILTY,

Defendant-Appellant.

No. 252107
Leelanau Circuit Court
LC No. 02-006119-NI

Before: Borrello, P.J., and Murphy and Neff, JJ.

PER CURIAM.

This case arises out of a boating accident in which plaintiff was seriously injured as a result of being struck by one or two boats. Plaintiff brought various claims against the multiple defendants. In Docket No. 248068, defendant Russell Dzuba appeals as of right the order denying his motion for summary disposition based on governmental immunity under MCL 691.1407(2). In Docket No. 252107, defendant Timothy John Keilty appeals by leave granted the order denying his motion for summary disposition with regard to plaintiff's claim against him under the watercraft owner's liability statute, MCL 324.80157. The cases have been consolidated for our consideration. The remaining defendants are not directly implicated in these appeals and are not parties to the appeals. We reverse the denial of summary disposition with respect to defendant Dzuba in Docket No. 248068, and we affirm the denial of summary disposition with respect to defendant Keilty in Docket No. 252107.

Plaintiff alleged the following in his complaint. On August 7, 2001, defendant Carl Myers' boat became inoperable while in Lake Michigan, and Myers issued a distress call. Dzuba received the distress call in his official capacity as an employee or agent of Leland Township. In response to the distress call, Dzuba, defendant John Reens, and defendant Robert Babich took a boat owned by Keilty to rescue Myers' vessel. After the rescue, at about 9:30 p.m., Reens was at the helm operating Keilty's boat "under the command" of Dzuba, and Myers was operating his boat, each at a location about three hundred yards south of the entrance to the Leland Marina and seventy-five yards west of the shoreline. During this time frame, plaintiff, along with several of his family and friends, were floating on an inflatable raft apparently referred to as a "party raft." The raft was about nine feet in diameter. Reens drove Keilty's boat over and through the raft. Myers drove his boat directly over and through plaintiff and his family and friends. Plaintiff was struck by the propeller of one or both boats causing severe injuries to his legs, hip, and abdomen.

Dzuba's deposition testimony, which appears to be largely undisputed, provides a more detailed account of the circumstances surrounding the accident. Dzuba testified that he was employed seasonally by Leland Township as the assistant harbormaster. He believed that at 8:00 p.m. on August 7, 2001, while he was working at the harbor, he received a telephone call from Myers who asked for help getting him gas. Myers indicated that he was calling on a cellular telephone, that he had exhausted his fuel, and that he was in his boat anchored off "Whale Back," a prominent hill south of the harbor. After unsuccessfully seeking help from other sources, Dzuba saw Reens and Babich enter the harbor on a sailboat at about 9:00 p.m. Dzuba asked them if they could help, and Reens agreed. While Dzuba filled up a fuel can, Reens brought around a twenty-three-foot "Pursuit" boat that Dzuba knew was owned by Keilty. After this, Reens, Dzuba, and Babich proceeded in Keilty's boat, with Reens at the helm and operating the boat, to the stranded boat and provided its occupants with fuel for their boat. After this, the previously stranded boat followed Keilty's boat back to the harbor. Dzuba eventually felt Keilty's boat come in contact with something and saw a raft in the water.

Dzuba moved for summary disposition based on a claim of governmental employee immunity, alleging that his conduct in connection with the incident could not possibly be considered "the proximate cause" of plaintiff's injuries. At the motion hearing, the trial court denied this motion largely because the time for discovery had not closed. Accordingly, an order was entered denying Dzuba's motion for summary disposition. Dzuba filed a claim of appeal with this Court from that order.[1]

Thereafter, Keilty filed a motion for summary disposition on the ground that he was not liable to plaintiff under MCL 324.80157 (the watercraft owner's liability statute) because there was no genuine issue as to the fact that Keilty did not provide Reens with express or implied permission or consent to operate Keilty's boat at the time of the incident. An order was entered denying that motion. This Court granted Keilty's motion for leave to appeal from that denial.

