STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH HINZ, as Personal Representative of the ESTATE OF JOHN ALLEN HAWKINS, deceased,

Plaintiff-Appellee,

v

ALAN ALMY,

Defendant-Appellant,

and

ALEXANDER HAMIL,

Defendant.

UNPUBLISHED
May 7, 2009

No. 285125
Ingham Circuit Court
LC No. 07-001056-NI

JOSEPH HINZ, as Personal Representative of the ESTATE OF JOHN ALLEN HAWKINS, deceased,

Plaintiff-Appellee,

v

MICHIGAN STATE UNIVERSITY BOARD OF TRUSTEES,

Defendant-Appellant.

No. 285126
Court of Claims
LC No. 07-000026-MZ

Before: Bandstra, P.J., and Whitbeck and Shapiro, JJ.

PER CURIAM.

In Docket No. 285125, defendant Alan Almy appeals as of right the circuit court's order denying his motion for summary disposition under MCR 2.116(C)(7). In Docket No. 285126, defendant Michigan State University Board of Trustees (MSU) appeals as of right the Court of Claims's order denying its motion for summary disposition under MCR 2.116(C)(7). We reverse and remand.

I. Basic Facts And Procedural History

At approximately 5:15 a.m., on March 18, 2005, Almy, a Michigan State University (MSU) electrician, was in possession of a 2003 Chevrolet pick-up truck owned by MSU. Almy left the truck unattended while it was running and unlocked, and parked in an area adjacent to MSU's Physical Plant Building. Almy left the vehicle to go inside the Physical Plant Building to talk to fellow employees. Almy returned to the parking spot where he left the truck to find that the truck was gone. Almy's actions of leaving the keys in the unlocked and unattended vehicle, allegedly contradicted MSU Basic Performance Standards Policy Numbers 8.01 and 11.02, as well as City of East Lansing Ordinance, Sec. 44-372.

On the evening of March 17, 2005, and into the morning hours of March 18, 2005, Alexander Hamil, age 19, had visited with friends at residence halls on the MSU campus and consumed alcohol. Somewhere between 5:15 a.m. and 5:30 a.m., on March 18, 2005, Hamil left the residence hall alone and walked by the MSU Physical Plant Building. While still inebriated, Hamil, apparently attracted to the unattended, unlocked, running vehicle, got into the MSU truck and drove off. While traveling at a high-speed rate, Hamil drove the truck eastbound on Grand River Avenue in East Lansing, Michigan, while, at the same time and place, Hawkins, was driving his Chevrolet Suburban westbound. Hamil drove across the centerline into oncoming traffic and struck Hawkins's vehicle head-on, killing Hawkins.

Joseph Hinz, as personal representative of the estate of John Hawkins, filed a complaint in the Court of Claims against MSU and Almy. Hinz alleged, in pertinent part, that MSU, through the acts of its employee, Almy, was negligent, or grossly negligent, for leaving the MSU truck unattended while it was unlocked and running. Hinz also argued that MSU was liable under MCL 691.1405, the "motor vehicle" exception to governmental immunity.

MSU moved for summary disposition under MCR 2.116(C)(7) and (8). MSU argued that it was immune from tort liability and that no exception to the general rule of immunity was applicable in this case. More specifically, MSU argued that the motor vehicle exception did not apply because an MSU employee was not negligently operating the MSU vehicle involved in the accident at the time of the collision. MSU clarified that "'"operation of a motor vehicle" encompasses activities that are directly associated with the driving of a motor vehicle.'"[1] Hinz responded, arguing that MSU was liable when Almy was grossly negligent for failing to conform to the MSU Performance Standards and the East Lansing ordinance regarding leaving vehicles unattended.

After hearing oral arguments on the motion, the Court of Claims entered an order, neither granting nor denying MSU's motion for summary disposition at that time and allowing the matter to proceed to discovery. The Michigan Supreme Court then ordered the Court of Claims to rule on MSU's motion for summary disposition.[2] The Court of Claims held another hearing,

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[1] Quoting *Chandler v Muskegon Co*, 467 Mich 315, 321; 652 NW2d 224 (2002).

[2] *Board of Trustees of Mich State Univ v Court of Claims Judge*, 480 Mich 1052; 743 NW2d 902 (2008).

and then subsequently entered an order denying MSU's motion for summary disposition. In so ruling, the Court of Claims concluded that there was a sufficient allegation that Almy left the vehicle in an "operational state" to bring Hinz's claims within the motor vehicle exception.

