# STATE OF MICHIGAN

# COURT OF APPEALS

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| MEGAN BAYAGICH,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>February 27, 2018 |
| v | No. 336321<br>Washtenaw Circuit Court |
| ALYSSA MCCULLOUGH,<br><br>Defendant-Appellant,<br>and | LC No. 2015-000448-NI |
| GILLIG, LLC, and VAPOR BUS INTERNATIONAL,<br><br>Defendants. | |

Before: MURPHY, P.J., and O'CONNELL and K. F. KELLY, JJ.

PER CURIAM.

Defendant, Alyssa McCullough,[1] appeals as of right the trial court's order denying her motion for summary disposition. We affirm.

This case arises out of an incident in which plaintiff, Megan Bayagich, along with two other women, fell out of the rear door of a moving bus on the University of Michigan campus in Ann Arbor. Defendant was driving the bus when the incident occurred. Both plaintiff and defendant were students at the University.

On September 14, 2013, plaintiff boarded a crowded University bus to be transported to the University's main campus. She stood near the back of the bus holding onto a pole with her left hand. Both plaintiff and defendant testified that although the bus was crowded, no one was leaning against the bus's rear door. Defendant stopped the bus momentarily on Huron Street to wait for opposing traffic to clear so she could make a left turn onto Fletcher Street. When the bus turned left, the passengers shifted to the right. The bus's rear door opened. Plaintiff lost her

[1] Defendants Gillig, LLC, and Vapor Bus International are not parties to this appeal. Therefore, we will refer to McCullough as defendant.

grip on the pole, and she fell out of the bus with two other women. Defendant testified that she was driving no more than 10 miles per hour when she made the turn. Plaintiff testified that the bus was moving less than five miles per hour as it was turning.

Testing on the bus immediately following the accident showed no problems with the bus or its doors. Defendant's supervisor ultimately opined that the incident was the result of defendant prematurely opening the bus's rear door before coming to a complete stop.

Plaintiff filed a complaint against defendant, alleging that she suffered serious injuries and damages as a result of defendant's negligent operation of the bus. Plaintiff argued that defendant was negligent for "failing to engage safety devices, overloading, and driving." The complaint contended that defendant was not immune from liability pursuant to MCL 691.1407[2] because she was grossly negligent and was "a proximate cause of injury and damage" to plaintiff.

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(7) (governmental immunity) and MCR 2.116(C)(10) (no genuine issue of material fact). Defendant argued that plaintiff's claim was barred by governmental immunity. It was undisputed that defendant was a governmental employee and that in driving a bus, she was acting within the scope of that employment. Therefore, defendant was immune from tort liability for plaintiff's injuries if her conduct did not amount to gross negligence. According to defendant, plaintiff provided no evidence from which a jury could conclude that defendant's conduct amounted to statutorily-defined gross negligence. Further, defendant argued that plaintiff's claim was also barred because she could not show that defendant's actions were the proximate cause of her injuries. Defendant contended that there was no evidence that any theoretical negligence on her part was the most direct cause of plaintiff's injuries. Instead, the opening of the rear door was the most immediate, efficient, and direct cause of her injuries. And there was no evidence that defendant caused the rear door to open.

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[2] In pertinent part, MCL 691.1407 provides:

> (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 . . . is immune from tort liability for an injury to a person . . . caused by the . . . employee . . . while in the course of employment or service . . . if all of the following are met:
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> (a) The . . . employee . . . is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The . . . employee's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

In response, plaintiff submitted evidence that defendant was cited for reckless driving by the University in two instances before the accident. She also submitted an affidavit from defendant's supervisor containing his opinion that the incident was caused by driver error. Plaintiff argued that defendant was not immune from tort liability because her conduct amounted to gross negligence. The evidence showed that there was nothing wrong with the bus; thus, the evidence established that the incident was caused by defendant. Additionally, there was no evidence that any action or omission by anyone else was the cause of the opening of the rear door while the bus was in motion. As a result, according to plaintiff, defendant's actions were the proximate cause of plaintiff's injuries.

The trial court found that defendant's supervisor could be qualified as an expert and that his opinion could be submitted to a jury. The trial court concluded that the supervisor had sufficient knowledge, training, skill, or experience to offer an opinion in this case. He was, as an accident investigator, able to offer his opinion regarding the cause of the incident. Thus, the trial court found that there was a genuine dispute of material fact in this case regarding whether the accident was caused by driver error. Accordingly, the trial court denied defendant's summary disposition motion.

