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STATE OF MICHIGAN

COURT OF APPEALS

SEAN WALLINGTON,

Plaintiff-Appellant,

v

MARTIN ROGERS MILLER,

Defendant-Appellee.

UNPUBLISHED
November 19, 2019

No. 345704
Eaton Circuit Court
LC No. 2017-001278-NI

Before: BORRELLO, P.J., and K. F. KELLY and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition to defendant pursuant to MCR 2.116(C)(7) (immunity granted by law) and (C)(10) (no genuine issue of material fact) in this negligence action arising from a motor vehicle accident when plaintiff's vehicle was rear ended by a pickup truck driven by defendant, a Michigan State Police (MSP) community service trooper, on his way to a training session. Finding no errors requiring reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Defendant was given the assignment of community service trooper. Although he was assigned to the Rockford post, defendant rarely went to the post. He generally gave speeches in his local tri-county area and drove a patrol vehicle home each day. Defendant's superior, MSP First Lieutenant Christopher McIntire, testified that employees were entitled to compensation for travel to and from training if it was outside of the post area. Therefore, unlike patrol officers or troopers assigned to the post, defendant's day commenced when he started the ignition on his vehicle. As a community service trooper, defendant's job responsibilities included speaking at schools, churches, retirement homes, community events, and businesses around the state of Michigan. He covered topics such as identity theft, senior security (both physical and financial), scams, social media, and distracted driving. On January 23, 2017, defendant left his home in Allendale, Michigan at 6:00 a.m. to drive to Lansing to speak at a weeklong "Teaching, Educating and Mentoring" (TEAM) event that began at 8:00 a.m. Defendant was wearing khaki pants, an MSP polo shirt, and an MSP jacket, a modified uniform in light of his duties. He also

carried his police badge and his service weapon. Because the TEAM meeting was a weeklong event, defendant made arrangements to stay at a hotel. Defendant was given the option of driving his assigned police vehicle to the event or driving his personal vehicle and seeking mileage reimbursement from MSP. However, police vehicles could not be driven for any personal use. Although defendant's hotel did not have a restaurant, he could not drive his police vehicle to get food after the event ended for the day. Defendant chose to drive his personal vehicle so that he would have access to a vehicle for personal use at the conclusion of the TEAM event each day. While driving to the TEAM event, defendant's vehicle rear-ended plaintiff's vehicle.

Plaintiff filed a complaint against defendant for damages resulting from defendant's alleged negligence. Specifically, he alleged that he suffered a serious impairment of an important body function. Defendant moved for summary disposition under MCR 2.116(C)(7) and (10), claiming that he was entitled to immunity because he was in the course of performing his duties as an MSP community service trooper. During the hearing on the motion, plaintiff argued that defendant left his home for work that day in his personal vehicle and could not perform traditional police activities including traffic stops and arrests, and therefore, he was not in the course of his employment at the time of the accident. Defendant argued that he was in the course of his employment because he was on his way to work (having the option to use his personal vehicle or patrol car), he was referred to as on duty in his daily log, he was compensated for his time, and he was entitled to compensation for his mileage driven that day. The trial court held that defendant was in the course of his employment at the time of the alleged negligence and was entitled to governmental immunity under MCL 691.1407(2).

II. APPLICABLE LAW

"Challenges to a trial court's decision on a motion for summary disposition are reviewed de novo." *Wood v Detroit*, 323 Mich App 416, 419; 917 NW2d 709 (2018). "Similarly, the applicability of governmental immunity is a question of law that this Court reviews de novo." *Id*. (quotation marks and citation omitted).

Summary disposition is appropriate under MCR 2.116(C)(7) when the plaintiff's claim fails because of immunity granted by law. *Estate of Voutsaras v Bender*, 326 Mich App 667, 672; 929 NW2d 809 (2019). "To survive a (C)(7) motion based on governmental immunity, a plaintiff must allege facts justifying the application of an exception to governmental immunity." *Tellin v Forsyth Twp*, 291 Mich App 692, 698; 806 NW2d 359 (2011) (quotation marks and citation omitted). "In reviewing a (C)(7) motion, a court must accept all well-pleaded allegations as true and construe them in favor of the nonmoving party." *Id*. "In reviewing a motion under MCR 2.116(C)(10), the trial court considers affidavits, pleadings, depositions, admissions, and other evidence introduced by the parties to determine whether no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *McLean v Dearborn*, 302 Mich App 68, 73; 836 NW2d 916 (2013). "The evidence submitted must be considered in the light most favorable to the opposing party." *Id*. (quotation marks and citation omitted).