We first address defendant Dzuba's appeal.[2] Dzuba argues that he is protected by governmental immunity under MCL 691.1407(2), which allows for the liability of governmental employees only if their conduct amounts to gross negligence that is the proximate cause of an injury, where there is no genuine issue of material fact that his conduct was not the proximate cause of plaintiff's injury, considering that defendant Reens was operating the boat.

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[1] MCR 7.202(7)(a)(v) defines a "final judgment" or "final order" as including an order denying governmental immunity to a governmental party, including a governmental employee. Thus, Dzuba had an appeal as of right from the trial court's order denying his motion for summary disposition, which was based on governmental immunity, because, under MCR 7.203(A)(1)(a), a party has an appeal as of right from a "final judgment" or "final order" of a court. Proceedings continued in this matter in the trial court even after Dzuba's claim of appeal was filed.

[2] This Court reviews de novo a trial court's ruling to either grant or deny a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). In addition, all affidavits, pleadings, depositions, admissions, and other documentary evidence filed in the action or submitted by the parties are viewed in a light most favorable to the party opposing the motion. *Id.* Where the burden of proof on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in the pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *Id.* Where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 363. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003)(citations omitted).

An employee or volunteer of a governmental agency is immune from tort liability for injury to a person while acting in the course of employment or service on behalf of the governmental agency if (1) the employee or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority, (2) the governmental agency is engaged in the exercise or discharge of a governmental function, and (3) the conduct of the employee or volunteer "does not amount to gross negligence that is the proximate cause of the injury or damage." MCL 691.1407(2). In this regard, "the proximate cause" means "the one most immediate, efficient, and direct cause of the injury or damage[.]" *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000); accord *Dean v Childs*, 262 Mich App 48, 58; 684 NW2d 894 (2004). It is undisputed that Dzuba satisfied the first two requirements for the applicability of governmental employee immunity. The disputed issue involves whether from undisputed facts it is clear that no reasonable person could find that gross negligence on Dzuba's part was the proximate cause of plaintiff's injuries.

It is manifest from the allegations in the complaint, particularly those indicating that Reens and Myers were operating the boats at the time of the incident, that no reasonable person could conclude that any act by Dzuba was the one most immediate, efficient, and direct cause of plaintiff's injuries. Rather, the apparent failure by Reens or Myers to see the inflatable raft or plaintiff and his companions and, consequently, their conduct in hitting the raft or plaintiff while operating the boats constituted the most immediate, efficient, and direct cause of plaintiff's injuries. This is true even assuming that Reens was acting under the general "command" of Dzuba in operating Keilty's boat, because that does not change the fact that Reens was the person actually operating the boat and that the manner in which he did so was a more direct cause of plaintiff's injuries. In this regard, even accepting that Dzuba directed Reens to drive at an excessive speed and unreasonably close to shore as alleged in the complaint, and that this played a role in the occurrence of the incident, it does not alter the fact that Reens' or Myers' alleged failure to see the raft or plaintiff and his companions constituted the direct cause of the accident rather than any negligence by Dzuba.[3] Thus, the trial court erred by denying Dzuba's motion for summary disposition because he was entitled to governmental employee immunity under MCL 691.1407(2).

With regard to plaintiff's argument to the effect that a grant of summary disposition would have been premature because the period for discovery had not closed, a grant of summary disposition prior to the close of discovery is not premature "if there is no fair chance that further

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[3] Dzuba indicated in his deposition that he was positioned with his back to Reens while Reens was driving Keilty's boat back to the harbor, which, if true, would indicate that Dzuba was not specifically directing Reens in driving the boat at the time of the accident and makes all the more clear that no conduct by Dzuba was the proximate cause of plaintiff's injuries. Dzuba also said at his deposition that, to his knowledge, he did not have any authority as the assistant harbor master to commandeer vessels to assist distressed boaters, which would indicate that Reens was not subject to Dzuba's "command" at the time of the incident. But Dzuba's deposition was not taken until April 11, 2003 – after summary disposition. Accordingly, we do not rely on Dzuba's deposition in analyzing this issue.

discovery will allow the party opposing the motion to present sufficient support for its allegations." *CMI Int'l, Inc v Intermet Int'l Corp,* 251 Mich App 125, 134-135; 649 NW2d 808 (2002). Given the undisputed fact that the boats were operated by Reens and Myers at the time of the incident, and thus not by Dzuba, there is no fair chance further discovery would allow plaintiff to avoid governmental employee immunity with regard to his claim against Dzuba. Thus, the timing of Dzuba's motion for summary disposition does not alter our conclusion that the trial court erred by denying that motion.[4]

In sum, the trial court's denial of Dzuba's motion for summary disposition is reversed, and the trial court is directed to enter an order granting summary disposition in defendant Dzuba's favor.

