STATE OF MICHIGAN

COURT OF APPEALS

GEORGE RAZOUKY,

Plaintiff-Appellee,

v

DIONDRE MARCUS DOAKS,

Defendant-Appellant,

and

MICHIGAN STATE POLICE and STATE OF MICHIGAN,

Defendants.

UNPUBLISHED
November 18, 2021

No. 354502
Wayne Circuit Court
LC No. 20-005546-NI

Before: GLEICHER, P.J., and K. F. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant, Michigan State Police Trooper Diondre Marcus Doaks, appeals as of right the trial court's order denying his motion for summary disposition. Finding error warranting reversal, we reverse the trial court's order denying defendant's motion for summary disposition and remand for entry of an order granting the motion.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case arises out of a car accident in which defendant rear-ended plaintiff's vehicle. At the time, defendant was on duty transporting a witness to Detroit Metropolitan Airport. There was another officer riding with defendant. Defendant was traveling west on I-94 in Dearborn, and he was in the left lane following plaintiff's car. Traffic was moving at about 10 miles per hour. Defendant looked down to pick up his radio microphone, and the other officer in the car told defendant to watch out. Plaintiff's vehicle was stopped directly in front of defendant's vehicle, Defendant could not stop in time, and he rear-ended plaintiff's vehicle traveling at about 5 miles per hour. None of the two vehicles' occupants reported any injuries at the accident scene. Both

vehicles had minor damage, but were able to be driven away from the accident scene. The purported cause of the collision was defendant's inability to stop in an assured clear distance.[1]

Pertinent to this appeal,[2] plaintiff alleged that defendant was grossly negligent in his operation of the vehicle and breached various duties to cause the collision with plaintiff's vehicle. In lieu of filing an answer to plaintiff's complaint, defendant filed a motion for summary disposition under MCR 2.116(C)(7) of the claim against him, contending that the allegations in the complaint did not support gross negligence. Specifically, defendant alleged that, even accepting all the allegations in the complaint as true and viewing them in the light most favorable to plaintiff, plaintiff had at most alleged that defendant was negligent for failing to stop in time, and his actions fell far short of the gross negligence standard.

Plaintiff opposed defendant's motion, alleging that summary disposition was inappropriate because no discovery[3] had been conducted by the parties. Plaintiff claimed that he had sufficiently pleaded a claim of gross negligence, and with discovery, he would be able to add specific factual allegations that defendant was grossly negligent. Plaintiff also submitted that defendant's admission in his declaration to looking down at his radio in the seconds before the collision could lead a reasonable jury to find defendant was grossly negligent. The trial court denied defendant's motion for summary disposition of the gross negligence claim stating that the motion was premature prior to the completion of discovery. From the denial of his motion, defendant appeals.

II. DISCUSSION

Defendant alleges that the trial court erred in denying his motion for summary disposition because he is entitled to governmental immunity as a matter of law. We agree.

This Court reviews de novo a trial court's decision to deny summary disposition. *Bowden v Gannaway*, 310 Mich App 499, 503; 871 NW2d 893 (2015). Summary disposition is appropriate when the movant is entitled to governmental immunity as a matter of law, MCR 2.116(C)(7). "The applicability of governmental immunity and the statutory exceptions to immunity are also reviewed de novo on appeal." *Moraccini v Sterling Heights*, 296 Mich App 387, 391; 822 NW2d 799 (2012). To survive a motion brought under MCL 2.116(C)(7), the plaintiff "must allege facts justifying the application of an exception to governmental immunity." *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). "The moving party may submit affidavits,

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[1] A state police vehicle accident report was prepared. In the accident information section, it concluded that defendant was at fault for being unable to stop in an assured clear distance.

[2] Plaintiff also raised three claims against the Michigan State Police and the state of Michigan pertaining to defendant's negligent driving, MCL 691.1405, and vicarious liability. The trial court nonetheless denied defendant's motion for summary disposition as premature, but concluded that it did not have jurisdiction and transferred the case to the Court of Claims. The sole issue raised in this appeal addresses the denial of defendant's motion for summary disposition of the gross negligence claim.

[3] To support his claim to summary disposition, defendant submitted an amended declaration and the state police crash report and accident investigation report.

depositions, admissions, or other documentary evidence in support of the motion if substantively admissible." *Moraccini*, 296 Mich App at 391. When considering a motion under MCR 2.116(C)(7), "a trial court should examine all documentary evidence submitted by the parties, accept all well-pleaded allegations as true, and construe all evidence and pleadings in the light most favorable to the nonmoving party." *McLain v Lansing Fire Dep't*, 309 Mich App 335, 340; 869 NW2d 645 (2015). Unsupported speculation or conjecture are insufficient to oppose a motion for summary disposition. *Karbel v Comerica Bank*, 247 Mich App 90, 97-98; 635 NW2d 69 (2001).

