STATE OF MICHIGAN

COURT OF APPEALS

MARGARET C. JOHNSON,

Plaintiff-Appellee,

v

BRIAN YINGER,

Defendant-Appellant,

and

SCHOOLCRAFT COLLEGE,

Defendant.

UNPUBLISHED
October 6, 2009

No. 287788
Wayne Circuit Court
LC No. 07-717405-NO

Before: Murray, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Defendant Brian Yinger appeals as of right from the trial court's order denying his motion for summary disposition based on governmental immunity, MCR 2.116(C)(7). We reverse and remand for further proceedings consistent with this opinion. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

At issue is whether plaintiff sufficiently established a genuine issue of material fact that Yinger's conduct amounted to gross negligence that was the proximate cause of plaintiff's injury.[1] The facts are not disputed. Plaintiff, who is in her early sixties, enrolled in a motorcycle safety course offered at Schoolcraft College but basically funded and operated by the state. Yinger was one of the instructors for the course. Plaintiff was injured when she lost control of her motorcycle and fell, breaking her leg. Her complaint alleged that defendants were grossly negligent in conducting the motorcycle safety course under "extremely wet conditions" due to a rainstorm that morning. The only issues presented here are whether Yinger could be found

[1] Defendant Schoolcraft College was dismissed from this case and is not a party to this appeal.

grossly negligent and if so, whether his gross negligence could be found the proximate cause of plaintiff's injuries.

We review de novo the trial court's denial of a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof, some statement of specific fact, upon which to base his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).[2]

The governmental tort liability act, MCL 691.1401 *et seq*, provides in relevant part at MCL 691.1407:

> (2) 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.
> >
> > (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.
> >
> > * * *
> >
> > (7) As used in this section:
> >
> > (a) "Gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

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[2] Plaintiff's brief on appeal utilizes cases outlining a summary disposition standard that has been inapplicable since at least 1999. See *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456 n 2; 597 NW2d 28 (1999).

Immunity for a 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). If reasonable jurors could honestly reach different conclusions regarding whether conduct constitutes gross negligence, the issue is a factual question for the jury; however, if reasonable minds could not differ, given the evidence presented, then the motion for summary disposition should be granted. *Jackson v Saginaw Co*, 458 Mich 141, 146-147; 580 NW2d 870 (1998).

The definition of gross negligence in the governmental immunity act suggests "a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks." *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). "Evidence of ordinary negligence does not create a material question of fact concerning gross negligence. Rather, a plaintiff must adduce proof of conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Maiden*, *supra* at 122-123; (quotation marks and citation deleted). Moreover, the defendant's actions must be "the" proximate cause of the plaintiff's injury, as opposed to "a" proximate cause of an injury. MCL 691.1407(2)(c); *Miller v Lord*, 262 Mich App 640, 644; 686 NW2d 800 (2004). This means that the gross negligence must be "the one most immediate, efficient, and direct cause of the injury or damage . . . ." *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000).

There is no dispute that the "range" pavement was wet. The incident report shows "light rain," and testimony about how hard it was raining varies; however, even Yinger stated that at some point there was thunder and lightning. It was the students' second day on the range, and they were not progressing as fast as classes normally do. Yinger held class on the range despite the rain, and they were about to begin "the fourth exercise," in which for the first time they would learn to shift gears. Plaintiff ended up with the first motorcycle in line and, although she asked Yinger not to make her go first, he told her she would be fine.

Plaintiff explained how the accident occurred:

> I got on the bike, I started off, I was attempting to put the, do the, work the clutch, get it in second gear, as I was coming around . . . As I was approaching the first turn in the oval, the front tire started to move, shimmy back and forth, the best thing I can tell you like it was hydroplaning, but I could not, I could not stop it with the handle bars. The handle bars [sic] were vibrating back and forth. I attempted to apply the brakes. It continued to shimmy. It slid, the front tire and the bike started to slide to the right and I went down.

Yinger argues that the evidence at best shows only ordinary negligence, and that plaintiff does not show that his actions were the proximate cause of her injury. The actions to which plaintiff points in support of her claim include: (1) failing to follow guidelines by pushing plaintiff to do the fourth exercise before she had minimally mastered the third; (2) coercing the students to perform the exercise by telling the class they would not get their licenses if they did not ride in the rain; (3) making plaintiff ride first; (4) expecting plaintiff to be able to shift gears for the first time ever, while going around a curve in the rain with wet pavement; (5) failing to appreciate the increased danger of riding on slippery surfaces, especially for inexperienced riders; and (6) violating safety guidelines that say training should not be conducted during a

thunderstorm. Plaintiff points out that had Yinger adhered to this guideline, the class would not have been out on the range that day and her accident would not have happened. Plaintiff asserts that the sequence of events—the shimmying wheel, vibrating handlebars, plaintiff's losing control and grabbing the brake—all occurred because of the wet pavement, the weather, and plaintiff's inexperience. She had already lost control of the motorcycle by the time she tried to use the brakes. Moreover, even if she could have refused to ride that day, she relied on Yinger's expertise and assurance that she would be fine.

Plaintiff's evidence may support a finding of negligence, but it does not support the higher threshold established by statute for gross negligence. There is no evidence that Yinger lacked concern for the safety of his students. They would need to know how to ride on wet pavement; indeed, had he avoided teaching them this, they would be unprepared to deal with it after completing the class.[3] Thus, having plaintiff perform the exercises on wet pavement and during a rain does not reveal a substantial lack of concern for whether an injury would result. Plaintiff also asserts that Yinger pressed her to begin the fourth exercise before she had "minimally mastered" the third exercise, stopping and starting, but she points to no evidence that she had not sufficiently mastered the third exercise. In fact, the co-instructor testified that they would not have moved a student on to the next exercise if they did not both feel the student was ready, and he believed that plaintiff was ready for the fourth exercise: "She wasn't that bad."

In *Tarlea*, this Court stated:

> Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." Simply alleging that an actor could have done more is insufficient under Michigan law, because, with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result. However, saying that a defendant could have taken additional precautions is insufficient to find ordinary negligence, much less recklessness. Even the most exacting standard of conduct, the negligence standard, does not require one to exhaust every conceivable precaution to be considered not negligent.
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> The much less demanding standard of care—gross negligence—suggests, instead, almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks. It is as though, if an objective observer watched the actor, he could conclude, reasonably, that the actor simply

[3] Plaintiff points to the dangers of thunderstorms, but that inherent danger—being hit by lightning—was not what contributed to her injury. Yinger does not dispute that thunder could be heard and lightning seen, but he conducted class because it was too far away to pose a danger. Yinger also testified that plaintiff's motorcycle could not have hydroplaned because she was going too slowly. Notably, plaintiff fell on her way to the staging area; both instructors testified that she was not supposed to be trying to shift gears at that point in the drill.

did not care about the safety or welfare of those in his charge. [*Tarlea*, *supra* at 90 (footnote and citation omitted).]

The evidence submitted by the parties does not meet this standard. Plaintiff can point to what in hindsight might at worst be called bad decisions, but certainly not "a singular disregard for substantial risks." Yinger and Durant both believed plaintiff was ready for the fourth exercise. The wet pavement increased the risk of an accident, but it was a condition the students would need to know how to handle—it was not a risk Yinger recklessly imposed on them.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

Tax costs to defendant-appellant, having prevailed in full. MCR 7.219.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Stephen L. Borrello