STATE OF MICHIGAN

COURT OF APPEALS

WENDY MCBRIDE, as Conservator of ALEXIS WASHBURN,

Plaintiff-Appellant,

v

BOBBY BROOKS,

Defendant-Appellee,

and

RACHEL BEDARD,

Defendant.

UNPUBLISHED
December 22, 2020

No. 351866
Genesee Circuit Court
LC No. 18-111895-NI

Before: O'BRIEN, P.J., and M. J. KELLY and REDFORD, JJ.

M. J. KELLY, J. (*concurring in part and dissenting in part*).

I concur with the majority that the Natural Resources and Environmental Protection Act, see MCL 324.73301, which is commonly referred to as the recreational land use act (RUA), applies to the facts of this case. I further agree that, because the trial court analyzed the motion for summary disposition as though gross negligence/willful and wanton misconduct had been plead, it was not error for the court to deny plaintiff's motion to amend the complaint. However, because I believe that genuine issues of material fact exist with respect to the conduct at issue, I would reverse the grant of summary disposition, allow plaintiff to amend her complaint, and remand to the trial court.

Essential to an analysis in this case is a proper application of the standard of review under MCR 2.116(C)(10). Too often we forget that the standard is a very liberal one. See *Pete v Iron Co*, 192 Mich App 687, 689; 481 NW2d 731 (1991) ("Courts are liberal in finding that a genuine issue exists, giving all benefits of doubt and resolving all reasonable inferences in favor of the nonmoving party."). See also *Patrick v Turkelson*, 322 Mich App 595, 605; 913 NW2d 369 (2018) ("Courts are liberal in finding a factual dispute sufficient to withstand summary disposition."). In

reviewing a (C)(10) motion, "a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019). If there is a genuine issue of material fact, the court must deny the (C)(10) motion. MCR 2.116(C)(10). "A genuine issue of material facts exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). The issue of gross negligence may be determined by summary disposition only if reasonable minds could not differ. *Jackson v Saginaw Co*, 458 Mich 141, 146; 580 NW2d 870 (1998).

The facts here are not complicated, and the issue is straightforward: can reasonable minds differ as to whether defendant's conduct constituted either gross negligence or willful and wanton misconduct?[1] Gross negligence is "conduct so reckless as to demonstrate a *substantial* lack of concern for whether an injury results." *Xu v Gay*, 257 Mich App 263, 269; 668 NW2d 166 (2003) (quotation marks and citation omitted; emphasis added). "Substantial" is defined as "of considerable importance, size, or worth." Compact Oxford English Dictionary, 2nd Edition, Revised. The test is not whether the conduct demonstrated an "absolute" or "total" lack of concern, but rather a "substantial" lack of concern. This, undoubtedly is a high standard, but it is not insurmountable. To prove a claim of willful and wanton misconduct, the plaintiff "must establish that the defendant (1) knew of a situation requiring the exercise of ordinary care and diligence to avert injury to another, (2) had the ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand, and (3) failed to use such care and diligence to avert the threatened danger, when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another." *Lamp v Reynolds*, 249 Mich App 591, 595; 645 NW2d. 311 (2002). I believe that, on this record, reasonable minds can differ.

My analysis is akin to the concept of cumulative error. In our criminal jurisprudence, the cumulative effect of several errors can constitute sufficient prejudice to warrant reversal in a case where the prejudice of any one error would not. See *People v LeBlanc*, 462 Mich 575, 591; 640 NW2d 246 (2002). In a similar manner the actions and non-actions of defendant in this action should be examined in a cumulative manner rather than on an individual basis. In other words, even though any one of the individual acts of negligence at issue may only rise to the level of ordinary negligence, the combination of all of the acts may add up to something more.

The facts in this case demonstrate that defendant allowed an eight-year-old child to ride tandem[2] on a vehicle that has the capability to travel at speeds of at least 50—and possibly 70-miles-per-hour—on hilly terrain with minimal training and while unsupervised. Every one of these

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[1] A default judgment was entered against defendant, Rachel Bedard, and she has not appealed to this Court. Consequently, all references to defendant refer solely to defendant-appellant Bobby Brooks.

[2] The ATV's manual unambiguously states: "WARNING. Operating this vehicle if you are under the age of 16 increases your chance of severe injury or death. NEVER operate this vehicle if you are under the age of 16." It also states: "WARNING. NEVER ride as a passenger. Passengers can cause a loss of control, resulting in SEVERE INJURY OR DEATH."

individual acts allow for an inference of negligence and, when combined and taken as a whole, it is plain to me that a reasonable juror could find that they transcend ordinary negligence and enter the realm of gross negligence and/or willful and wanton misconduct.

In addition to the above factual considerations, I also find relevant the legislatively-created prohibitions against eight-year-old children operating an ATV. MCL 324.81129 provides:

> (5) Subject to subsection (17), the owner or person in charge of an ATV with 4 or more wheels shall not knowingly permit the vehicle to be operated by a child less than 12 years of age unless the child is not less than 10 years of age and is on private land owned by a parent or legal guardian of the child. This subsection does not apply to the operation of an ATV used in agricultural operations."

And MCL 324.8130 states:

> A person who is under 16 years of age, before operating an ATV or ORV, shall complete an ORV safety education course approved by the department. This course may include a written examination and a driving test designed to test the competency of the applicant. Upon successful completion of this safety education course, a person shall receive an ORV safety certificate.[3]

As correctly recognized by the majority, violation of a statute does not automatically mean that defendant was grossly negligent. However, when taken together with all of the other facts pointing to negligence, a reasonable jury could find that *this* defendant's violation of the statutes is additional evidence of negligence and that it is enough to tip the scale from weighing in favor of ordinary negligence to gross negligence and/or willful and wanton misconduct.