We now address defendant Keilty's appeal. Keilty argues that plaintiff did not submit sufficient evidence that would allow a jury to reasonably conclude that he consented, either expressly or implicitly, to Reens' use of Keilty's boat on the night of the accident.

The trial court essentially denied Keilty's motion for summary disposition on the grounds that evidence regarding the relationship between Keilty and Reens could be considered by a jury to establish implied consent and a potential reason to question the credibility of the denials of consent by Keilty and Reens. We agree with the trial court.

MCL 324.80157, the watercraft owner's liability statute, provides:

> The owner of a vessel is liable for any injury occasioned by the negligent operation of the vessel, whether the negligence consists of a violation of the statutes of this state, or in the failure to observe such ordinary care in the operation as the rules of the common law require. The owner is not liable unless the vessel is being used with his or her expressed or implied consent. It shall be presumed that the vessel is being operated with the knowledge and consent of the owner if it is driven at the time of the injury by his or her son, daughter, spouse, father, mother, brother, sister, or other immediate member of the owner's family.

In response to Keilty's motion for summary disposition, plaintiff relied largely on Dzuba's deposition testimony as indicating that Reens had permission to use Keilty's boat. On direct examination by plaintiff's counsel, when Dzuba was initially asked if Reens had permission to take the boat, Dzuba replied, "He did have permission to take the boat, yes." When asked how he knew this, Dzuba replied:

> The relationship between Reens and Keilty is one of they've exchanged work. [Keilty] is a cattle farmer and [Reens] has done a lot of work for [Keilty]

[4] In light of the above analysis, there is no need to reach the alternative argument that plaintiff did not adequately plead an allegation that Dzuba was grossly negligent.

over the years. [Reens] and [Keilty's] wife Nancy are friends and generally, . . . there was implicit agreement.

Dzuba then said, "Uh-huh," when asked if there "was an understanding between them." More specifically, Dzuba agreed that it was his understanding that there was an agreement between Reens and Keilty that Reens could use the boat. However, Dzuba also agreed that he just assumed that Reens had permission to use the boat and that he did not talk to Reens about whether Reens had asked for such permission. Dzuba further stated that Reens had used the boat in the past for a boat ride. Dzuba indicated that he never would have gone in Keilty's boat if he thought that Reens did not have express or implied permission to use it.

The following exchange occurred during Dzuba's cross-examination by Keilty's counsel:

Q. So were you the first person in the conversation [between Dzuba and Reens] to make reference to the boat?

A. I guess it would be – I'm searching for the right term. It would be – it would just be a natural choice to, you know, because I knew of [Keilty's] and [Reens'] relationship that we could take Keilty's boat.

Dzuba also asserted that he had been on Keilty's boat once before "maybe in the fall" of 1998 or 1999, when he went for a boat ride with Reens. Dzuba did not hear Reens obtain Keilty's permission to use the boat at that earlier time, but rather "was just invited by Mr. Reens." Dzuba never discussed with Reens how Reens obtained Keilty's consent to use the boat for that boat ride, but could "only assume" that Reens had permission.

When asked about the relationship between Keilty and Reens, Dzuba replied, "[Reens] had worked on [Keilty's] farm and they had exchanged work for favors, I suppose you'd call it. [Reens] helped him out with his boat." Dzuba stated that, while he had the "understanding" that Reens had express or implied permission from Keilty to use Keilty's boat, he "did not know of any agreement between the two." Dzuba agreed with Keilty's counsel that his testimony with regard to whether Reens had such consent was based on "speculation." He further stated that, from his experience as the assistant harbormaster, there was never much of a problem with theft of boats in the harbor and that it would not be unreasonable for a boat owner to leave a key (to start his or her boat) on a boat.