On appeal, defendant first argues that the trial court improperly denied her motion for summary disposition because plaintiff did not provide any evidence that would allow a reasonable jury to find that she was grossly negligent. We disagree.

In *Moraccini v City of Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012), this Court, addressing the standard of review in a case entailing a claim of governmental immunity, explained:

> This Court reviews de novo a trial court's decision on a motion for summary disposition. The applicability of governmental immunity and the statutory exceptions to immunity are also reviewed de novo on appeal. MCR 2.116(C)(7) provides for summary disposition when a claim is barred because of immunity granted by law. The moving party may submit affidavits, depositions, admissions, or other documentary evidence in support of the motion if substantively admissible. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. We must consider the documentary evidence in a light most favorable to the nonmoving party for purposes of MCR 2.116(C)(7). If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. But when a relevant factual dispute does exist, summary disposition is not appropriate. [Citations, quotation marks, and ellipses omitted.]

In the context of examining whether a trial court properly deemed documentary evidence, such as an expert's opinion, to be admissible or inadmissible for purposes of rendering a ruling on a motion for summary disposition, our review is for an abuse of discretion, although questions of law underlying the evidentiary ruling are reviewed de novo. *Elher v Misra*, 499 Mich 11, 21; 878 NW2d 790 (2016).

In *Moraccini*, 296 Mich App at 391-392, this Court set forth the basic analytical framework concerning governmental immunity:

> Except as otherwise provided, the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., broadly shields and grants to governmental agencies immunity from tort liability when an agency is engaged in the exercise or discharge of a governmental function. MCL 691.1407(1); *Duffy v Dep't of Natural Resources*, 490 Mich 198, 204; 805 NW2d 399 (2011); *Grimes v Dep't of Transp*, 475 Mich 72, 76-77; 715 NW2d 275 (2006). "The existence and scope of governmental immunity was solely a creation of the courts until the Legislature enacted the GTLA in 1964, which codified several exceptions to governmental immunity that permit a plaintiff to pursue a claim against a governmental agency." *Duffy*, 490 Mich at 204. A governmental agency can be held liable under the GTLA only if a case falls into one of the enumerated statutory exceptions. *Grimes*, 475 Mich at 77; *Stanton v Battle Creek*, 466 Mich 611, 614-615; 647 NW2d 508 (2002). An activity that is expressly or impliedly authorized or mandated by constitution, statute, local charter, ordinance, or other law constitutes a governmental function. *Maskery v Univ of Mich Bd of Regents*, 468 Mich 609, 613-614; 664 NW2d 165 (2003). This Court gives the term "governmental function" a broad interpretation, but the statutory exceptions must be narrowly construed. *Id.* at 614.

"[T]he burden . . . fall[s] on the governmental employee to raise and prove his entitlement to immunity as an affirmative defense." *Odom v Wayne Co*, 482 Mich 459, 478-479; 760 NW2d 217 (2008).

In *Bellinger v Kram*, 319 Mich App 653, 659; 904 NW2d 870 (2017), this Court observed:

> MCL 691.1407(2) provides qualified governmental immunity from tort liability to a government employee acting within the scope of his or her authority and engaging in the exercise of a governmental function provided the employee's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. Therefore, in order to have survived defendant's motion for summary disposition, plaintiff was required to show that there was both an issue of material fact on the element of gross negligence and on the element of proximate cause. [Quotation marks omitted.]

At the outset, the parties do not dispute that defendant was a government employee, that she was acting within the scope of her employment in driving the bus, and that operation of a bus is a governmental function. As a result, we will not address these elements of MCL 691.1407(2).

MCL 691.1407(8) defines "gross negligence" as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." "Grossly negligent conduct must be conduct that is substantially more than negligent." *Bellinger*, 319 Mich App at 659-660 (quotation marks omitted). "[A]llegations or evidence of inaction or claims that a defendant

could have taken additional precautions are insufficient." *Id*. at 660. Gross negligence reflects a willful disregard of safety measures and a singular disregard for substantial risks. *Id*.

First, defendant argues that the trial court, in ruling on her motion for summary disposition, improperly relied on her supervisor's opinion that she prematurely opened the bus's rear door before bringing the bus to a complete stop. However, we conclude that the trial court did not abuse its discretion in determining that the supervisor's opinion as to the cause of the incident was admissible as an expert opinion.

