STATE OF MICHIGAN

COURT OF APPEALS

DEBBIE A. WHITMAN, Personal Representative for the Estate of MATTHEW WHITMAN, Deceased,

Plaintiff-Appellee,

v

BOYNE CITY,

Defendant-Appellant,

and

DENNIS JACOB LEHTO,

Defendant.

UNPUBLISHED
December 18, 2008

No. 280212
Otsego Circuit Court
LC No. 06-011627-NO

Before: Saad, C.J., and Fitzgerald and Beckering, JJ.

PER CURIAM.

Defendant Boyne City appeals as of right the August 7, 2007, trial court order denying in part the city's motion for summary disposition under MCR 2.116(C)(7). We reverse and remand.

On the night of January 23, 2004, defendant Dennis Lehto, a Boyne City basic emergency medical technician (EMT), received a call from the 911 central dispatch center regarding a possible drug and alcohol overdose / attempted suicide at the home of Ira and Ruth Holburn. Basic EMTs Katherine Handy and Melissa Meteer and EMT specialist Tammy Smith accompanied Lehto to the Holburn residence. Ira testified that unbeknownst to him, Ruth had either overdosed or taken extra pain pills for which she did not have a current prescription. When asked by the EMT personnel if she had attempted suicide, Ruth said "yes." Ruth did not want to go to the hospital, however, and in Ira's opinion, "she didn't look that bad." The EMTs insisted on taking Ruth to the hospital. Handy testified that Ruth was oriented to person, place, and time, but that Smith actually evaluated Ruth's medical condition. Smith called the hospital to report Ruth's condition and was told to make an "intercept," meaning that they needed to pick up an EMT paramedic to treat the patient en route to the hospital. Smith advised Lehto of the need to make an intercept and told him that Ruth was a "priority two" patient. Lehto explained

that there are three levels of EMTs–basic, specialist, and paramedic, with a paramedic having the highest level of training–and that there are four "priority" classifications for patients. According to Lehto, "priority two" means that the patient is seriously ill or injured, and that they "need to get to the hospital," but "it's not a pressing emergency."[1]

En route to the hospital, Lehto picked up EMT paramedic Wendy Dawson. Lehto, Handy, and Dawson testified that "intercepts" are required under state law or at the direction of the receiving hospital depending on the condition of the patient. Dawson testified that upon entering the back of the ambulance and assessing the patient, she learned that Ruth had vomited and was not answering appropriately. She determined that Ruth had an altered level of consciousness and possible airway risk, making it appropriate that she, an EMT paramedic, be on board the ambulance. Dawson further testified that although she was unable to complete her evaluation of Ruth's condition, Ruth had the characteristics of a "priority two" patient.

EMT paramedic Leonard Zierler, who delivered Dawson to the intercept site, testified that after an "intercept" is made, it is the paramedic's duty to evaluate the patient's condition and determine whether the ambulance's flashers and sirens should be activated. Dawson testified that after initially evaluating Ruth, she told another EMT to instruct Lehto to "take it easy." When asked what she meant by "take it easy," Dawson testified:

> *A.* Just be careful, the roads were terrible. . . . .
>
> *Q.* And what do you mean by careful?
>
> *A.* It's slippery out, there was a lot of snow on the roads. . . . .
>
> *Q.* Were you telling him to drive slow?
>
> * * *
>
> *A.* Just be careful.
>
> *Q.* What did you mean by careful?
>
> *A.* Just to be careful. I didn't mean anything specific I guess.

Dawson further testified that when she rides in an ambulance, the flashers are almost always activated, and sirens may be activated depending on the proximity of other vehicles. Lehto testified that when transporting a "priority two" patient, the general procedure is to activate the ambulance's flashers and sirens. He acknowledged that there were three to four inches of snow and patches of ice on the ground that night, but stated that it had stopped snowing and visibility was excellent. Lehto heard Dawson say to take it "nice and easy" after she entered the

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[1] A "priority one" means a patient who is seriously injured or ill. A "priority three" means a patient with the lowest level of injury, typically the "walking wounded." A "priority four" involves a deceased person.

ambulance and interpreted her statement to mean that they "didn't need to fly to the hospital." At Zierler's deposition, plaintiff's counsel questioned him about the phrase, "nice and easy":