Joseph Hinz, as personal representative of the estate of John Hawkins, also filed a negligence action against Almy and Hamil in the Ingham Circuit Court. Hinz alleged, in pertinent part, that Almy was grossly negligent for leaving the MSU truck unattended while it was unlocked and running. Almy moved for summary disposition under MCR 2.116(C)(7) and (8). Almy argued that, under the facts alleged, his conduct did not rise to the level of gross negligence and, therefore, Hinz's claim was not cognizable under § 7(2)[3] of the Governmental Tort Liability Act (GTLA). Almy further argued that the alleged facts demonstrated that he was not the proximate cause of Hawkins's death. Hinz responded, arguing that Almy was grossly negligent for failing to conform to the MSU Performance Standards and the East Lansing ordinance regarding leaving vehicles unattended. Hinz further argued that Almy was the proximate cause of Hawkins's death.

After hearing oral arguments on the motion, the circuit court concluded that the simple act of leaving a running vehicle unlocked and unattended did not rise to the level of gross negligence. The circuit court went on to find that, even assuming it was gross negligence, it could not conclude that Almy's conduct was the proximate cause of the accident. Accordingly, the circuit court granted Almy's motion for summary disposition.

Hinz then moved for reconsideration, arguing that the circuit court erred in concluding that Almy's conduct was not the proximate cause of the accident. Hinz argued that there was at least a question of fact regarding whether Almy's conduct was "the" proximate cause of Hawkins's death, thereby precluding summary disposition. In other words, Hinz argued that the issue of proximate cause should have been reserved for determination by a factfinder. Almy responded, arguing that Hinz's motion was without merit.

After hearing oral arguments on the motion, the circuit court stated its ruling and reasoning on the record. In doing so, the circuit court first quoted the following statement from *Robinson v City of Detroit*,[4] "'[I]n MCL 691.1407[(2)(c)] . . . the Legislature provided to[rt] 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.'" The circuit court then went on to reason:

> Michigan Civil Jury Instruction 15.03 makes clear that the proximate cause is not necessarily the last cause. The argument I'm hearing on behalf of the Defendant is somehow I'm to read this language as meaning the last cause. I mean, what is the proximate cause is . . . quite clearly a factual question.

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[3] MCL 691.1407(2).

[4] *Robinson v City of Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000) (alterations added).

> In many cases, and in fact, the Robinson case it can be determined as a matter of fact. And they said police officers who were chasing individuals where the individuals themselves in vehicles—non-governmental vehicles cause injury, that they said is matter of fact and law—well actually they said as a matter of law. And they conclude, Justice Taylor, at the same page, "Applying this construction to the present cases, we hold that the officers in question are immune from suit [in] tort because their pursuit of the fleeing vehicles was not[,] as a matter of law, quote, 'the proximate cause of the injuries sustained by the plaintiffs.' The one most immediate, efficient, and direct cause of the plaintiffs' injuries was the reckless conduct of the drivers of the fleeing vehicles."[5]
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> I agree. In—in this case, there may have been some reckless conduct, but I'm not prepared to say it's a matter of law and fact. I mean, we—one thing we know for sure, but for this conduct, this could not have occurred. That's not true. That is not true in the Robinson case. It's a—it's less clear perhaps in the Helfner[6] case, but absolutely, if these keys are not left in the vehicle, this does not occur. And as I say, they're left under circumstances. Anybody who takes this vehicle is taking it in violation of the authority of the University, in violation of law, probably has some criminal intent.
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> And so, I think that a fact-finder could conclude that the immediate, efficient, and direct cause was this failure. And I'm satisfied that it—this conduct as described is at least a fact question as well as to whether or not there's gross negligence. There was error in the initial determination of the motion.

Accordingly, the circuit court granted Hinz's motion for reconsideration, set aside its previous order granting Almy summary disposition, and denied Almy's motion for summary disposition.

MSU and Almy appealed, and their appeals have been consolidated.[7]

II. Motions For Summary Disposition

A. Standard Of Review

MCR 2.116(C)(7) provides that a motion for summary disposition may be raised on the ground that a claim is barred because of immunity granted by law. Neither party is required to file supportive material; any documentation that is provided to the court, however, must be admissible evidence.[8] The plaintiff's well-pleaded factual allegations must be accepted as true

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[5] Quoting *Robinson*, *supra* at 462 (alterations added).

[6] *Helfner v Center Line Public Schools*, unpublished opinion per curiam of the Court of Appeals, issued June 20, 2006 (Docket No. 265757).

[7] *Hinz v Almy*, unpublished order of the Court of Appeals, entered June 5, 2008 (Docket Nos. 285125; 285126).