MRE 702 provides that:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

MRE 702 encompasses not only experts in the strictest sense of the word, but also that large group of individuals called "skilled" witnesses, such as doctors, counselors, police officers, and social workers. *People v Beckley*, 434 Mich 691, 711; 456 NW2d 391 (1990). In his affidavit, defendant's supervisor explained his qualifications:

> 2. I have worked in the public transportation industry for 30 years.
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> 3. I have worked in the public transportation industry driving and using Gillig busses since approximately 1999.
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> 4. I was employed by Ann Arbor Transportation Authority as a Bus Driver, a Bus Driving Trainer and a Service Ambassador from March 18, 1985 until my March 2011 retirement.
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> 5. I am an experienced bus driver, and have competed in annual bus rodeos for the Ann Arbor Transportation Authority, which involved conducting advanced bus maneuvers in a safe yet efficient manner.
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> 6. After retirement, I was employed by the University of Michigan Transportation Department for four years as a Supervisor and an Accident Investigator from March 28, 2011 to April 2015.
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> 7. I am currently employed by Ann Arbor Transportation Authority as a Bus Driver, and have been employed by the Ann Arbor Transportation Authority since December 7, 2015, the company from which I retired in 2011.

From the information contained in the affidavit regarding his qualifications and experience, we cannot conclude that the trial court abused its discretion in qualifying the supervisor as an expert. He had extensive experience in the public transportation industry as

both a driver and supervisor. He also had worked with Gillig buses, the type of bus involved in this incident, since approximately 1990. The supervisor additionally worked for four years as an accident investigator. He drew on his knowledge and experience with Gillig buses to make his determination that the incident was caused by driver error. Therefore, the trial court did not abuse its discretion in considering the opinion regarding the cause of the accident when deciding defendant's motion for summary disposition. See *People v Fowler*, 193 Mich App 358, 362-363; 483 NW2d 626 (1992) (holding that the trial court did not abuse its discretion in admitting expert testimony because each expert "possessed either experience or education in the field in which he provided expert testimony . . . [and] they drew on their knowledge of the individual systems to express an opinion . . . ").

Defendant also contends that the trial court erred in considering this testimony because the supervisor did not show that he had any specific training to investigate traffic accidents. However, "[g]aps or weaknesses in the witness' expertise are a fit subject for cross-examination, and go to the weight of his testimony, not its admissibility." *Wischmeyer v Schanz*, 449 Mich 469, 480; 536 NW2d 760 (1995) (quotation marks omitted).

Moreover, aside from the supervisor's opinion, there was sufficient documentary evidence, as viewed in a light most favorable to plaintiff, from which it could reasonably be inferred that defendant had opened the rear door while the bus was in motion, causing plaintiff and the others to fall out of the bus. There was documentary evidence that no one was leaning against the backdoor, that the door opened while the bus was still in motion, that defendant had never experienced the door opening on its own, that post-accident testing of the bus's door revealed that it was in complete working order, that the bus's door could not physically be forced open wide enough to create a fall hazard, that there were no alarms or lights indicating that the door was already open prior to the fall, and, importantly, that the door could be opened by a driver while the bus was in motion if traveling at speeds below two miles per hour. This evidence reasonably suggests that defendant opened the door. While there was also evidence that might support a conclusion that mechanical failure caused the bus's rear door to open prematurely, this only means that the ultimate resolution of the cause of the accident is a matter for the trier of fact.

Defendant also argues that evidence of her previous driving incidents is inadmissible. On the other hand, plaintiff argues that this evidence is admissible to show defendant's habit or routine practice of driving recklessly.

MRE 406 provides:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

"Such evidence must establish a set pattern or show that something is done routinely or has been performed on countless occasions." *Laszko v Cooper Laboratories, Inc*, 114 Mich App 253, 256; 318 NW2d 639 (1982). We disagree that evidence of two or three incidents involving "reckless driving" in two years, which did not entail the alleged activity at issue here, establishes

a relevant "a set pattern" or that defendant routinely drove recklessly on countless occasions. At any rate, it does not appear that the trial court based its decision to deny defendant's motion for summary disposition on this evidence. Therefore, defendant has failed to show that the trial court relied on any improper evidence in making its ruling on defendant's motion for summary disposition.