> *Q.* . . . if a paramedic evaluated a patient and told you to go nice and easy, what does that lead you to believe?
>
> * * *
>
> *A.* . . . to me it would be to just shut things down, the lights and sirens off and drive normal speed.
>
> *Q.* . . . [if] you just picked up a paramedic and the road conditions that night are slippery, there is light snow falling and the paramedic tells you as the driver to take it nice and easy. What do you interpret her – how do you interpret that?
>
> * * *
>
> *A.* You drive safely.
>
> *Q.* Does that mean to drive with your lights and sirens on?
>
> * * *
>
> *A.* That would be totally up to the [para]medic. The driver has got to have some common sense to make some type of judgment too.
>
> *Q.* But nice and easy in that hypothetical, what does that mean?
>
> *A.* If the driver feels he is capable of driving [with] lights and sirens at a safe speed without causing an accident or getting into one, it's possible he can do it. . . . .

Lehto testified that after picking up Dawson, he drove southbound on Old US 27 with the ambulance's flashers and sirens activated. At some point, Lehto glanced at his speedometer and noted that he was traveling at 45-50 miles per hour (mph). The speed limit was 55 mph. After driving about one-half mile, at approximately 12:35 a.m. on January 24, Lehto observed the glow of headlights in the northbound lane. At that point, the other vehicle was approximately 100 yards away on the other side of a hill, around a curve. As Lehto drove uphill and around the curve, the other vehicle crested the hill and swerved toward the bank of the northbound lane. Lehto "backed off the throttle and started to steer towards [his] right," or the bank of the southbound lane to avoid the vehicle. But, the vehicle then did a sudden, 270-degree turn into the southbound lane and collided with the ambulance. Lehto testified that he saw the vehicle turn into the southbound lane immediately before the collision, and that the point of impact was on the passenger side of the vehicle approximately three feet from the southbound bank.

Michael Jones was the driver of the other vehicle. He was 17 years old at the time. His friend, Matthew Whitman, was a passenger in the vehicle. Jones testified that he was driving northbound at approximately 40 to 45 mph. At some point, he observed the glow of flashing lights and realized that an ambulance was approaching. He did not hear the ambulance's siren.

Driving around the curve in the road, he tried to slow down and pull over for the ambulance. But, according to Jones, his vehicle "began to fishtail to the right and I tried to straighten it out, and it came back around and did about a two seventy degree turn which sent me sliding sideways, and the ambulance then T-boned us."

Ira followed the ambulance en route to the hospital. He believed that the flashers were activated, but that the sirens were not, and that the ambulance was traveling at least 65 mph, based on his own speed and knowledge of the roads in the area. Handy, who was seated in the front of the ambulance, recalled seeing the other vehicle fishtale to the left, or toward the bank of the northbound lane, and then collide with the snow bank on the right. Handy and the police officers at the scene believed that the collision occurred in the southbound lane.[2] Trooper Carlson testified that in his opinion, Lehto did nothing wrong and that the only cause of the accident was Jones' loss of control and his inexperience as a driver.[3]

Matthew, the passenger in Jones' vehicle, died as a result of the accident. Jones was charged with negligent homicide, but the charges were dismissed after the preliminary examination. Plaintiff Debbie Whitman, Matthew's mother, sued Lehto for negligence and gross negligence and Boyne City for Lehto's alleged negligence in operating the ambulance and negligent hiring, retention, and supervision of Lehto. Defendants moved for summary disposition, but the trial court denied the motion as premature. After further discovery had occurred, defendants moved for summary disposition under MCR 2.116(C)(7), on the basis of governmental immunity. The trial court granted in part and denied in part. It granted the motion with respect to the negligence and gross negligence claims against Lehto and the negligent hiring, retention, and supervision claims against Boyne City. It denied the motion with respect to the negligent operation claim against the city, finding that the evidence regarding Lehto's speed, the poor weather conditions, and Dawson's statement to "take it easy," created a genuine issue of material fact regarding Lehto's negligent operation of the ambulance.

On appeal, the city argues that the motor vehicle exception to governmental immunity is inapplicable to this case and that the trial court erred in denying in part its motion for summary disposition. We agree.

