STATE OF MICHIGAN

COURT OF APPEALS

ALEX A. LEMERAND, Plaintiff-Appellant, v UNIVERSITY OF MICHIGAN REGENTS, Defendant-Appellee.	UNPUBLISHED October 20, 2011 No. 298637 Court of Claims LC No. 09-000067-MZ
ALEX A. LEMERAND, Plaintiff-Appellant, v KEVIN SHELDON HARTMAN, Defendant-Appellee.	No. 300157 Washtenaw Circuit Court LC No. 09-000622-NI

Before: M. J. KELLY, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

Plaintiff appeals as of right the orders granting summary disposition in favor of defendants in these consolidated actions alleging tort liability arising from a governmental employee's negligent operation of a motor vehicle. We affirm.

On June 19, 2006, plaintiff was allegedly injured in a car accident involving a vehicle owned by defendant University of Michigan Regents (the university) and driven by its employee, defendant Kevin Sheldon Hartman, on university business at the time. According to Hartman, he was traveling 25 to 30 miles per hour and was following the car in front of him, which was driven by plaintiff, by two car lengths as he approached Division Street in Ann Arbor. The stoplight at Division Street turned from green to yellow, and plaintiff's vehicle stopped. Hartman slammed on the brake pedal with one foot. Hartman's vehicle struck plaintiff's vehicle in the rear. The police report regarding the accident described "no injuries," minor damage to Hartman's vehicle, and extensive damage to the rear of plaintiff's vehicle. The police cited

Hartman for failure to stop within an assured distance. Hartman filled out a vehicle damage report for the University in which he described the accident as follows:

> The car in front of me stopped for a yellow light. I did all I could to stop my vehicle. Given the condition of the vehicle, not much happened when I forcefully applied the brakes. I was traveling west bound on Hill [S]treet toward Division, moving at the posted speed limit when the accident occurred.

During his deposition, Hartman described the vehicle's condition as "not ideal, but it – I don't believe that it wasn't – it wasn't unsafe." In two years of driving the vehicle, Hartman had never experienced a braking problem with the vehicle. Another university employee who drove the same vehicle for work did not recall any problems with the brakes. Plaintiff's supervisor testified that he had no safety concerns with the vehicle, that he was unaware of any problems with the vehicle's braking system, and that he did not recall Hartman reporting any problems with the vehicle.

On August 1, 2006, plaintiff sent a letter to Hartman advising him that he had retained counsel. The Senior Claims Representative for the University of Michigan Risk Management Services responded to plaintiff's letter, advising that she would be investigating the accident. On August 3, 2007, plaintiff demanded settlement.

On May 29, 2009, plaintiff filed a claim alleging negligence and gross negligence against Hartman in Washtenaw Circuit Court. On June 1, 2009, plaintiff filed a claim in the Court of Claims under the motor vehicle exception to governmental immunity, MCL 691.1405, alleging that the university negligently maintained the vehicle. Plaintiff's case in the Court of Claims was consolidated with his case in the Washtenaw Circuit Court under MCL 600.6421.[1]

The university moved for summary disposition, arguing that plaintiff's claim was barred for failure to file a claim, or notice of intention to file a claim, with the clerk of the Court of Claims within six months of the accident in violation of MCL 600.6431(3), the applicable notice provision of the Court of Claims Act, MCL 600.6401 *et seq*. Plaintiffs responded that summary disposition should be denied because the university was not prejudiced by plaintiff's noncompliance with the notice requirement. The trial court granted the university's motion pursuant to MCR 2.116(C)(7) on the ground that plaintiff failed to comply with the notice requirement.

Hartman also moved for summary disposition, arguing that this case involved nothing more than a standard car accident. Plaintiff asserted that the language in Hartman's report wherein he stated, "given the condition of this vehicle," showed that a genuine issue of material fact existed regarding whether the vehicle was unsafe. The trial court, finding no genuine issue

[1] MCL 600.6421 provides that "[c]ases in the court of claims may be joined for trial with cases arising out of the same transaction or series of transactions which are pending in any of the various courts of the state."

of material fact regarding whether Hartman acted with gross negligence in operating the vehicle, granted summary disposition in favor of Hartman pursuant to MCR 2.116(C)(7) and (10).

Docket No. 298637

Plaintiff argues that the trial court erroneously granted summary disposition in favor of the University because the university failed to show that it was actually prejudiced by plaintiff's failure to comply with the notice requirements of MCL 60.6431(3).

This Court reviews de novo both a trial court's decision on a motion for summary disposition and questions of statutory interpretation. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007).