Further, viewing the evidence in the light most favorable to plaintiff, there was sufficient evidence to create a genuine issue of material fact as to whether defendant acted with gross negligence. It is undisputed that the rear door of the bus opened at some point while the bus was making a left turn and that three women, including plaintiff, fell out. As noted above, subsequent testing on the bus showed that the doors were working properly and there was also evidence showing that it was possible for the rear door of the bus to be opened if the bus was traveling less than two miles per hour. Defendant testified that she stopped the bus at the intersection to allow oncoming traffic to clear. She then made her left turn. Plaintiff testified that no one was pressing on the door when it opened. In addition, no alarms or lights indicated that the rear door was open while the bus was in motion. And again, defendant's supervisor opined that based on his investigation, the incident was caused by defendant prematurely opening the rear door. Finally, two University transportation employees testified that University guidelines and safety rules prohibited drivers from opening the bus doors while the bus was still in motion. Therefore, based on the submitted evidence, a reasonable jury could conclude that defendant opened the rear door of a bus full of passengers (with many of them standing) while making a left turn, and that this conduct was a "willful disregard of safety measures and a singular disregard for substantial risks." *Bellinger*, 319 Mich App at 660. As a result, there was a genuine issue of material fact as to whether defendant was grossly negligent.

Although defendant contends that she never opened the rear door while the bus was moving and that she did not open the rear door on the day of the incident, there was evidence to the contrary, thereby precluding summary disposition. And "summary disposition is precluded in cases in which reasonable jurors could honestly have reached different conclusions with regard to whether the defendant's conduct amounted to gross negligence." *Vermilya v Dunham*, 195 Mich App 79, 83; 489 NW2d 496 (1992). Thus, the trial court did not err in denying defendant's motion for summary disposition in this regard.

Next, defendant contends that the trial court improperly denied her motion for summary disposition because plaintiff did not provide any evidence that would allow a reasonable jury to find that defendant's alleged gross negligence was the proximate cause of plaintiff's injuries. We disagree. In *Ray v Swager*, 501 Mich 52, 83; 903 NW2d 366 (2017), our Supreme Court recently held:

> Proximate cause requires determining whether the defendant's negligence foreseeably caused the plaintiff's injuries. That negligence (or gross negligence in the case of the GTLA) cannot have been a proximate cause of a plaintiff's injury if it is not both a factual and legal cause of the injury. A court should take all possible proximate causes into account when determining whether the defendant was "the proximate cause," i.e., "the one most immediate, efficient, and direct cause of the injury . . . ." In this case, the Court of Appeals erred by instead attempting to discern whether the various but-for causes of plaintiff's injuries

> were a more direct cause of those injuries than defendant's alleged gross negligence, without first determining whether any of the asserted but-for causes were *proximate* causes. Accordingly, we vacate the Court of Appeals' decision and remand to the Court of Appeals for further proceedings not inconsistent with this opinion. [Citation omitted; ellipsis in original.]

In this case, both parties appear to agree that plaintiff's injuries were caused by the opening of the bus's rear door during a left turn. However, the parties dispute what caused the door to open. Defendant argues that she did not open the rear door, thereby suggesting mechanical failure or some other unintentional cause. She testified that she never opened the rear door while driving and that she was under the impression that the rear door would not open while the bus was moving. There was evidence submitted that showed that the associate director of transportation operations had difficulty in getting the bus to move slowly enough in gear to open the rear door. On the other hand, plaintiff contends that defendant prematurely opened the rear door before bringing the bus to a complete stop, and there is evidence supporting this contention, as discussed earlier. Because the exact cause of the rear door opening is unclear, there is a genuine issue of material fact as to whether defendant's actions were the proximate cause of plaintiff's injuries. MCL 691.1407(2)(c).

Furthermore, viewing the evidence in the light most favorable to plaintiff, the one most immediate, efficient, and direct foreseeable and factual cause of plaintiff's injuries was defendant's opening of the rear door while the bus was moving. It was clearly foreseeable that opening either bus door (front or back) while making a left turn when the bus was full of passengers (with many of them standing) could lead to injuries. And there was sufficient evidence for a trier of fact to determine that defendant's actions were the proximate cause of the rear door of the bus opening and of plaintiff's injuries.

Affirmed. Having fully prevailed on appeal, plaintiff is awarded taxable costs under MCR 7.219.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly