STATE OF MICHIGAN

COURT OF APPEALS

DONNA MARIE BARBER and PAUL A. BARBER,

Plaintiffs-Appellees,

v

DARYL PHILLIP WATSON,

Defendant-Appellant,

and

BAY METRO TRANSPORTATION AUTHORITY,

Defendant.

UNPUBLISHED
February 9, 2010

No. 289683
Bay Circuit Court
LC No. 08-003343-NI

Before: Donofrio, P.J., and Meter and Murray, JJ.

PER CURIAM.

Defendant[1] 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).

Defendant Watson was the driver of a bus that was involved in a multi-vehicle traffic accident at dusk on December 15, 2006. Several vehicles were traveling in a line. Somewhere in front was an unknown driver; the first identified vehicle was driven by Shannon Granger; the next was driven by Patricia Collins with plaintiff Donna Barber as a passenger;[2] then came Scott Korman, who was plaintiff's realtor; and last, defendant, driving his bus. At some point, an

[1] The Transportation Authority is not part of this appeal; "defendant" will be used in this opinion to refer to defendant Daryl Phillip Watson.

[2] Mr. Barber's claims are derivative; "plaintiff" will be in reference to Mrs. Barber.

unknown driver made an abrupt stop, causing a chain reaction of sudden stops. Defendant was unable to stop the bus in time and ran into the back end of Korman's vehicle, pushing it into Collins's vehicle which, in turn, was pushed into Granger's vehicle. Defendant was ticketed for "unable to stop in assured clear distance." Defendant got out and checked to see if everyone was all right. According to Barber, defendant said, "I was looking down at the floor and when I looked up, bang." There was no skidmark evidence, but defendant did testify that he applied the brakes before the accident.

All those deposed testified that it was a sudden stop. Collins stated:

> . . . suddenly out of nowhere somebody stopped abruptly. The guy behind him, I'm assuming it was a guy, I don't know for certain, hurried up and went into a driveway, otherwise he would have nailed him. The lady behind that person [Granger], she stopped. I managed to stop. Scott stopped. And then this gentleman—
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> * * *
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> *Q*. It was like a panic stop?
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> *A*. Oh, yes.
>
> *Q*. You jammed your brakes?
>
> *A*. Oh, yeah.

Korman testified that it was a "quick stop" but it did not require him to lock up the brakes. He considered it "not quite a panic" stop. Korman stated, "There was plenty of time if [defendant] was paying attention to make this stop." He also noted that a couple of seconds before the impact, defendant turned on the bus's headlights, and estimated defendant was 150 to 200 yards away at that point.

There was no other evidence to indicate the cause of the accident. Defendant submitted to and passed drug and alcohol tests. There was no evidence he was speeding; the speed limit was posted at 40 miles per hour, defendant testified he was going about 35 miles per hour, and Collins also testified that the vehicles were not speeding. There was no evidence of any problem with the bus's brakes.

Plaintiff filed a three-count complaint, alleging "negligence and/or gross negligence" by defendant, vicarious liability by the Transportation Authority, and negligent hiring and training by the Transportation Authority. The acts specifically alleged to show "negligence and/or gross negligence" by defendant were:

> a. Failed to operate his motor vehicle in a safe and reasonable manner;
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> b. Failed to operate his motor vehicle with regard to the safety and property of others, including the Plaintiff, in accordance with MSA 9.2326 [sic];
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> c. Failed to operate his motor vehicle at a speed within the posted speed limit;

> d. Failed to operate his motor vehicle at a speed safe and reasonable for the conditions which then and there existed;
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> e. Failed to observe conditions which were there to be seen for all motorists making reasonable observation of the road ahead of them;
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> f. Failed to yield to motor vehicles in the roadway ahead of him[;]
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> g. Failed to operate his motor vehicle in a careful and prudent manner;
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> h. Operate[d] his vehicle in a negligent, grossly negligent, careless or reckless fashion;
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> i. Failed to operate his motor vehicle in a manner which allowed him to [c]ome to a stop within the assured clear distance ahead;
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> j. Failed to operate his motor vehicle in a non-negligent manner in compliance with MCLA 257.626;
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> k. Failed to operate his motor vehicle in a non-negligent manner in compliance with MCLA 257.626(b);
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> l. Failed to operate his motor vehicle at a careful and prudent speed, not greater than nor less than is reasonable and proper; at a speed which will permit a stop within the assured clear distance ahead, or the posted speed limit, in compliance with MCLA 257.627[.]

