STATE OF MICHIGAN

COURT OF APPEALS

BOBBIE J. HARDY,

Plaintiff-Appellant,

and

BRUCE S. HARDY

Plaintiff,

V

DEPUTY DAWN NYE, INGHAM COUNTY SHERIFF'S DEPARTMENT, and INGHAM COUNTY,

Defendants-Appellees.

UNPUBLISHED
October 7, 2010

No. 292259
Ingham Circuit Court
LC No. 08-000012-NO

Before: MURPHY, C.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Plaintiff Bobbie Hardy appeals as of right the trial court's order granting summary disposition to defendants Dawn Nye, the Ingham County Sheriff's Department, and Ingham County. We affirm in part and reverse in part.

I. BASIC FACTS

In the morning of October 16, 2006, Nye, then a deputy with the Ingham County Sheriff's Department, engaged in a high-speed chase of a gold car. The gold car "blew" through the stop sign at the intersection of Delhi Commerce Road and Willoughby Road. Nye testified that she slowed her police vehicle to a complete stop or almost a complete stop, traveling no faster than one or two miles per hour, at the stop sign. Nye admitted that she had an unobstructed view of Willoughby Road and that she carefully, but quickly, looked for traffic. She looked to her left, to her right, and then to her left again. She saw an eastbound car stop, and she did not see any westbound cars. Nye then accelerated into the intersection. However, she had not seen plaintiff's van, and her vehicle collided into the driver's side of plaintiff's van.

Plaintiff sued defendants. She claimed that Nye failed to operate the police vehicle in a reasonable manner, and alleged that the Ingham County Sheriff's Department and Ingham

County were liable for Nye's negligence under a respondent superior theory and as owner of the police vehicle pursuant to the Civil Liability Act, MCL 257.401. Defendants moved for summary disposition. The trial court granted the motion. The trial court held that Nye was entitled to summary disposition on the basis of individual governmental immunity because plaintiff failed to allege that Nye acted with gross negligence. It also held that the Ingham County Sheriff's Department and Ingham County could not be held liable under the motor vehicle exception to governmental immunity because plaintiff failed to establish a genuine issue of material fact regarding whether Nye engaged in ordinary negligence.

II. GOVERNMENTAL IMMUNITY

Plaintiff argues that the trial court erred in granting summary disposition to defendants because she presented sufficient evidence to establish a genuine issue of material fact regarding whether Nye acted with gross negligence and negligence.

We review de novo a trial court's decision on a motion for summary disposition. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 279; 769 NW2d 234 (2009). Summary disposition is proper under MCR 2.116(C)(7) if "[t]he claim is barred because of . . . immunity granted by law[.]" In deciding a motion under MCR 2.116(C)(7), a court must accept as true and construe in the plaintiff's favor the plaintiff's well-pleaded factual allegations, affidavits, or other admissible documentary evidence, unless the moving party contradicts such evidence with documentation. *Marilyn Froling Revocable Living Trust*, 283 Mich App at 278. Summary disposition is proper under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." In deciding a motion under MCR 2.116(C)(10), a court must view the documentary evidence in the light most favorable to the nonmoving party. *Huntington Woods v Detroit*, 279 Mich App 603, 614; 761 NW2d 127 (2008). The applicability of governmental immunity is an issue of law reviewed de novo, *Plunkett v Dep't of Transp*, 286 Mich App 168, 180; 779 NW2d 263 (2009), as is the interpretation of a statute, *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 141; 783 NW2d 133 (2010).

A. GROSS NEGLIGENCE

Under the governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, an employee of a governmental agency is immune from tort liability for injury to a person caused by the employee in the course of employment if three conditions 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. [MCL 691.1407(2).]

Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). It requires "almost 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).

