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UNPUBLISHED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.

SHAPIRO, J. (*concurring in part and dissenting in part*).

I concur in the majority's conclusion that a reasonable trier of fact could not conclude that the actions of the individual government employee constituted *gross* negligence, defined by MCL 691.1407(7)(a) as "conduct so reckless as to demonstrate a substantial lack of concern for

whether an injury results." Accordingly, I concur in the majority's reversal of the circuit court and remand for entry of summary disposition as to defendant Almy.

I respectfully dissent, however, from the majority's reversal of the court of claims denial of defendant Michigan State University Board of Trustees' motion for summary disposition. In my view, the facts of this case fall within the exception to governmental immunity set forth in MCL 691.1405 for bodily injuries resulting from "the negligent operation . . . of a motor vehicle." Further, I conclude that a reasonable trier of fact could find that leaving this truck unfenced, unlocked, and unattended while the key was in the ignition and its motor was operating constitutes negligence.

In *Chandler v County of Muskegon*, 467 Mich 315, 322; 652 NW2d 224 (2002), our Supreme Court held that the motor vehicle exception did not apply where the vehicle was "parked in a maintenance facility for the purpose of maintenance." Thereafter, in *Martin v Inter-Urban Transit*, 271 Mich App 492; 722 NW2d 262 (2006), this Court, interpreting *Chandler*, ordered dismissal of a claim brought by a bus-rider who slipped on icy stairs while she was entering a city-owned shuttle bus. This Court viewed *Chandler* as limiting the exception to cases involving only the act of "driving." Our Supreme Court peremptorily reversed the decision, however, and noted that "operation" of a vehicle is not limited solely to "driving." *Martin v Inter-Urban Transit*, 480 Mich 936; 740 NW2d 657 (2007). The Court stated that the "loading and unloading of passengers is an action within the operation of a shuttle bus." *Id.* Justices Corrigan and Taylor dissented from the order, opining that the central issue was not the location of the incident, i.e., on the bus, but rather whether the injury was related to the operation of the bus rather than to its maintenance. The dissenting Justices argued that removing ice from the stairway was a maintenance, rather than an operative function and so not within the exception. *Id.* at 937.

The instant case plainly does not involve maintenance of the vehicle. Moreover, the injury directly relates to the vehicle's operation. Turning on the vehicle's engine for the purpose of driving it on the public roads is operation of the vehicle. This conclusion is consistent with *Chandler*, which holds that for the exception to apply, the motor vehicle must be "operated *as* a motor vehicle" (emphasis in original), and with *Martin*, which makes clear that "operation of a motor vehicle" is not limited to decisions about safe navigation of the roadways.

Finally, I do not believe that *Terry v Detroit*, 226 Mich App 418; 573 NW2d 348 (1997) requires us to conclude, as matter of law, that Almy's actions do not rise to the level of negligence. In *Terry*, the vehicle was not left running in a public, unguarded area, but rather left off in a "guarded and secured . . . garage." By contrast, in this case, it is alleged that the truck was left running in an unsecured, unlocked location and that doing so violated both a city ordinance and MSU policy. This is much more akin to the actions found to present a jury question in *Davis v Thornton*, 384 Mich 138; 180 NW2d 11 (1970) than those in *Terry*. Indeed, the allegedly negligent actions in the instant case far exceed those in either *Terry* or *Davis*.

Accordingly, I would hold governmental immunity does not bar the claim against the Michigan State University Board of Trustees under the government immunity exception set forth in MCL 691.1405, and would affirm the court of claims.

/s/ Douglas B. Shapiro