

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In re Estate of Clay Arthur Dangler.

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BRENDA DANGLER and DARYL DANGLER,  
CO-PERSONAL REPRESENTATIVES OF THE  
ESTATE OF CLAY ARTHUR DANGLER,

UNPUBLISHED  
November 4, 2010

Plaintiffs-Appellants,

v

CHRISTINE SUE HERBERT and WEST  
BLOOMFIELD SCHOOL DISTRICT,

No. 291414  
Oakland Circuit Court  
LC No. 2008-088268-NI

Defendants-Appellees.

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Before: FITZGERALD, P.J., and MARKEY and BECKERING, JJ.

PER CURIAM.

This case arises out of a May 2, 2007, collision between a motorcycle driven by decedent, Clay Arthur Dangler, and a school bus driven by defendant Christine Herbert, an employee of the West Bloomfield School district. The collision resulted in decedent's death. Plaintiffs, the co-representatives of decedent's estate, filed the present negligence action against Herbert and defendant West Bloomfield School District.<sup>1</sup> Plaintiffs appeal as of right the trial court's order granting summary disposition based on governmental immunity pursuant to MCR 2.116(C)(7),<sup>2</sup> as well as the order denying their motion to amend the complaint. We affirm.

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<sup>1</sup> Plaintiffs also named as defendants George Brydges and Wimsatt Building Materials. Shortly after the litigation began, plaintiffs reached a monetary settlement with defendants Brydges and Wimsatt. Thus, Herbert and the school district are the only remaining defendants.

<sup>2</sup> The trial court also granted summary disposition pursuant to MCR 2.116(C)(10), finding that there was no evidence to establish that defendant Herbert violated any statutory or common law duty of car and, therefore, failed to show either ordinary or gross negligence.

Many of the facts are undisputed. At approximately 3:15 p.m. on May 2, 2007, traffic was congested on Commerce Road in West Bloomfield. Commerce Road is a two-lane road that runs west and east. Scotch Elementary School is on the south side of Commerce Road near the intersection of Hiller Road and Commerce Road. The eastbound lane of Commerce Road flares at the entrance to Scotch Elementary School to permit a right turn into the school driveway.

George Brydges was traveling eastbound on Commerce Road, driving a large boom truck owned by his employer, Wimsatt Building Supply. His vehicle was stopped in traffic close to the entrance of Scotch Elementary School. Decedent, who was riding a motorcycle, was also traveling eastbound on Commerce Road and was several vehicles behind Brydges's vehicle.

The school bus driven by Herbert was traveling westbound on Commerce Road and was stopped on Commerce Road waiting to make a left hand turn into Scotch Elementary School. Brydges observed that the eastbound lane in front of him was blocked by traffic all the way up to the intersection at Hiller and Commerce Roads. He estimated that both his vehicle and the school bus had been stopped for approximately three to four minutes. According to Brydges, he knew he could not make it through the light and he saw no reason to block the buses from turning into the school. Brydges raised his hand to signal to the school bus driver that he was not going to move forward, thus enabling the bus driver to make a left turn in front of him into the school. Brydges denied that he intended to wave the bus through. Herbert, who believed that Brydges was giving her an "all clear" to turn left, inched the bus forward in front of Brydges's truck to look for any oncoming, illegally passing traffic on Brydges's passenger side. After stopping and seeing no oncoming traffic, Herbert slowly began her left turn into the driveway of Scotch Elementary School. At about the same time, decedent passed the stopped traffic on the right side and sped up the flare lane and around Brydges' vehicle and some additional vehicles. Brydges testified that he saw a "flash" go by his vehicle on the right – the flash being decedent on his motorcycle. James Brant, who was also in the eastbound line of cars, indicated that decedent went from behind him up the right side of the road. Seconds later, decedent's motorcycle collided with the side of the school bus as it was making its left turn into the driveway of the elementary school. Herbert testified that she never saw decedent and had no idea what had hit her bus when the collision occurred.

The police report completed by the West Bloomfield Police Department following their investigation indicated that the accident was the fault of decedent, who was illegally passing traffic in the right flare lane at the time of the collision. The police report also concluded that the left turn completed by Herbert was proper under the circumstances:

While the driver was making a left turn that requires a yield, she was flagged to complete that turn. The vehicle, a large stake truck, blocked clear view of the shoulder of the road. This, in conjunction with the position in the lane and illegal pass by the operator of the motor[cycle] would have made it impossible to see and or predict that another vehicle would attempt such a pass. The driver of the bus, a commercially licensed and trained operator, was relying on the direction of another commercially licensed operator.

Accident Reconstructionist James Madden, P.E., concluded, using generally accepted accident reconstruction techniques, that Herbert could have stopped, conducted a reasonable

visible inspection of the right flare lane, saw no traffic, and proceeded without decedent having been in the right flare lane. He concluded that given the weight and power of the motorcycle in relation to the slow acceleration of a large school bus, decedent could easily have covered the distance between his starting position to the point of impact after Herbert looked and confirmed that there was no one in the right flare lane.

Defendants moved for summary disposition, arguing that plaintiffs failed to plead in avoidance of governmental immunity and that defendants were entitled to summary disposition because plaintiffs' claims were barred by statutory governmental immunity. Defendants also argued that there was no question of fact that decedent's negligence was the primary cause of the accident. Plaintiffs argued that Herbert was negligent for relying solely on Brydges' signaling her to make a left turn, and that a jury could find Herbert negligent for making the left turn without confirming that no vehicles were illegally passing on the right.