We review a trial court's decision on a motion for summary disposition de novo, viewing the evidence in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 118-120; 597 NW2d 817 (1999). MCR 2.116(C)(7) permits summary disposition where the claim is barred by immunity. *Maiden*, *supra* at 118. The moving party "is not required to file supportive material, and the opposing party need not reply with supportive material." *Id*. at 119.

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[2] Ira testified that the impact occurred on the shoulder of the southbound lane.

[3] Jones testified that in the weeks preceding the accident, he heard his brakes making a squeaking noise. His brakes were examined after the accident and found to be faulty. At the preliminary examination arising from charges filed against Jones, a certified mechanic testified that Jones' right front wheel had ten percent of its brake pad left, while the others were worn down to the metal.

The trial court must consider all documentary evidence submitted by the parties and accept all well-pleaded allegations as true, unless contradicted by documentation submitted by the opposing party. *Id.* "If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred." *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000); *Guerra v Garratt*, 222 Mich App 285, 289; 564 NW2d 121 (1997). If, however, a genuine issue of material fact exists such that factual development could provide a basis for recovery, summary disposition is inappropriate. *Guerra*, *supra* at 289.

A governmental agency is generally immune from tort liability when it is engaged in the exercise of a governmental function, subject to various exceptions. MCL 691.1407. The motor vehicle exception, MCL 691.1405, provides that "[g]overnmental 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." Therefore, a plaintiff must establish two elements under MCL 691.1405: (1) negligent operation of a motor vehicle; and (2) an injury resulting from that negligent operation. Exceptions to governmental immunity should be construed narrowly. *Robinson v Detroit*, 462 Mich 439, 455; 613 NW2d 307 (2000).

Plaintiff argues that Lehto acted negligently in speeding and activating the ambulance's flashers when no emergency existed and he knew the road conditions were dangerous. MCL 257.603 sets forth the duty of care and reasonable conduct required of drivers of emergency vehicles. It provides, in relevant part:

> (2) *The driver of an authorized emergency vehicle when responding to an emergency call, but not while returning from an emergency call*, or when pursuing or apprehending a person who has violated or is violating the law or is charged with or suspected of violating the law *may exercise the privileges set forth in this section, subject to the conditions of this section.*
>
> (3) The driver of an authorized emergency vehicle may do any of the following:
>
> (a) Park or stand, irrespective of this act.
>
> (b) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation.
>
> (c) *Exceed the prima facie speed limits so long as he or she does not endanger life or property.*
>
> (d) Disregard regulations governing direction of movement or turning in a specified direction.
>
> (4) *The exemptions granted in this section to an authorized emergency vehicle apply only when the driver of the vehicle while in motion sounds an audible signal by bell, siren, air horn, or exhaust whistle as may be reasonably necessary, except as provided in subsection (5), and when the vehicle is equipped with at least 1 lighted lamp displaying a flashing, oscillating, or rotating red or blue light visible*

under normal atmospheric conditions from a distance of 500 feet in a 360 degree arc . . . . [Emphasis added.]

MCL 257.632 also exempts drivers of emergency vehicles from speed limits. It provides, in relevant part:

> *The speed limitation set forth in this chapter shall not apply to* vehicles when operated with due regard for safety under the direction of the police when traveling in emergencies or in the chase or apprehension of violators of the law or of persons charged with or suspected of a violation, nor to fire department or fire patrol vehicles when traveling in response to a fire alarm, nor to *public or private ambulances when traveling in emergencies. This exemption shall apply only when the driver of the vehicle while in motion sounds an audible signal by bell, siren or exhaust whistle as may be reasonably necessary or when the vehicle is equipped with at least 1 lighted lamp displaying a flashing, oscillating or rotating red or blue light visible under normal atmospheric conditions from a distance of 500 feet to the front of such vehicles*, ... This exemption shall not however protect the driver of the vehicle from the consequences of a reckless disregard of the safety of others. [Emphasis added.]

