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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-453**

Kelly Anderson,
Appellant,

vs.

Kyle Foglesong,
Respondent.

**Filed December 22, 2009
Affirmed
Wright, Judge**

Scott County District Court
File No. 70-CV-08-8786

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Considered and decided by Wright, Presiding Judge; Kalitowski, Judge; and
Stoneburner, Judge.

UNPUBLISHED OPINION

WRIGHT, Judge

Appellant, a passenger in respondent's vehicle, sustained serious injuries when
respondent's vehicle veered off of the road and crashed into a tree. Appellant contends

that the district court erred by denying her motion to amend her complaint to add a claim for punitive damages. We affirm.

FACTS

Appellant Kelly Anderson began dating respondent Kyle Foglesong in late 2005 or early 2006. The relationship terminated shortly thereafter, but the two continued to spend time together. On April 1, 2006, Anderson and Foglesong met to discuss reconciliation. After they began arguing, Anderson requested that Foglesong drive her home. As they walked to Foglesong's vehicle, Foglesong grabbed Anderson and pushed her against the garage door; but Anderson voluntarily entered the vehicle.

As Foglesong drove out of his neighborhood, he traveled in the opposite direction of Anderson's home. When Anderson asked where he was going, Foglesong stated, "I'm taking you for the ride of your life." Anderson assumed that he meant "he was going to do something crazy." Accelerating quickly, Foglesong pulled out approximately 200 yards in front of another vehicle, which caused it to slow to approximately 40 miles per hour to avoid a collision. Anderson reached for her cellular telephone to call the police because she was frightened by Foglesong's conduct. As Anderson and Foglesong argued, Foglesong took Anderson's telephone away from her. As Anderson reached across Foglesong to retrieve her telephone from his left hand, Foglesong's vehicle abruptly veered off of the road and hit a tree. The district court determined that the investigation following the traffic accident produced no evidence of erratic driving prior to the accident.

Anderson suffered severe leg and ankle injuries as a result of the accident. She filed a civil complaint, alleging that Foglesong's negligence was the direct and proximate cause of her injuries. Following discovery, Anderson moved to amend her complaint to include a claim for punitive damages. After the district court denied the motion, the parties stipulated to a judgment of dismissal, which the district court entered on March 6, 2009. This appeal followed.

DECISION

Anderson contends that the district court erred by denying her motion to amend her complaint to include a claim for punitive damages, arguing that the evidence submitted in support of her motion to amend clearly and convincingly demonstrates that Foglesong acted with a deliberate disregard for the safety of others. We review the district court's decision to deny a motion to add a claim for punitive damages to determine whether it constitutes an abuse of discretion. *See J.W. ex rel. B.R.W. v. 287 Intermediate Dist.*, 761 N.W.2d 896, 904 (Minn. App. 2009) (applying abuse-of-discretion standard under current statute); *see also Utecht v. Shopko Dep't Store*, 324 N.W.2d 652, 654 (Minn. 1982) (applying abuse-of-discretion standard to punitive-damages claim governed by an earlier version of statute, which required a showing of "willful indifference" rather than "deliberate disregard").¹

¹ We acknowledge the decision in *Swanlund v. Shimano Indus. Corp.*, which recognized the abuse-of-discretion standard of review but applied a de novo standard. 459 N.W.2d 151, 155 (Minn. App. 1990), *review denied* (Minn. Oct. 5, 1990). Because Minnesota courts have otherwise applied the abuse-of-discretion standard of review, we apply that standard here.

