

STATE OF MICHIGAN
COURT OF APPEALS

BRUCE D. BOONE and JILL E. BOONE,

Plaintiffs-Appellees,

v

RIETH-RILEY CONSTRUCTION COMPANY,
INC., NES TRAFFIC SAFETY LP, and DLZ
MICHIGAN, INC.,

Defendants,

and

DEANNA PAPANEK and CHANNING PAGE,

Defendants-Appellants.

UNPUBLISHED
September 24, 2009

No. 285276
Ingham Circuit Court
LC No. 05-001479-NI

Before: O'Connell, P.J., and Talbot and Stephens, JJ.

PER CURIAM.

Defendants Deanna Papanek and Channing Page appeal as of right the circuit court's order denying their motion for summary disposition. We affirm.

In May 2005, plaintiff Bruce Boone was paralyzed from the chest down as a result of a motorcycle accident at the Holt Road exit on US-127. Defendants are Michigan Department of Transportation (MDOT) employees. Several miles of US-127 preceding this exit were being repaved at the time, and Papanek, a lead construction inspector for MDOT, oversaw the seven MDOT inspectors at the US-127 construction project. Page was the senior technical engineer involved in the project for MDOT.

Boone had been riding near the fog line that marked the right-hand boundary of the road on newly paved temporary asphalt that was laid partially over the existing road and partially over the existing shoulder. There was a skip line on the pavement that marked the entry to the Holt Road exit ramp, and the fog line moved to the right when the asphalt ended. Shortly after Boone

entered the Holt Road exit lane, he found that he was unable to steer or brake his motorcycle. He looked down to see that he was riding in a trench, located immediately to the right of the exit's fog line, at the beginning of the shoulder of the exit.¹ Unable to control his motorcycle, Boone crashed and suffered severe injury.

Papanek and Page sought summary disposition under MCR 2.116(C)(7), (8), and (10), arguing that they were protected by governmental immunity. A trial court's determination of a motion for summary disposition is reviewed de novo. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004). In reviewing a motion for summary disposition based on immunity, we consider the affidavits, depositions, admissions, and other documentary evidence to determine whether the movant is entitled to immunity as a matter of law. *Herman v Detroit*, 261 Mich App 141, 143-144; 680 NW2d 71 (2004). We view the evidence in a light most favorable to the nonmoving party, and we draw all legitimate inferences in favor of the nonmoving party. *Jackson v Saginaw Co*, 458 Mich 141, 142; 580 NW2d 870 (1998). The applicability of governmental immunity is a question of law that we review de novo. *Herman*, *supra* at 143.

The immunity of an individual governmental employee is an affirmative defense that the employee must raise and prove. *Odom v Wayne Co*, 482 Mich 459, 479; 760 NW2d 217 (2008). Governmental immunity from tort liability is governed by MCL 691.1407, with immunity for individual lower-ranking public officials accused of negligent torts determined by application of MCL 691.1407(2). *Id.* at 479-480. MCL 691.1407(2) provides:

Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:

(a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

¹ The trench was installed in April 2005 as a part of the highway's drainage system. The trench was estimated to be 85 feet long, four to six inches wide, and 12 to 20 inches deep, and it was filled with pea stone gravel. The trench was not marked with construction barrels at the time of the accident.

(c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

In the instant case, whether appellants were engaged in a governmental function or were acting within in the scope of their authority was not disputed. However, the parties dispute whether appellants were grossly negligent. “‘Gross negligence’ means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.” MCL 691.1407(7)(a); see also *Costa v Community Emergency Medical Services, Inc*, 475 Mich 403, 411; 716 NW2d 236 (2006). The determination whether an individual governmental employee's conduct constituted gross negligence is generally a question of fact for the jury. *Briggs v Oakland Co*, 276 Mich App 369, 374; 742 NW2d 136 (2007). “‘Summary disposition is precluded where reasonable jurors honestly could have reached different conclusions with respect to whether a defendant's conduct amounted to gross negligence.’” *Kendricks v Rehfield*, 270 Mich App 679, 682; 716 NW2d 623 (2006), quoting *Stanton v Battle Creek*, 237 Mich App 366, 375; 603 NW2d 285 (1999), *aff'd* 466 Mich 611 (2002).

Appellants argue that there is no evidence indicating that they did not care about the safety of others. To the contrary, they argue, they had presented evidence of several discussions in which they considered the trench and its effect on safety. Ultimately, appellants assert, they concluded that there were sufficient safety measures at the Holt Road exit, in accordance with the traffic flow plan for that road construction site. Arguably, the evidence could be viewed as establishing that appellants considered the safety concerns that the trench created and ultimately determined that the safety precautions in the traffic flow plan, the room provided to exit, the pea stone gravel filling the trench, and their instructions to the primary contractor, ensured the safety of motorists. Papanek testified that no contractor expressed concern regarding the failure to place barrels over the Holt Road trench, and Tom Harris, a supervisor for contractor Rieth-Riley Construction Co., testified that he did not believe the Holt Road trench was a hazard.