Defendant moved for summary disposition, arguing that plaintiff did not plead any facts amounting to gross negligence as failing to stop in time to avoid hitting another vehicle is not "conduct so reckless as to demonstrate a substantial lack of concern for whether injury results." He simply was unable to stop his large vehicle in time when the vehicle at the front of the line stopped suddenly. He also argued that his actions were not *the* proximate cause of plaintiff's injuries, citing *Greater Flint HMO v Allstate Ins Co*, 172 Mich App 783, 788; 432 NW2d 439 (1988), where this Court found that there was a causal nexus between the lead vehicle (which had unexpectedly changed lanes) in a chain-reaction accident and the resulting injury occurring several vehicles back. Here, defendant asserted that the driver who made the initial sudden stop was a cause, as was Collins because had she stopped farther away from Granger, her car would not have been hit both in front and back.

In response, plaintiff argued that the evidence showed defendant was not watching the roadway for an appreciable period of time and this conduct amounted to gross negligence. She also argued that defendant's actions were the proximate cause: except for defendant, everyone else stopped and there would have been no injury resulting had he not failed to stop. At oral argument, plaintiff asserted that the distance between the bus and Korman's car, as estimated by Korman, indicated that defendant must have been looking down for seven to ten seconds. Plaintiff analogized this case to *Sargeson v Yarabek*, 24 Mich App 577, 581; 180 NW2d 474 (1970), asserting this Court upheld a jury verdict for the plaintiff where the defendant looked away from the road for one second and struck a pole without ever applying the brakes.

The trial court agreed with plaintiff that a question of fact existed regarding defendant's gross negligence. The court did not identify which facts gave rise to gross negligence.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Similarly, the applicability of governmental immunity is a question of law that we review de novo on appeal. *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). Although a plaintiff must plead in avoidance of governmental immunity when suing an agency, an individual defendant must affirmatively plead the defense. *Odom v Wayne Co*, 482 Mich 459, 479; 760 NW2d 217 (2008).

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

> (1) Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.
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> (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:
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> (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.
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> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
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> (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.
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> (3) Subsection (2) does not alter the law of intentional torts as it existed before July 7, 1986.
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> * * *
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> (7) As used in this section:
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> (a) "Gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

Under MCL 691.1407(2), an officer or employee of a governmental agency who is acting within the scope of his authority and engaged in carrying out a governmental function is immune from liability for negligence unless his conduct amounts to gross negligence that is the proximate cause of the injury or damage. For the purpose of employee immunity, 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); *Costa v Community Emergency Medical Services, Inc*, 475 Mich 403, 411; 716 NW2d 236 (2006). 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). Although the resonableness of an actor's conduct under the standard is generally a question for the factfinder, 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; 580 NW2d 870 (1998). "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 v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999) (citation omitted).

The trial court erred in finding the evidence could allow a jury to find defendant acted with gross negligence. There was no evidence that defendant was subject to anything more than ordinary distractions, and he was not speeding. Contrary to plaintiff's argument, there was no evidence he did not apply the brakes (in fact, defendant testified that he did), nor was there evidence that defendant averted his eyes from the road for the whole time Korman could see him. There was no *evidence* that shows he was driving with a "singular disregard for substantial risks." *Tarlea*, 263 Mich App at 90. Mere speculation or conjecture is insufficient to establish reasonable inferences of causation. *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994). In sum, plaintiff's allegations and the facts of record are those that would only support a claim for ordinary negligence, which is insufficient as a matter of law to establish gross negligence. *Maiden*, 461 Mich at 122-123. Plaintiff has not shown the existence of a genuine issue of material fact regarding defendant's conduct.

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

/s/ Pat M. Donofrio
/s/ Patrick M. Meter
/s/ Christopher M. Murray