The trial court granted summary disposition to Nye because plaintiff failed to allege any facts in the complaint to support a finding of gross negligence. On appeal, plaintiff does not address the trial court's basis for granting summary disposition to Nye. "When an appellant fails to dispute the basis of the trial court's ruling, this Court need not even consider granting plaintiffs the relief they seek." *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004) (quotation and alternations omitted). Accordingly, we affirm the trial court's order granting summary disposition to Nye.[1]

B. MOTOR VEHICLE EXCEPTION

Under the GTLA, "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). There are, however, five statutory exceptions to governmental immunity. *Conmy v Dep't of Transp*, 272 Mich App 138, 140; 724 NW2d 297 (2006). One of the exceptions is the motor vehicle exception, MCL 691.1405, which provides:

> Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner . . . .

The goal of statutory interpretation is to give effect to the intent of the Legislature. *Paris Meadows*, 287 Mich App at 141. If the language of the statute is unambiguous, the Legislature is presumed to have intended the meaning plainly expressed, and judicial construction is not permitted. *Id.* "[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). Undefined statutory terms are to be given their plain and ordinary meanings, *Bronson Methodist Hosp v Allstate Ins Co*, 286 Mich App 219, 223; 779 NW2d 304 (2009), but words that have acquired a peculiar or appropriate meaning in the law are to be construed according to that meaning, *Feyz v Mercy Mem Hosp*, 475 Mich 663, 673; 719 NW2d 1 (2006).

Based on the plain language of MCL 691.1405, the trial court correctly stated that the Ingham County Sheriff's Department and Ingham County could be held liable under the motor

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[1] We also note that plaintiff presents no argument that Nye's conduct was "so reckless as to demonstrate a substantial lack of concern for whether an injury results," MCL 691.1407(7)(a). In fact, at the hearing on the motion for summary disposition, plaintiff essentially conceded that because Nye slowed down at the stop sign and looked both ways before entering the intersection, Nye did not act with gross negligence.

vehicle exception if Nye engaged in "ordinary negligence." MCL 691.1405 provides that "[g]overnmental agencies shall be liable for bodily injury . . . resulting from the *negligent operation* by any . . . employee of the governmental agency, of a motor vehicle . . . ." (emphasis added). The Legislature used the adjective "negligent" to describe the operation of a motor vehicle, rather than the adjectives "grossly negligent" or "reckless." The term "negligent" has obtained a peculiar legal meaning. It is defined as "[c]haracterized by a person's failure to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance." Black's Law Dictionary (7th ed). Thus, even though a governmental employee cannot be held liable for the operation of a motor vehicle unless the employee was grossly negligent, MCL 691.1407(2)(c), a governmental agency is liable for the employee's operation of a motor vehicle if the employee engaged in ordinary negligence.

In *Robinson v Detroit*, 462 Mich 439, 450-451; 613 NW2d 307 (2000), our Supreme Court held that police officers while in a high-speed chase owe a duty to innocent bystanders. This duty, stated the Supreme Court, was consistent with the statutes, such as MCL 257.603, MCL 257.632, and MCL 257.653, that governed the operation of emergency vehicles. *Id.* at 451. Pursuant to MCL 257.603(3)(b), a police vehicle may proceed past a stop sign or a red light, "but only after slowing down as may be necessary for safe operation." A police vehicle may also exceed the prima facie speed limit so long as life or property is not endangered. MCL 257.603(3)(c). MCL 257.632 exempts police vehicles from the speed limit but only when the vehicle is "operated with due regard for safety." In addition, a police officer is not protected "from the consequences of a reckless disregard of the safety of others." MCL 257.632. MCL 257.653 requires drivers to pull over upon the approach of an emergency vehicle when the emergency vehicle's lights and siren are activated, but the driver of the emergency vehicle is not relieved "from the duty to drive with due regard for the safety of persons using the highway." In determining whether a police officer while in a high-speed chase breached the duty to innocent by-standers, "[t]he officer's conduct should be compared to 'that care which a reasonably prudent man would exercise in the discharge of official duties of like nature under like circumstances.'" *Fiser v Ann Arbor*, 417 Mich 461, 470; 339 NW2d 413 (1983), overruled in part *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000), quoting *McKay v Hargis*, 351 Mich 409, 418; 88 NW2d 456 (1958); see also *White v Beasley*, 453 Mich 308, 322 n 8; 522 NW2d 1 (1996) (opinion by BRICKLEY, C.J.) (quoting *Fiser*).