The governmental tort liability act (GTLA) provides that public employees are immune from tort actions, with a few exceptions, including when the employee's conduct amounts to gross negligence. MCL 691.1407(2). Under the statute, a government employee is entitled to governmental immunity when the following conditions are met:

> (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, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:
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> (a) The officer, employee, member, or volunteer 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, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. [MCL 691.1407(2).]

"Gross negligence" is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a). Gross negligence "has been characterized as a willful disregard of safety measures and a singular disregard for substantial risks." *Oliver v Smith*, 290 Mich App 678, 685; 810 NW2d 57 (2010). Stated otherwise, gross negligence occurs "if an objective observer watched the actor, he could conclude, reasonably, that the actor simply did not care about the safety or welfare of those in his charge." *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). "A claim that a defendant has violated an applicable standard of practice or care sounds in ordinary negligence." *Costa v Community Emergency Med Servs*, 475 Mich 403, 411; 716 NW2d 236 (2006). Evidence of ordinary negligence is insufficient to establish a material factual issue regarding whether a government employee was grossly negligent. *Wood v Detroit*, 323 Mich App 416, 423-424; 917 NW2d 709 (2018). "Although questions regarding whether a governmental employee's conduct constituted gross negligence are generally questions of fact for the jury, if reasonable minds could not differ, summary disposition may be granted." *Id*. at 424.

To support his claim to summary disposition, defendant submitted an amended declaration stating that he was acting within the scope of his authority at the time of the accident. Indeed, he was transporting a witness to Detroit Metropolitan Airport, was on duty, and was driving an unmarked police vehicle. "[T]he operation of a motor vehicle by a governmental employee is typically in a setting where a governmental function is being undertaken." *Regan v Washtenaw Co Rd Comm*, 249 Mich App 153, 163; 641 NW2d 185 (2002). Thus, this information satisfied the requirements of MCL 691.1407(2)(a) and (b). Accordingly, the remaining inquiry to the application of governmental immunity is whether defendant's actions constituted gross negligence. MCL 691.1407(2)(c).

Defendant contends that plaintiff cannot support the claim that his conduct rose to the level of gross negligence for an accident that occurred at a slow rate of speed when he briefly looked down from the roadway to reach for his radio microphone. In response, plaintiff submits that discovery is necessary stating, without citation to authority:

> Discovery will shed light on the facts of the case. Even without any discovery, a jury could certainly conclude that a person who purposefully chooses to look down and away from the road while driving on the freeway is acting "so reckless as to demonstrate a substantial lack of concern for whether an injury results." This is especially true when, allegedly, another officer was sitting in the passenger seat who, assumedly, was perfectly capable of using the radio. This is all assuming that the two individuals were actually working at the time.
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> In fact, whether or not [defendant] was acting within the scope of his authority and/or engaged in the exercise of a governmental function is likewise a question of fact for the jury. This is doubly true in this case where the facts and circumstances surrounding the collision at issue are suspicious and unusual. The Traffic Crash Report indicates that [defendant] was on duty as a police/emergency officer, and that one of his passengers was also an on-duty officer. However, a third passenger is not identified as a police officer or emergency personnel. The vehicle is not a marked vehicle and, in fact, was not registered to the State or any police agency. It is entirely possible that facts arise in the course of discovery demonstrating that [defendant] was not in the course of employment, and not subject to any immunity whatsoever. [Reference to appendix omitted.]

Despite a lack of discovery, the documentation filed by defendant may be considered when the motion is premised on MCR 2.116(C)(7). MCR 2.116(G)(5). Although plaintiff attempted to raise suspicion about the vehicle driven by defendant, the traffic crash report identified the year, make, and model as well as the plate number and vehicle identification number. This report also characterized the vehicle as a police vehicle with the insurance company identified as the state of Michigan and the insurance as self-insured. Additionally, the vehicle accident report identified the vehicle as a police department vehicle included in the fleet and identified the vehicle's fleet number. Additionally, the other occupants of defendant's vehicle, a fellow police officer and a witness were each identified by name, birthdate, position in vehicle, and their use of safety restraints. Similarly, defendant and the occupants of his vehicle were identified by name, address,

birthdate, position in vehicle, and use of safety restraints. There is nothing in the documentation to support plaintiff's assertion that the facts are "suspicious and unusual."[4]