A plaintiff in a civil lawsuit may not plead a claim for punitive damages in its initial complaint. Rather, a plaintiff seeking punitive damages must move to amend the pleadings to add a punitive-damages claim. Minn. Stat. § 549.191 (2008). The motion is properly granted only when the moving party presents a prima facie case that will reasonably allow the conclusion that there is clear and convincing evidence that the defendant deliberately disregarded the safety of others. Minn. Stat. §§ 549.191, .20 (2008); *McKenzie v. N. States Power Co.*, 440 N.W.2d 183, 184 (Minn. App. 1989). A prima facie case is established when evidence is presented, which if unrebutted, sustains a fact or supports a judgment. *McKenzie*, 440 N.W.2d at 184; *see also Black's Law Dictionary* 1310 (9th ed. 2009) (defining prima facie evidence). “[P]rima facie’ does not refer to a quantum of evidence, but to a procedure for screening out unmeritorious claims for punitive damages.” *Swanlund v. Shimano Indus. Corp.*, 459 N.W.2d 151, 154 (Minn. App. 1990). “Clear and convincing evidence” refers to a quantum of evidence that is “more than a preponderance of the evidence but less than proof beyond a reasonable doubt.” *Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978). When the motion to amend with a punitive-damages claim and supporting affidavits do not reasonably allow the conclusion that clear and convincing evidence will establish that the defendant acted with deliberate disregard for the safety of others, denial of the motion is proper. *McKenzie*, 440 N.W.2d at 184.

A defendant acts with deliberate disregard for the safety of others if the defendant

has knowledge of facts or intentionally disregards facts that create a high probability of injury to the . . . safety of others and:

(1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the . . . safety of others; or

(2) deliberately proceeds to act with indifference to the high probability of injury to the . . . safety of others.

Minn. Stat. § 549.20, subd. 1. Neither negligence nor gross negligence is sufficient to satisfy the deliberate-indifference standard required for punitive damages. *See Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 381 (Minn. 1990) (grossly negligent conduct insufficient to establish punitive-damages claim); *Utecht*, 324 N.W.2d at 654 (negligent conduct is insufficient to establish punitive-damages claim).

The district court considered the evidence submitted by Anderson and made three principal findings. First, Foglesong’s “ride of your life” comment did not constitute “clear and convincing evidence that he intended to harm [Anderson] or to otherwise act with a deliberate disregard for the rights or safety of others.” Second, although Foglesong’s driving became inattentive and careless, “[p]rior to the point when the vehicle left the road, there is no evidence that [Foglesong’s] driving conduct was out of control or otherwise erratic[,]” and “the crash was not preceded by any egregious driving conduct: no excessive speeding, no careless or reckless driving, no erratic driving.” Third, the accident occurred immediately following “an argument and physical struggle inside the vehicle over a cell phone.” Based on these findings, the district court held that “a wrong turn, followed by an ambiguous comment about taking someone for a ride, followed by an intervening physical struggle over a cell phone, followed by an abrupt crash,” was not sufficient evidence to support a finding that Foglesong’s driving conduct rose to the level of knowing and deliberate disregard for the safety of others.

The evidence regarding Foglesong's conduct while driving is undisputed. The record demonstrates that Anderson voluntarily entered Foglesong's vehicle, that Anderson never requested that Foglesong stop or let her out of the vehicle, and that Foglesong had never been violent or physical in the past. But when Foglesong made the "ride-of-your-life" comment, Anderson feared that "he was going to do something crazy." Anderson contends that Foglesong's acts of pulling out approximately 200 yards in front of a vehicle and grabbing the cell phone from Anderson constituted dangerous and erratic driving. But the investigation following the accident produced no evidence that the vehicle was speeding or traveling erratically prior to Anderson reaching across Foglesong and the steering wheel to retrieve her cell phone from him. This evidence fails to establish that Foglesong was driving dangerously or erratically such that he acted with deliberate disregard for Anderson's safety.

Our review of the record as presented to the district court establishes that Foglesong's driving conduct may manifest a level of carelessness sufficient to establish gross negligence. *See State v. Chambers*, 589 N.W.2d 466, 479 (Minn. 1999) (defining gross negligence as "without even scant care but not with such reckless disregard of probable consequences as is equivalent to a willful and intentional wrong"). But because Foglesong lost control of the vehicle only after Anderson reached across him and the steering wheel, we cannot conclude that the district court abused its discretion when it found that there was not a prima facie showing that Anderson could establish by clear and convincing evidence that the accident resulted from Foglesong's deliberate disregard

for Anderson's safety. Accordingly, the district court's denial of Anderson's motion to amend the complaint with a punitive-damages claim was not reversible error.

Affirmed.