Once determined that a duty is owed to the plaintiff, the reasonableness of the defendant's conduct is a question of fact for the jury. *Arias v Talon Dev Group, Inc*, 239 Mich App 265, 268; 608 NW2d 484 (2000). However, if reasonable jurors could not disagree regarding the reasonableness of the defendant's actions, the issue should be decided as a matter of law. See *Fiser*, 417 Mich at 469-470 (a defendant is only entitled to summary disposition in a negligent action if all reasonable persons would agree that the defendant acted as a reasonably prudent person under the same or similar circumstances); cf. *Nichols v Dobler*, 253 Mich App 530, 532; 655 NW2d 787 (2002) ("[I]f reasonable minds could not differ regarding the proximate cause of the plaintiff's injury, the court should decide the issue as a matter of law.").

Plaintiff fails to create a dispute concerning Nye's testimony that Nye's vehicle came to a complete stop or almost a complete stop, going no more than one or two miles per hour, at the stop sign. While plaintiff claims, based on the opinion of an accident reconstruction expert that Nye's vehicle was traveling at the speed of 26 miles per hour at the time of collision, that it was

not physically possible for Nye to have slowed her vehicle at the stop sign, the claim is nothing more than speculation and conjecture. Plaintiff's claim is premised on the fact that Nye's vehicle only traveled "one lane of traffic, about 8 feet" from the stop sign before it collided with her van. However, there is no evidence in the record regarding how many lanes of traffic there were on Willoughby Road or the distance between the stop sign and the place of collision. In addition, there is no evidence in the record, including in the report of plaintiff's expert, that Nye could not have accelerated her police vehicle from a complete stop or from a speed of one or two mph at the stop sign to 26 mph when the collision occurred. Similarly, plaintiff's claim that the force of the collision, which flipped her van and slid it to the other side of Willoughby Road and over the curb, refutes Nye's testimony, finds no support in the record. Accordingly, there is no factual dispute that Nye completely stopped or almost completely stopped her vehicle at the stop sign.

There is also no factual dispute that Nye, in checking for traffic on Willoughby Road, looked to her left, her right, and then her left again. Plaintiff presents no evidence to dispute Nye's testimony concerning her check for traffic on Willoughby Road.

Nye further testified that she activated her vehicle's lights and siren during the chase. The trial court correctly stated that plaintiff's deposition testimony did not create a factual dispute. At her deposition, plaintiff did not testify that the lights and siren on Nye's vehicle were not activated, but rather that she could not recall. Nonetheless, an investigating officer with the Lansing Police Department testified that plaintiff told her in the emergency room that plaintiff saw the police vehicle, but that she did not see any lights or hear a siren. This statement by plaintiff to the investigating officer could possibly create a factual dispute.[2] However, it does not appear that plaintiff seriously contends that the lights and siren of Nye's vehicle were not activated. First, it is an implied fact in the report of plaintiff's expert that the lights and siren were activated. For example, the expert wrote, "It is Deputy Nye's responsibility to insure even with her emergency lights and siren activated that before proceeding past a stop sign that it can be done in safety," and, "Deputy Nye was or should have been trained to be aware that emergency lights and sirens are not always effective in warning other drivers of their approach." Second, the statutes that authorize an emergency vehicle to proceed past a stop sign or a red light and to exceed the speed limit, MCL 257.603(3) and MCL 257.632, only apply if the driver of the emergency vehicle sounds a siren and the vehicle is equipped with a lighted lamp displaying a flashing or oscillating light. MCL 257.603(4); MCL 257.632. Plaintiff does not argue that these statutes do not apply because Nye did not activate her vehicle's lights and siren. Rather, she argues that Nye, by not engaging in conduct at the stop sign that would have allowed Nye to observe her van, did not slow down "as may be necessary for safe operation," MCL 257.603(3)(b), "endanger[ed] life or property," MCL 257.603(3)(c), and failed to operate the vehicle "with due regard for safety," MCL 257.632. Plaintiff's argument does not depend on there being a factual dispute concerning whether Nye activated her vehicle's lights and siren.