However, Page stated that he knew that Harris was concerned that another exposed trench on the nearby Cedar Street exit was a safety hazard. Harris testified that he was told that Rieth-Riley should stop paving over the milled shoulder of the Cedar Street exit because doing so would not comply with the repair contract. When asked if Rieth-Riley would have paved over the Holt Road trench had it not been for the conversation about Cedar Street, Harris responded (with some apparent reluctance), “No, . . . we wouldn't have got paid for that material It all comes down to the dollar, and they wouldn't have paid us to go any further.” Harris also indicated that Rieth-Riley would not have been paid for placing barrels over the trench unless it was authorized in the traffic plan.

Additionally, Logan Lauzon, another Rieth-Riley employee, testified that he told Papanek, “We needed to pave up farther. We needed to get rid of the trench.” After the paving suggestion was denied, Lauzon expressed concern with the manners of channeling traffic and the temporary fog line. Lauzon stated that he was told “That's it,” which he took to mean that no more barrels would be used for channeling traffic. Lauzon testified that when talking with Papanek about placing barrels over the trench, Lauzon heard Page state over a walkie-talkie that nothing further needed to be done to the trench because the exit was wide enough. Lauzon stated that there would have been no one else to ask about placing barrels over the trench.

A reasonable juror could conclude from this evidence that appellants displayed a willful disregard for the substantial risk that the trench posed and the suggested precautions and safety measures that could have ameliorated the danger. See *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). Evidence was presented that indicated that appellants were warned about the danger the trench posed, but chose to disregard the warnings because the suggested solutions were not part of the approved plan. Appellants told Reith-Riley that they could place barrels over the trench, but that they would not authorize further channeling of traffic with additional barrels. Also, although appellants left it to the contractor to place barrels over the trench if it was concerned with the safety of the shoulder, Harris indicated that placing these barrels would not have happened because Reith-Riley would not be compensated unless a change was made to the traffic plan. Here, the people who would have approved the change had indicated that the additional barrels were not needed. Thus, a jury could conclude that an apparent solution (namely, placing barrels over the trench) was really no solution at all. Arguably, appellants' actions were not just passive in nature, see *Rakowski v Sarb*, 269 Mich App 619, 633; 713 NW2d 787 (2006), and were driven by concerns other than the safety of the motorists who would be traveling over the Holt Road exit.

Appellants also dispute that their actions were the proximate cause of Boone's accident. The proximate cause of an injury under MCL 691.1407 is generally a question of fact for the jury, but a court may grant summary disposition if reasonable minds cannot differ. *Briggs, supra* at 374. MCL 691.1407(2)(c) provides tort immunity for employees of governmental agencies unless the employee's conduct amounts to gross negligence that is the one most immediate, efficient, and direct cause of the injury or damage, i.e., the proximate cause preceding the accident. *Rakowski, supra* at 636.² "The Legislature's use of the definite article 'the' [in the statute] clearly evinces an intent to focus on one cause." *Robinson v Detroit*, 462 Mich 439, 458-459; 613 NW2d 307 (2000).

Appellants argue that Boone was the one most immediate and direct cause of the accident because he drove over the fog line and onto the shoulder of the road. Appellants point out that the shoulder of the road was not designed for vehicular travel and that driving on the shoulder can violate the motor vehicle code. See *Grimes v Dep't of Transportation*, 475 Mich 72, 87 n 47; 715 NW2d 275 (2006). Thus, Boone was required to drive only in the roadway, and he caused the accident when he failed to do so. Appellants state that the lack of barrels or markings could not have caused Boone to drive off of the road and cause the accident. Conversely, plaintiffs contend that it was foreseeable that Boone might ride on the shoulder and that Boone's leaving the roadway was merely an intervening cause of the accident, rather than a cause that superseded appellants' gross negligence.

However, the concepts of intervening and superceding causation, and the foreseeability of an intervening cause, are not relevant in determining the proximate cause under MCL

² In 1986, the Legislature amended MCL 691.1407(2)(c) to require that a government employee's actions be "the" proximate cause of the plaintiff's injury, rather than "a" proximate cause of the injury. 1986 PA 175; *Miller v Lord*, 262 Mich App 640, 644; 686 NW2d 800 (2004).

691.1407(2) in circumstances in which there were multiple causes of the harm. *Cooper v Washtenaw Co*, 270 Mich App 506, 510; 715 NW2d 908 (2006). In the instant case, motorists were directed to partially drive on the paved-over shoulder of the road when approaching the Holt Road exit ramp. The evidence shows that the new asphalt blended with the old concrete at the exit ramp. Further, the exit lane was apparently narrower than normal, and the significantly sized trench was immediately next to the fog line. This trench was fully exposed, unmarked, and filled with a displaceable material.

Boone acknowledged crossing the fog line and entering the shoulder of the road as he was exiting US-127. However, without warning or expectation of a hazard, Boone encountered the trench, which seemingly caused him to lose control of his motorcycle and caused his accident and injuries. Reasonable jurors could reach the conclusion that appellants' conduct in allowing, and not warning of, the existence of a trench filled only with pea gravel immediately next to the fog line was the proximate cause of Boone's accident. See *Briggs, supra* at 374. Although a motorist is expected to stay within the portion of the roadway established for vehicular travel, factual questions were raised regarding whether the linear markings on the roadway and the layout of the roadway itself might lead a motorist to cross these markings when exiting the highway.

Affirmed.

/s/ Peter D. O'Connell

/s/ Michael J. Talbot

/s/ Cynthia Diane Stephens