Rather than examining all the evidence in the light most favorable to plaintiff, the trial court and the majority place heavy—if not exclusive—emphasis on the fact that defendant provided some rudimentary instruction to the plaintiff's eight-year-old ward. The majority then clings to a single line from *Tarlea*[4]–a case that is no way factually similar to the instant one—that

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[3] I recognize that MCL 324.8130 does not impose an affirmative obligation on defendant to take or not take any particular action. However, on this record, it is undisputed that he permitted an eight-year-old child who had not taken the statutorily required safety education course to operate his ATV without any supervision. Thus, rather than rely on the statutorily required safety education course, defendant decided to substitute his own version of safety training—apparently primarily consisting of explaining how to accelerate and brake and an admonishment that the machine should not be driven too fast. In sum, a reasonable jury could determine that such an action pushes defendant's conduct from ordinary negligence to gross negligence and/or willful and wanton misconduct, notwithstanding that the statute does not impose an affirmative obligation on defendant.

[4] *Tarlea* involved a high school student who died of heatstroke during football practice. *Tralea*, 263 Mich App at 87. Finding that the estate failed to establish that the coaches conduct demonstrated a substantial lack of concern for whether an injury would result, the court went

notes, "saying that a defendant could have taken additional precautions is insufficient to find ordinary negligence, much less recklessness." *Tralea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004).

I do not read *Tralea* as standing for the proposition that providing minimal instructions—without any regard to the other accompanying circumstances—relieves a tortfeasor from liability for gross negligence or willful and wanton misconduct. The majority more than once sweeps away the possibility of any existing fact questions by noting the instruction that defendant provided to the young child. But this hardly seems dispositive.

The majority's position fails to take into account factors that a reasonable juror might find distinguishable. For instance, providing instruction to a sixteen-year-old is certainly different than providing the same instruction to an eight-year-old. Likewise, reasonable minds could differ as to whether the quantitative difference between an ATV owner providing rudimentary safety instructions to an eight-year-old and the completion of the department-approved ORV safety-education course that is mandated by MCL 324.8130. Further, the *type* of activity is also relevant to a determination of whether safety instructions are sufficient to warrant a finding that—as a matter of law—no gross negligence or willful and wanton misconduct exists. For example, providing instruction on how to ride a bicycle is different than providing instruction on how to handle a semi-automatic weapon, or skydiving, or, as here, a vehicle manufactured for people who are, at a minimum, twice the age of this child. And when adding the additional negligent acts noted above, the minimal instructions provided by defendant Brooks could be seen by a reasonable jury as woefully insufficient. Indeed, a reasonable juror might very well determine that any "additional precautions" were irrelevant, given the manufacturer's warnings and statutory law that explicitly prohibit the child from being on the vehicle in the first place.

Caselaw also supports my view. *In Estate of Thomas v Consumer's Power*, 394 Mich 459, 460; 231 NW2d 653. (1975) two snowmobilers were killed when they struck the unmarked guy wires of a Consumers Power utility pole. In reversing this Court, which affirmed the trial court's granting of summary judgment, our Supreme Court held:

> Count II was based on gross negligence. We find that the allegations of the complaint sufficiently state facts giving rise to a cause of action based on gross negligence as to withstand summary judgment. Plaintiffs clearly alleged that the defendants knew of Consumer Power's unmarked guy wires and the threat therefrom to snowmobilers permissively using the Saginaw County Agricultural Society's land, that unmarked guy wires in areas 'exposed to traffic 'were a violation of an industry safety code, that the defendants could have avoided the

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through the facts which included the student decedent having had a medical examination from a physician four days before the tragic event which found him to be in completely normal health and capable of participating unrestrictedly in all rigorous activity; the players were not wearing pads or equipment, were encouraged to take breaks and drink water and they were not penalized if they chose not to participate in the fateful one-and-one-half mile run. *Id*. at 85-87, 89-91. It is hard to make a case for ordinary negligence under these facts, let alone gross negligence.

> resulting harm in several ways, and that they failed to do so. See, E.g., *Taylor v Mathews*, 40 Mich App 74; 198 NW2d 843 (1972); Restatement of Torts 2d, s 500. [*Id*. at 460-461.]

Further, in *Lamp*, 249 Mich App at 593, the motorcycle-racing plaintiff was injured when he struck the stump of a tree which was hidden by weeds just inches off of a motocross track. Finding that the facts were sufficient to support a claim of willful and wanton misconduct, the court explained:

> In this case, the evidence showed that defendants knew about the tree stump for years, knew that the stump was located a short distance from the outside perimeter of the racetrack, and knew that motocross racing involved high rates of speed and that it was common for racers to leave the track during the race. The evidence also showed that defendants did not cut the weeds around the edges of the racetrack or around the tree stump, failed to remove the stump although they had the equipment to remove it with little effort, failed to make the stump's presence known to the motocross racers, and admitted that a hidden tree stump near a racetrack was a dangerous condition that could cause serious injury. Consequently, we find no error in the trial court's determination that defendants' conduct was willful and wanton. [*Id*. at 595-596.]

Recognizing that an ill-trained, eight-year-old child should not be allowed to operate an ATV having the capacity to travel up to 50 (and possibly 70 miles per hour) is not the fevered hand-wringing of a worrywart or killjoy. It is extremely dangerous, even reckless. The manufacturer of the vehicle strongly warned against it and the Michigan Legislature has passed laws prohibiting it. When considering the additional factors that the child was riding tandem and unsupervised on hilly terrain, I believe there is a question of fact for a jury to determine whether these actions amount to gross negligence and/or willful and wanton conduct. Accordingly, I respectfully dissent.

/s/ Michael J. Kelly