First, plaintiff argues that Lehto was negligent in activating the ambulance's flashers, although she has failed to present any authority stating when the flashers should be activated. According to plaintiff, an ambulance's flashers and sirens should never be activated when other vehicles are not visible on the road because their activation causes "instantaneous panic reactions" in drivers. We are unpersuaded by plaintiff's argument. The evidence established that Smith first evaluated Ruth's condition and informed Lehto that Ruth was a "priority two" patient and that they needed to make an "intercept." According to Zierler, after an "intercept" is made, it is the EMT paramedic's duty to evaluate the patient's condition and determine whether the flashers and sirens should be activated. EMT paramedic Dawson determined that Ruth had an altered level of consciousness and possible airway risk, indicating that she was a "priority two" patient. Dawson then told another EMT to instruct Lehto to "take it easy." Zierler testified that if a paramedic told him to take it "nice and easy," he would turn the flashers and sirens off and drive at a normal speed. He further testified, however, that turning off the flashers and sirens is "totally up to the [para]medic," and that the "driver has got to have some common sense" to make that type of judgment too. Dawson testified that she only intended for Lehto to be careful on the snow-covered roads when she said to "take it easy," and that when she rides in an ambulance, the flashers are almost always activated, and sirens may be activated depending on the proximity of other vehicles. Likewise, Lehto testified that he understood Dawson's instruction to mean that they "didn't need to fly to the hospital," but that the general procedure when transporting a "priority two" patient is to activate the flashers and sirens. Considering the evidence that Lehto was transporting a "priority two" patient requiring an EMT paramedic's presence in the ambulance, that activating the flashers is the general procedure when transporting a "priority two" patient to the hospital, and that Dawson–who was responsible for determining whether the flashers should be activated–did not instruct Lehto to turn them off, plaintiff cannot establish that Lehto was negligent in operating the ambulance's flashers.

Next, plaintiff argues that Lehto was negligent for speeding. We note that the parties presented conflicting evidence regarding Lehto's speed. The speed limit on Old US 27 was 55

mph and Lehto testified that he was traveling at 45-50 mph. He admitted, however, that he last checked his speedometer one-half mile before the collision. On the other hand, Ira testified that the ambulance was traveling at least 65 mph. Given Ira's testimony, a factual dispute exists regarding Lehto's speed immediately before the collision.

That said, even if Lehto was traveling at 65 mph, pursuant to MCL 257.603 and MCL 257.632, it was legally permissible for him to exceed the speed limit if he was responding to an emergency call or traveling in an emergency and activated the ambulance's flashers and sirens as reasonably necessary.[4] Courts of this state have held that "Whether or not there was an emergency (or circumstances warranting the driver's belief that there was) bringing into play [MCL 257.603 and MCL 257.632] is a matter of fact." *Fiser v Ann Arbor*, 417 Mich 461, 472; 339 NW2d 413 (1983), overruled on other grounds by *Robinson*, *supra*, quoting *Hoffmaster v McNett*, 2 Mich App 709, 711; 141 NW2d 352 (1966). Given that Ruth was a "priority two" patient, meaning that she was seriously ill or injured and needed to get to the hospital, and that she had an altered level of consciousness and possible airway risk, necessitating an EMT paramedic's presence in the ambulance, there can be no material factual dispute that an emergency existed in this case or that the circumstances warranted Lehto's belief that an emergency existed. Further, while MCL 257.603 and MCL 257.632 require that emergency vehicles "be driven with due regard for the safety of others" even in an emergency, *Fiser*, *supra* at 472, citing *Kalamazoo v Priest*, 331 Mich 43, 46; 49 NW2d 52 (1951), plaintiff has not established that by traveling ten mph over the posted speed limit in an emergency, Lehto acted without due regard for others. While Lehto was aware that the road conditions were poor given his accident earlier that night and his own observations of the road, visibility was excellent and Old US 27 had almost no traffic on it. Moreover, the record is void of any evidence that Lehto ever lost control of the ambulance en route to the hospital, even immediately before the collision. Accordingly, we find that there is no question of material fact regarding Lehto's allegedly negligent operation of the ambulance.

Because plaintiff cannot establish that Lehto negligently operated the city's ambulance as required by MCL 691.1405, the city is entitled to summary disposition under MCR 2.116(C)(7).

Reversed and remanded for entry of summary disposition in favor of the city. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering

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[4] There is no dispute that the ambulance's flashers were activated at the time of the collision. While it is unclear whether the ambulance's sirens were also activated, MCL 257.603 and MCL 257.632 only require that the sirens be activated as "reasonably necessary."