Plaintiff also suggests that the following deposition testimony from Keilty supports a finding that Reens had permission to use the boat at the time of the incident:

> [E]ssentially we had an agreement that [Reens] because he lived in Leland and spent a lot of time at the harbor because he had a boat moored in the harbor – and this is a situation or something he proposed to me – that he would take care of the boat, look after it and for that while the boat was in there that he could use the boat on a day or maybe two days if he asked permission beforehand. It was that simple.

> And that was because I did not – my time is such that when I go to the boat, I'm going to use the boat and it best be there. And [Reens] – there's nobody on the planet that would just go take that boat and think they had a right to take it without asking. [Reens] and I had an agreement.

In support of his motion for summary disposition, Keilty relied largely on affidavits from Reens and himself. In his affidavit, Reens averred that he did not have Keilty's express permission to use the boat at the time of the accident and that he "never had Mr. Keilty's implied permission to use his boat at any time." Reens further stated that there was "never any arrangement, agreement or understanding between Mr. Keilty and me for me to take custody of or use his boat without first obtaining his express permission." Keilty's affidavit similarly indicated that he did not give Reens express or implied permission to use Keilty's boat. Keilty's affidavit also averred that Reens "was specifically told not to use my watercraft unless he obtained my express permission first." The affidavit additionally indicated that Keilty was upset that Reens took his boat without permission when Reens told him about the incident the following morning, that Reens was apologetic, and that Keilty routinely kept his keys on his boat for his own convenience.[5]

Implied consent may be gathered from a consideration of all the facts and circumstances, taking into consideration reasonable inferences arising from those facts and circumstances, and the question whether there was implied consent is usually an issue for the jury to resolve. *Wingett v Moore*, 308 Mich 158, 161; 13 NW2d 244 (1944).

We find it unnecessary to determine whether a rebuttable common-law presumption of consent exists where a watercraft is being operated by a person who is not a member of the owner's family.[6] Even without such a presumption, a factual issue regarding implied consent was created in the case at bar. We conclude that the trier of fact must determine whether Reens had implied consent to operate the boat in a so-called "emergency" situation, considering Reens' lack of hesitation in boarding and operating the boat under the circumstances, the prior relationship between Reens and Keilty, including their agreement that Reens take care of and look after the boat in Keilty's absence, Dzuba's observations, Reens' prior operation and use of the boat, and the accessible keys. While we acknowledge the affidavits executed by Keilty and Reens, the grant of a motion for summary disposition "is especially suspect where motive and intent are at issue or where a witness or deponent's credibility is crucial." *Vanguard Ins Co v Bolt*, 204 Mich App 271, 276; 514 NW2d 525 (1994); see also *Echelon Homes, LLC v Carter*

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[5] Apparently, the keys used by Reens to operate the boat were located on the boat itself.

[6] In the context of liability for motor vehicle owners under MCL 257.401, which contains language comparable to the language found in MCL 324.80157, our Supreme Court has stated that "the operation of a motor vehicle by a person who is not a member of the owner's family gives rise to a rebuttable common-law presumption of consent." *Bieszck v Avis Rent-A-Car Sys, Inc*, 459 Mich 9, 18-19; 583 NW2d 691 (1998), citing *Fout v Dietz*, 401 Mich 403, 405; 258 NW2d 53 (1977).

Lumber Co, 261 Mich App 424, 440; 683 NW2d 171 (2004)(courts "may not make findings of fact or weigh credibility in deciding a summary disposition motion"). It could reasonably be inferred from the factual surrounding circumstances that implied consent existed, yet Keilty's and Reens' averments regarding their intentions and understanding lead to a contrary and conflicting conclusion. Thus, a jury or trier of fact is the proper arbiter to resolve the issue.

Affirmed in part and reversed in part and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ William B. Murphy
/s/ Janet T. Neff