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[2] Plaintiff's statement to the investigating officer is hearsay, see MRE 801(c), and it does not appear to fall within any hearsay exception.

Based on Nye's actions, one could conclude that Nye used due care and caution before entering the intersection. However, the fact remains that Nye failed to see plaintiff's van, despite having an unobstructed view of traffic. Nye admitted at her deposition that nothing obstructed her view of vehicles traveling on Willoughby Road. In addition, a reasonable inference from the occurrence of the collision is that plaintiff's van was in Nye's field of vision while Nye was at the stop sign. We conclude that, because Nye failed to see plaintiff's van, despite the van being in Nye's field of vision, reasonable minds could differ regarding whether Nye negligently operated her police vehicle when entering the intersection.

Defendants contend that it was plaintiff who acted negligently, by failing to yield an intersection to a police vehicle in contravention of MCL 257.653. They claim that plaintiff cannot recover for injuries that were proximately caused by her own negligence. The issue of proximate cause is generally a question of fact for the jury. *Helmus v Dep't of Transp*, 238 Mich App 250, 256; 604 NW2d 793 (1999). Under the facts of this case, specifically where Nye admitted that she had unobstructed views at the stop sign and yet failed to observe plaintiff's van, we conclude that reasonable minds could differ regarding proximate cause.

Because reasonable minds could differ on whether Nye negligently operated her police vehicle and on the issue of proximate cause, we reverse the trial court's order granting summary disposition to the Ingham County Sheriff's Department and Ingham County.[3]

III. AFFIRMATIVE DEFENSE

Plaintiff argues that because defendants alleged for the first time in the motion for summary disposition that she failed to plead facts of recklessness by Nye, contrary to MCL 257.632, defendants have waived the affirmative defense. Whether a particular assertion constitutes an affirmative defense is a question of law that is reviewed de novo. *Citizens Ins Co of America v Juno Lighting, Inc*, 247 Mich App 236, 241; 635 NW2d 379 (2001).

An affirmative defense must be specifically pleaded, MCR 2.111(F)(3), and one not properly pleaded is waived, MCR 2.111(F)(2). "An affirmative defense does not deny the allegations of the plaintiff's complaint; rather it claims—on some ground not disclosed in the plaintiff's pleadings—that the plaintiff is not entitled to recovery." *The Meyer and Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 46; 698 NW2d 900 (2005) (quotation omitted). The list of affirmative defenses in the applicable court rule, MCR 2.111(F)(3)(a), is nonexclusive, *Citizens Ins Co of America*, 247 Mich App at 241.

MCL 257.632 provides, in pertinent part: "This exemption [from the speed limit for an emergency vehicle] shall not however protect the driver of the vehicle from the consequences of a reckless disregard of the safety of others." Plaintiff presents no argument that this sentence is an affirmative defense. It is not included in the list of affirmative defenses in MCR

[3] In their brief on appeal, defendants do not assert any alternative grounds for affirmance. We therefore do not address any of the other arguments for summary disposition that defendants raised below.

2.111(F)(3)(a), and plaintiff makes no claim that it falls within the definition of an affirmative defense. Accordingly, plaintiff has abandoned the claim. See *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003)

Regardless, the issue is moot. The pertinent sentence in MCL 257.632 concerns whether a driver of an emergency vehicle may be held liable for exceeding the speed limit. Under MCL 257.632, Nye, as the driver of the emergency vehicle, was not protected from liability for injuries resulting from "a reckless disregard of the safety of others." However, Nye was also a governmental employee, and, as such, could only be held liable for injuries resulting from gross negligence. MCL 691.1407(2)(c). Because the trial court held that Nye was entitled to individual governmental immunity, and is entitled to have that order affirmed because plaintiff has not disputed the basis for the grant of summary disposition, it makes no difference whether defendants are able to argue, pursuant to MCL 257.632, that Nye's conduct was not reckless. In other words, even if defendants are precluded from arguing that Nye's conduct was not reckless under MCR 257.632, Nye is still entitled to summary disposition under MCR 691.1407(2).

Affirmed in part, reversed in part.

/s/ William B. Murphy
/s/ Joel P. Hoekstra