[8] *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

and construed in the plaintiff's favor, unless the movant contradicts such evidence with documentation.[9] This Court reviews de novo the applicability of governmental immunity.[10] This Court reviews for an abuse of discretion a trial court's decision to grant or deny a motion for reconsideration.[11]

B. Gross Negligence

Almy argues that the circuit court erred in its determination that Hinz met his burden to plead in avoidance on Almy's immunity because the complaint did not set forth a cognizable gross negligence claim and when no reasonable person could find that a governmental employee's conduct was grossly negligent, policy favors a court's timely grant of summary disposition. We agree.

The GTLA provides broad immunity from tort liability to governmental agencies and their employees whenever they are engaged in the exercise or discharge of a governmental function.[12] Moreover, governmental employees carrying out a governmental function are immune from tort liability under the GTLA so long as the employee's conduct does not constitute gross negligence. Specifically, MCL 691.1407(2) provides, in pertinent part, that:

> 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, . . . is immune from tort liability for an injury to a person or damage to property caused by the officer [or] employee . . . while in the course of employment or service . . . while acting on behalf of a governmental agency if all of the following are met:
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> (c) The officer's [or] employee's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

Gross negligence is, "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."[13] "[E]vidence of ordinary negligence does not create a material question of fact concerning gross negligence."[14] "The plain language of the governmental immunity statute indicates that the Legislature limited employee liability to situations where the

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[9] MCR 2.116(G)(5); *Maiden*, *supra* at 119; *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997).

[10] *Baker v Waste Mgt of Michigan, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995).

[11] *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

[12] *Ross v Consumers Power Co* (*On Rehearing*), 420 Mich 567, 595; 363 NW2d 641 (1984); see MCL 691.1407.

[13] MCL 691.1407(7)(a).

[14] *Maiden*, *supra* at 122.

contested conduct was substantially more than negligent."[15] It is the responsibility of the party seeking to impose liability on the governmental agency to prove that the alleged conduct was grossly negligent.[16] "To establish gross negligence as statutorily defined, the plaintiff must focus on the actions of the governmental employee, not on the result of those actions."[17] To constitute gross negligence conduct must suggest "almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks."[18] If reasonable jurors could honestly reach different conclusions as to whether conduct constitutes gross negligence, the issue is a factual question for the jury. However, if reasonable minds could not differ, the issue may be determined by summary disposition.[19]

We initially note that, here, it is undisputed that Almy, while starting his shift as an MSU electrician, was performing a government function when the injury occurred.

Contrary to Hinz's argument that Almy was grossly negligent for leaving the truck unattended, with the keys in the ignition, and the engine running, we conclude that Almy's conduct was not so reckless as to demonstrate a substantial lack of concern for whether an injury resulted. Although Almy's conduct may have been careless, reasonable minds would agree that this conduct does not amount to gross negligence. That is, no reasonable juror could honestly conclude that Almy's conduct suggested "a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks."[20]

Indeed, conduct similar to Almy's has previously been held to not even rise to the level of negligence, let alone gross negligence. In *Terry v Detroit*,[21] a GM employee left the keys in an unattended and unlocked, GM-owned vehicle. Subsequently, the vehicle was stolen, driven in a high-speed police chase, and then crashed into another vehicle.[22] This Court reasoned,

> while it *may* be foreseeable to a vehicle owner that, if he leaves his keys in the ignition, the vehicle might be stolen and driven recklessly or negligently, we believe that this fact alone is insufficient to create liability in this type of case.
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[15] *Id*. at 121.

[16] See *Mack v Detroit*, 467 Mich 186, 201; 649 NW2d 47 (2002).

[17] *Maiden*, *supra* at 127 n 10.

[18] *In re Estate of Tarlea*, 263 Mich App 80, 90; 687 NW2d 333 (2004).

[19] *Jackson v Saginaw Co*, 458 Mich 141, 146-147; 580 NW2d 870 (1998); *Briggs v Oakland Co*, 276 Mich App 369, 374; 742 NW2d 136 (2007).

[20] *Tarlea*, *supra* at 90.

[21] *Terry v Detroit*, 226 Mich App 418, 421; 573 NW2d 348 (1997).

[22] *Id*. at 420-421.