"Governmental immunity from tort liability is governed by the operation of § 7 of the governmental tort liability act (GTLA), MCL 691.1407. Under § 7, immunity is broadly interpreted, and exceptions to it are narrowly construed." *Margaris v Genesee Co*, 324 Mich

App 111, 116; 919 NW2d 659 (2018). "Under the GTLA, governmental agencies and their employees are generally immune from tort liability when they are engaged in the exercise or discharge of a governmental function. The act provides several exceptions to this general rule." *Ray v Swager*, 501 Mich 52, 62; 903 NW2d 366 (2017) (citation omitted). One exception is MCL 691.1407, which provides, in relevant part:

> (1) Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. . . .
>
> (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 or damage to property caused by the officer . . . [or] employee . . . while in the course of employment . . . while acting on behalf of a governmental agency if all of the following are met:
>
> (a) The officer . . . [or] 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 officer's . . . [or] employee's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage.
>
> * * *
>
> (8) As used in this section:
>
> (a) "Gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

III. ANALYSIS

The issue on appeal is whether defendant was "in the course of employment" under MCL 691.1407(2) at the time of the collision. The necessary considerations are "(1) the existence of an employment relationship, (2) the circumstances of the work environment created by the employment relationship, including the 'temporal and spatial boundaries established,' and (3) 'the notion that the act in question was undertaken in furtherance of the employer's purpose.' " *Niederhouse v Palmerton*, 300 Mich App 625, 633; 836 NW2d 176 (2013), quoting *Backus v Kauffman (On Rehearing)*, 238 Mich App 402, 407-408; 605 NW2d 690 (1999).

In *Backus*, the defendant was a full-time employee of the Lansing School District, but was not a traditional employee. *Backus*, 238 Mich App at 404. The defendant would spend the first half of the day teaching an eighth-grade class, then drive to another school to teach at an elementary school. *Id*. The defendant would drive her personal vehicle between the two schools, and one day she was involved in a motor vehicle accident while driving between the

schools. *Id.* This Court held that the defendant was within the course of her employment at the time of the accident. *Id*. at 408-409. The Court concluded that the accident occurred during her workday while the defendant was traveling from one teaching assignment to another and that there was "nothing in the record to suggest that defendant was motivated by any purpose other than discharging her duties to the school district." *Id.* at 409. The Court concluded that "the act of driving between the two schools fell within the scope of her authority" because the defendant's driving was done in pursuance of satisfying her duties to the school, because she was compensated for her time and miles traveled, and because the travel was essential to the job. *Id*. at 409-410.

Similarly, in *Niederhouse*, 300 Mich App at 628, the Roscommon County Sheriff's Department provided rides on an airboat driven by officers during a winter festival. The defendant, Palmerton, an employee of the Roscommon County Sheriff's Department, declined when asked to provide these rides at the fair, but arrived at the festival with his family as an off-duty officer. *Id*. The defendant offered to assist the on-duty officer providing the rides, only to learn that the last ride of the day was about to take place. *Id*. The defendant offered to give the on-duty officer a break, and the defendant took his family and friends on the boat instead. *Id*. at 629. An accident ensued between this airboat and a snowmobile driver. *Id*. at 629-630. The Court, applying the *Backus* factors, concluded that the defendant was acting in the course of his employment at the time of the accident. *Id*. at 633-636. The Court cited several factors in support of this conclusion. First, the defendant, although an off-duty officer, was still an employee of the sheriff's department, such that an employment relationship existed between the Roscommon County Sheriff's Department—a governmental agency—and the defendant. *Id*. at 634. Second, the Court noted that even though the winter festival "was perhaps not within the typical 'temporal and spatial boundaries' of [the defendant's] employment," it was relevant that qualified deputies were asked to provide airboat rides at the festival for the sheriff's department. Further, the defendant's operation of the airboat to give rides to members of the public was "within the circumstances of the work environment created by his employment relationship." *Id*. Third, the Court noted that the defendant was a qualified driver, that he was asking if a fellow employee needed help with his job, and that he was asked to perform this job. Therefore, the record established that the defendant "undertook driving the airboat in furtherance of his employer's purpose." *Id*. at 634-635. Accordingly, the Court held that the defendant was entitled to governmental immunity under MCL 691.1407(2). *Id*. at 627, 637.

In *Alex v Wildfong*, 460 Mich 10, 12-13; 594 NW2d 469 (1999), the Court addressed whether a volunteer firefighter was in the course of his employment under MCL 691.1407 when he was involved in a collision while responding from his home to a fire call and was driving his personal vehicle with a siren installed on the roof. The Court concluded that, absent gross negligence, the volunteer was entitled to governmental immunity. *Id.* at 22.

In the present case, defendant was acting in the course of his employment under the analysis set forth in *Backus*.[1] There was a clear employment relationship between defendant and the Michigan State Police. Defendant was not a traditional patrol officer, but was a community service trooper. Defendant was assigned the job of driving to and speaking in Lansing and was required to travel between his home and the location of his speaking assignments to accomplish his work. Defendant was furthering his employer's purpose because he was assigned to speak at the TEAM event. The travel component of defendant's job was an essential element of his duties. Defendant was compensated for his time between 6:00 a.m. and 5:00 p.m., and he had the option of receiving compensation for the miles he traveled. The trial court properly concluded that there was no genuine issue of material fact regarding whether defendant was in the course of his employment at the time of the accident.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly
/s/ Deborah A. Servitto

[1] Because there is caselaw on point addressing the phrase "course of employment" as found in MCL 691.1407, we decline plaintiff's invitation to consider caselaw addressing employment in the workman's compensation field.