Following a hearing on the motion for summary disposition, the trial court issued a written opinion and order. The court stated in relevant part:

The Court finds that Plaintiffs have failed to submit any evidence that demonstrates gross negligence by Defendant Herbert. There is no evidence that Defendant Herbert's [sic] acted recklessly. The evidence submitted shows that Defendant Herbert stopped the bus and signaled for the left turn, when the truck driver waved that he would allow her to turn in front of him she looked for oncoming traffic before completing her turn. The evidence shows that the bus proceeded to make the left turn with caution. The Police Report found that decedent was at fault for illegally passing the stopped traffic. Defendants' accident reconstruction expert concluded that the accident occurred as a result of decedent's illegal traffic maneuver. Even Plaintiffs' expert acknowledges that there was fault attributable to decedent. Based on the evidence submitted, the Court finds that Defendant Herbert was not negligent in the operation of the school bus. There is no evidence to establish that Defendant Herbert violated any statutory or common law duty of care. Therefore, the Court finds that summary disposition is appropriate because Plaintiffs have failed to show either ordinary or gross negligence. In addition, the Court finds that Plaintiffs' request to amend the complaint to allege gross negligence would be futile based on the evidence that has been presented.

## I

Plaintiffs first argue that the trial court erred when it granted summary disposition in favor of defendants. This Court reviews 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 is reviewed de novo on appeal. *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004).

### A. Defendant Herbert

Under MCL 691.1407(2), an officer or employee of a governmental agency who is acting within the scope of his authority and is 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.<sup>3</sup> For the purpose of employee immunity, gross negligence is 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 Med Serv, 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 reasonableness 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 County*, 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; 597 NW2d 817 (1999) (citation deleted).

The trial court properly found that the evidence could not allow a jury to find Herbert acted with gross negligence. Herbert waited for three or four minutes in front of the school driveway before Brydges signaled that he would not be moving forward and that he would allow her to make a left turn into the school. Even assuming that Herbert wrongfully interpreted Brydges’s hand gesture as one indicating that the roadway was clear for Herbert to make the turn, Herbert’s testimony reveals that she did not solely rely on Brydges’s hand gesture when making the turn. Before making the turn, Herbert turned on her left turn signal and inched into the turn so that she could see past Brydges’s vehicle in the direction of the turn. Herbert did not see any vehicles approaching and proceeded to make her turn. Nothing shows she was driving with a singular disregard for substantial risks. *Tarlea*, 263 Mich App at 90.

#### B. Defendant Bloomfield Hills School District

The operation of a school bus system by a public school district is typically recognized to constitute an immune governmental function. *Cobb v Fox*, 113 Mich App 249, 257, 317 NW2d 583 (1982). Any recognized exceptions, such as the motor vehicle exception, to this broad grant of immunity are to be construed narrowly. *Robinson v Detroit*, 462 Mich 439, 455; 613 NW2d 307 (2000). The motor vehicle exception to governmental immunity specifically excepts injuries

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<sup>3</sup> “A school district, its board members, and its employees generally qualify for governmental immunity. See MCL 691.1407(1), (2) (establishing that a ‘governmental agency’ and its board members and employees are generally immune from tort liability); MCL 691.1401(b), (d) (defining “governmental agency” to include a ‘political subdivision’ of the state and defining “political subdivision” to include school districts). *Lansing Schools Educ Assn v Lansing Bd of Educ*, \_\_\_ Mich \_\_\_, \_\_\_ NW2d \_\_\_ (Docket No. \_\_\_, issued July 31, 2010).

“resulting from the negligent operation ... of a motor vehicle.” MCL 691.1405. At issue in this case is whether decedent’s injuries resulted from the negligent operation of the school bus within the meaning of MCL 691.1405.

Plaintiffs alleged that Herbert acted negligently by driving the bus “carelessly and heedlessly,” by driving “carelessly and recklessly” and by failing to drive “at a careful and prudent speed,” by failing “to make sure traffic was clear before initiating a left turn,” and by driving “in willful or wanton disregard for the safety of Plaintiff.” As previously discussed, however, there is no evidence that Herbert operated the school bus in any of these fashions, and the trial court specifically found that plaintiffs failed to present any evidence of even ordinary negligence on the part of Herbert. Because no reasonable jury could find that the injury in this case resulted from the negligent operation of the school bus, as opposed to the negligence of a driver who chose to drive illegally on the right side of a line of stopped traffic, summary disposition in favor of defendant school district was appropriate.

## II

Plaintiffs argue that the trial court erred by denying their motion to amend their complaint. We review a trial court's decision regarding a motion to amend a complaint for an abuse of discretion. *Tierney v Univ of Mich Regents*, 257 Mich App 681, 687; 669 NW2d 575 (2003).

When defendants moved for summary disposition on the ground that plaintiffs failed to plead in avoidance of governmental immunity, plaintiffs acknowledged their failure and moved to amend their complaint. The trial court, as part of the court’s “Summary Disposition Opinion and Order,” denied the motion on the ground that the amendment “would be futile based on the evidence that has been presented.”

In Michigan, leave to amend is freely granted in the absence of any undue delay, bad faith or dilatory motive on the part of the amending party, and so long as the amendment is not futile and does not unfairly prejudice the opposing party. *Ben P Fyke & Sons, v Gunter Co*, 390 Mich 649, 656-659; 213 NW2d 134 (1973),

As an initial matter, the trial court did not grant summary disposition under MCR 2.116(C)(8) and, therefore, did not dismiss plaintiffs’ complaint on the basis that it failed to plead in avoidance of governmental immunity. The trial court’s opinion and order reveals that the court decided this case as though plaintiffs had pleaded in avoidance of governmental immunity. That is, the trial court specifically found that plaintiffs failed to submit any evidence demonstrating either ordinary or gross negligence by Herbert. Under these circumstances, the trial court properly found that it would have been futile for plaintiffs to amend their complaint to

add reference to MCL 691.1405, and to allege gross negligence against Herbert.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Jane M. Beckering