> [W]e conclude that GM did not have a duty to protect plaintiffs from the harm that resulted from [the defendant's] theft of GM's vehicle and subsequent reckless driving. Plaintiffs stress foreseeability based on GM's alleged policy of leaving keys in unlocked vehicles and its knowledge of prior thefts. However, we find that the connection between GM's conduct and plaintiffs' injuries was simply too attenuated to impose a duty and resulting liability for breach of the duty on GM. Rather, the accident was more closely connected to [the defendant's] criminal conduct in stealing GM's vehicle and driving recklessly.
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> In sum, we simply do not find that GM's practice of leaving keys in employee automobiles creates the kind of unreasonable risk of harm to third persons such as plaintiffs that would warrant the imposition of a duty under this state's common law. To hold otherwise would, in effect, make parties like GM insurers against the criminal misconduct of others.[23]

Notably, in support of his position Hinz relies on *Davis v Thorton*, to support the proposition that the act of leaving keys in an unlocked, unattended, and possibly still-running vehicle can give rise to liability for negligence when such conduct violates an ordinance. Here, Almy allegedly violated an MSU policy and an East Lansing city ordinance by leaving the vehicle unattended, with the keys in the car, and the engine running. However, this Court has held that the presumption arising from violation of an ordinance or statute is merely one of ordinary negligence, not gross negligence.[24] And, as stated, "evidence of ordinary negligence does not create a material question of fact concerning gross negligence."[25]

Additionally, although it is tragic that Almy's careless conduct ultimately led to Hawkins's death, as stated, the proper focus is on the government employee's actions, not on the result of those actions.[26] The mere fact that a death results from a government employee's actions does not in and of itself support a conclusion that the employee acted in a manner that evidenced a substantial lack of concern for whether an injury occurred.[27]

Accordingly, we conclude that the circuit court erred in determining that Hinz had met his burden to plead in avoidance of Almy's immunity and, therefore, erred in denying Almy's motion for summary disposition.

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[23] *Id*. at 426, 427-428 (emphasis in original).

[24] *Poppen v Tovey*, 256 Mich App 351, 358; 664 NW2d 269 (2003).

[25] *Maiden*, *supra* at 122.

[26] *Id*. at 127 n 10.

[27] *Id*.

C. Proximate Cause

Almy argues that the circuit court erred in ruling that his asserted negligence may be "the" proximate cause of Hawkins's death as a matter of law. We agree.

To be the proximate cause of an injury, gross negligence of a government employee that subjects him to liability must be the one most immediate, efficient, and direct cause preceding the injury.[28] Proximate cause is usually a factual issue to be decided by the trier of fact, but if the facts bearing on proximate cause are not disputed and if reasonable minds could not differ, then the issue is one of law for the court.[29]

In his brief, Hinz gives many different dictionary definitions for the word "proximate" because he claims that this Court may turn to dictionary definitions to help construe an ambiguous term; however, Hinz fails to mention that the *Robinson* Court already defined proximate as the "one most immediate, efficient, and direct cause preceding an injury."[30] And we are bound to follow that interpretation.[31]

In *Robinson v City of Detroit*, the plaintiff was the personal representative of a passenger sitting in the backseat of car that was involved in a collision.[32] Detroit police officers had noticed the car weaving from lane to lane, so they activated their police lights.[33] Instead of stopping, however, the driver of the car began to flee and then hit another non-police vehicle.[34] The backseat passenger died as a result of the collision.[35] The plaintiff sued the individual police officers seeking to hold them personally liable, but the Michigan Supreme Court held that the police officers' conduct was not the proximate cause of the resulting injury, rather the proximate cause was the reckless conduct of the driver of the fleeing vehicle.[36] According to the Court, "the Legislature provided 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."[37] The police officers were

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[28] *Robinson, supra* at 462.

[29] *Nichols v Dobler*, 253 Mich App 530, 532; 655 NW2d 787 (2002); *Dep't of Trans v Christensen*, 229 Mich App 417, 424; 581 NW2d 807 (1998); *Rogalski v Tavernier*, 208 Mich App 302, 306; 527 NW2d 73 (1995).

[30] *Robinson, supra* at 446.

[31] *People v Beasley*, 239 Mich App 548, 556; 609 NW2d 581 (2000).

[32] *Robinson, supra* at 448-449.

[33] *Id*. at 449.

[34] *Id*.

[35] *Id*.

[36] *Id*. at 449, 462.

[37] *Id*. at 462.

immune from liability because their conduct was not the one most immediate, efficient, and direct cause preceding the injury.[38]

Like in *Robinson*, where the police officers' conduct was a cause of the injury but not the proximate cause, Almy's conduct was *a cause* of the resulting injury but it was not *the proximate cause*. As in *Robinson*, where the driver recklessly fleeing was the one most immediate, efficient, and direct cause preceding the injury, in this case the one most immediate, efficient, and direct cause preceding the injury was not Almy leaving the keys in the car with the engine running but Hamil stealing the car, driving it recklessly, and crashing it into Hawkin's car.