Under the governmental tort liability act, MCL 691.1404 *et seq*, a governmental agency is immune from tort liability when the agency is engaged in the exercise or discharge of a governmental function. MCL 691.1407(1). The grant of immunity is subject to six statutory exceptions, including the motor vehicle exception, MCL 691.1405, which provides in pertinent part:

> Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is the owner.

In an action for property damage or personal injuries, "claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action." MCL 600.6431(3).

In *Rowland*, 477 Mich 197, the Supreme Court held that a plaintiff's failure to comply with the notice requirements of MCL 691.1404(1) requires dismissal, regardless of actual prejudice to the defendant. *Id*. at 219. Although the present case involves MCL 600.6431(3), a panel of this Court has recently held that the *Rowland* rationale applies to other statutory notice provision, including MCL 600.6431(3). *McCahan* v *Brennan*, ___Mich App __; ___NW2d___ (Docket No. 292379, issued February 1, 2011), slip op at 2. Thus, under *Rowland* and *McCahan*,[2] defendant was not required to demonstrate actual prejudice from plaintiff's noncompliance with MCL 600.6431(3).[3] Because it is undisputed that plaintiff failed to comply

[2] In *Kline v Dep't of Transportation*, ___ Mich App ___; ___ NW2d ___ (Docket No. 295652, issued March 1, 2011), slip op at 3, a panel of this Court declared a conflict with *McCahan* and followed *McCahan* only because it was required to under MCL 7.215(J)(1). This Court declined to convene a conflict panel and *McCahan* remains good law. *Klein [sic] v Dep't of Transportation*, unpublished order of the Court of Appeals, issued March 14, 2011.

[3] For the reasons stated in his dissenting opinion in *McCahan*, ___ Mich App at ___, Judge Fitzgerald believes that *McCahan* was wrongly decided.

with the notice requirement of MCL 600.6431(3), the trial court did not err in granting the university's motion for summary disposition.

Docket No. 300157

Plaintiff argues that the trial court erroneously granted summary disposition in favor of Hartman because there was a genuine issue of material fact as to whether he was grossly negligent. Although the trial court cited MCR 2.116(C)(7), (8), and (10) in its order granting summary disposition in favor of Hartman, the court clearly looked beyond the pleadings, and defense counsel specifically requested summary disposition pursuant to MCR 2.116(C)(7) and (10) at the hearing on the motion. We will therefore review the decision as though premised on MCR 2.116(C)(7) and (10).

A trial court properly grants summary disposition under MCR 2.116(C)(7) where a claim is barred because of immunity granted by law. When reviewing a motion under subrule (C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them. *Dextrom v Wexford Co*, 287 Mich App 406, 429; 789 NW2d 211 (2010). "If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court." *Id*. at 430. Conversely, if a factual dispute exists as to whether immunity applies, summary disposition is not appropriate. *Id*. When reviewing a motion under subrule (C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists warranting a trial. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

A government employee is immune from tort liability if: (1) the employee is acting within the scope of his employment, (2) the government agency is discharging a government function, and (3) the employee's conduct does not amount to gross negligence. MCL 691.1407(2); *Costa v Community Emergency Med Servs, Inc*, 475 Mich 403, 409; 716 NW2d 236 (2006). Only factor (3) is at issue in this case.

"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). Evidence of ordinary negligence does not create a material question of fact concerning gross negligence. *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999). Instead, a plaintiff must allege conduct of "almost a willful disregard of precautions or measures to attend to safety and a singular disregard for the substantial risks." *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004).

Plaintiff argues that Hartman was grossly negligent both in the manner in which he drove and in his decision to drive the vehicle "given its condition." No evidence has been introduced to show that Hartman was speeding or that he was driving recklessly. Although Hartman received a ticket for failure to stop within an assured distance, Hartman testified that he was driving two car lengths behind plaintiff's vehicle, that he saw the light turning yellow, and that he applied the brakes when plaintiff's car stopped. The failure to stop his vehicle before striking plaintiff's vehicle under the circumstances does not rise to the level of reckless disregard for

substantial risks. Additionally, plaintiff has not shown that Hartman's decision to drive the truck was grossly negligent. There was no evidence introduced that Hartman was previously aware of any braking or mechanical problem with the truck. Hartman's statement in the accident report prepared for the university after the accident was ambiguous and insufficient to create a question of fact as to whether he willfully disregarded safety measures by deciding to drive the truck. *Tarlea*, 263 Mich App at 90. There is simply nothing in plaintiff's pleadings that would remove Hartman from the protection of governmental immunity. Plaintiffs allege nothing more than ordinary negligence against Hartman. The trial court properly dismissed plaintiff's claim against Hartman.

Affirmed.

/s/ Michael J. Kelly
/s/ E. Thomas Fitzgerald
/s/ William C. Whitbeck