Accordingly, because the facts in this case are undisputed and reasonable minds could not differ, we conclude that the circuit court erred in ruling that Almy's asserted negligence may be the proximate cause of Hawkin's death as a matter of law, and, therefore, the court erred in denying Almy's motion for summary disposition.

D. The Motor Vehicle Exception

MSU argues that the Court of Claims erred in concluding that Hinz met his burden to plead in avoidance of MSU's governmental immunity by invoking the motor vehicle exception to the GTLA and claiming that the death resulted from Almy's operation of the truck. We agree.

"To survive a motion for summary disposition, brought under MCR 2.116(C)(7), the plaintiff must allege facts warranting the application of an exception to governmental immunity."[39] MCL 691.1405(5), the motor vehicle exception to governmental immunity, states that:

> 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. . . .

In *Chandler v Muskegon Co*, the plaintiff, not a government employee, was helping to clean transit buses for Muskegon County.[40] A Muskegon County employee parked one of the buses, turned off the engine, and started to exit through the bus doors when the doors closed on his neck for failure to release the hydraulic air pressure valve.[41] The plaintiff attempted to pry the doors open and injured his shoulder in the process.[42] The Michigan Supreme Court held that:

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[38] *Id*.

[39] *Smith*, *supra* at 616.

[40] *Chandler*, *supra* at 316.

[41] *Id*.

[42] *Id*.

> In the context of a motor vehicle, the common usage of the term "operation" refers to the ordinary use of the vehicle *as* a motor vehicle, namely, driving the vehicle. In this case, the injury to plaintiff did not arise from the negligent operation of the bus as a motor vehicle. The plaintiff was not injured incident to the vehicle's operation as a motor vehicle. Rather, the vehicle was parked in a maintenance facility for the purpose of maintenance and was not at the time being operated *as* a motor vehicle.[43]

Chandler, therefore, makes clear that the negligent operation of a vehicle requires that the motor vehicle was being operated as a motor vehicle, and the exception encompasses only activities that are directly associated with the actual driving of a motor vehicle.[44]

The dissent argues that the injury in this case directly relates to the vehicle's operation because "[t]urning on the vehicle's engine for the purpose of driving it on the public roads is operation of the vehicle."[45] Arguably, as the trial court also concluded, Almy left the vehicle in an "operational state," which facilitated Hamil's driving away of the vehicle. However, this Court's decision in *Poppen v Tovey*[46] is instructive on this point. In *Poppen*, the defendant, a municipal employee who drove a city truck, parked the truck on a curb, turned it off, left the warning lights on, and walked away for several minutes.[47] The plaintiff struck the parked truck from behind and suffered injury from being ejected from his vehicle during the crash.[48] This Court held that the motor vehicle exception to the GTLA did not apply because the municipal employee was not operating the truck when he walked away from it and the vehicle's presence on the road was no longer directly associated with driving.[49] Although the facts in this case are not identical to *Poppen*, when Almy parked and left the vehicle, its presence on the road was no longer directly associated with driving, and Almy himself was no longer operating it as a motor vehicle.

The dissent also cites *Martin v Inter-Urban Transit*[50] to support its position that operation of a motor vehicle need not directly involve the driving of the vehicle. In *Martin*, the plaintiff slipped and fell down the steps of a shuttle bus that the City of Grand Rapids owned and operated.[51] The Michigan Supreme Court held that the plaintiff satisfied the motor vehicle exception to governmental immunity because "[t]he loading and unloading of passengers is an

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[43] *Id*. at 321-322 (emphasis in original).

[44] *Id*. at 320-321.

[45] *Post* at ___.

[46] *Poppen*, *supra*.

[47] *Id*. at 352.

[48] *Id*. at 352, 253.

[49] *Id*. at 356.

[50] *Martin v Inter-Urban Transit*, 480 Mich 936; 740 NW2d 657 (2007) (*Martin II*).

[51] *Martin v Inter-Urban Transit*, 271 Mich App 492, 493; 722 NW2d 262 (2006) (*Martin I*).

action within the 'operation' of a shuttle bus."[52] We believe this case is distinguishable from *Martin*. In its short opinion, the Michigan Supreme Court was specifically speaking to the operation of shuttle buses, the purpose of which is to load people onto the bus, drive them to their destination, and unload them; making the loading and unloading of people part of the operation of the shuttle bus. Thus, *Martin* does not bear on the circumstances here.

Accordingly, we conclude that the Court of Claims erred in concluding that Hinz met his burden to plead in avoidance of MSU's governmental immunity by invoking the motor vehicle exception to the GTLA and claiming that the death resulted from Almy's operation of the truck.

Reversed and remanded for entry of orders granting Almy and MSU summary disposition. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra

[52] *Martin II, supra* at 936.