Further, plaintiff's complaint relies on the conclusory allegation that defendant's conduct was so reckless that it demonstrated a substantial lack of concern for whether plaintiff would be injured. However, defendant submitted documentary evidence to support his position that his conduct did not rise to the level of gross negligence. Defendant proffered that traffic was moving at 10 miles per hour prior to the collision. He looked down at his radio when plaintiff's car came to a complete stop in front of him. The other officer in the car alerted defendant to the stopped traffic, and defendant managed to slow the vehicle down to 5 miles per hour at the moment of impact. No injuries were reported at the accident scene. Defendant's vehicle had minor damage to the front bumper with an estimated repair cost of $1,500, while plaintiff's vehicle had minor damage to the rear bumper with an estimated repair cost of $500. The airbags in neither vehicle deployed. Both vehicles were driven away from the accident scene. This evidence failed to show that defendant operated his vehicle with a disregard for whether injury resulted. His mistake was looking down at his radio while traffic moved at 10 miles per hour. The resulting collision was minor. Accepting plaintiff's allegations as true and considering the evidence in the light most favorable to plaintiff, defendant's conduct, at most, constituted ordinary negligence.

Plaintiff submits that defendant should have allowed the other officer to operate the radio, but this is merely an allegation that more precautions could have been taken. To assert a defendant could have taken more precautions is insufficient to find ordinary negligence, let alone gross negligence. *Tarlea*, 263 Mich App at 90. "Simply alleging that an actor could have done more is insufficient under Michigan law, because, with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result." *Id*. Aside from using the radio while stopped, it is hard to imagine a more innocuous situation than for a trooper to look down at his radio than when traveling at 10 miles per hour.[5] Defendant's conduct was, at most, negligent, and his actions certainly do not suggest that he had a disregard for whether injury would result.

The principal theme of plaintiff's brief on appeal submits that summary disposition is inappropriate because discovery in the case had not begun. "In general, summary disposition is premature if granted before discovery on a disputed issue is complete." *Meisner Law Group PC*

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[4] Plaintiff contends that the facts are suspicious because a request for information on the vehicle's plate number reported that there was "No Record Found." Plaintiff filed this request for information nearly three years after the accident. It is speculative whether the facts are "suspicious" or whether the vehicle is no longer in service.

[5] Plaintiff posits that anytime a driver looks down from the road, a jury may find gross negligence. Under the definition of gross negligence requiring "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results," we disagree. We also note that plaintiff alleges that defendants Michigan State Police and state of Michigan were "dismissed" from the litigation. The trial court did not dismiss these defendants, but determined that the litigation belonged in the Court of Claims, particularly in light of the parties' agreement. Our review of the public record reflects that the litigation was transferred to the Court of Claims where a stay was issued pending the outcome of this appeal.

v Weston Downs Condo Ass'n, 321 Mich App 702, 723; 909 NW2d 890 (2017). "However, a party must show that further discovery presents a fair likelihood of uncovering factual support for the party's position." *Id*. at 723-724. "A party opposing summary disposition cannot simply state that summary disposition is premature without identifying a disputed issue and supporting that issue with independent evidence." *St. Clair Medical, PC v Borgiel*, 270 Mich App 260, 271; 715 NW2d 914 (2006). "Mere speculation that additional discovery might produce evidentiary support is not sufficient." *Caron v Cranbrook Educ Community*, 298 Mich App 629, 646; 828 NW2d 99 (2012).

Here, plaintiff only offers speculation that discovery will yield evidence supporting that defendant was grossly negligent. Again, plaintiff submitted that the circumstances of defendant driving an unmarked police vehicle with another officer and third person were suspicious, and therefore, defendant may not have been acting within the scope of his employment such that governmental immunity would not apply. There is nothing in the accident report to support plaintiff's speculative theory. Plaintiff also contends that discovery is necessary to determine what exactly was occurring in defendant's vehicle in the moments leading up to the collision. But plaintiff offers no theory of what evidence discovery would uncover that would support defendant committed gross negligence as opposed to ordinary negligence. Defendant admitted that he looked down, leading to the collision. The police investigation concluded that the cause of the collision was defendant's inability to stop in an assured, clear distance. "[W]hen no reasonable person could find that a governmental employee's conduct was grossly negligent, our policy favors a court's timely grant of summary disposition to afford that employee the fullest protection of the GTLA immunity provision by sparing the employee the expense of an unnecessary trial." *Tarlea*, 263 Mich App at 88. Allowing defendants to move for summary disposition on the issue of governmental immunity at the outset of litigation also prevents defendants from having to engage in discovery "when a case can be quickly resolved on an issue of law." *Id*. Because plaintiff failed to allege facts sufficient to show that defendant was grossly negligent, the trial court erred when it denied his motion for summary disposition.

Reversed and remanded for entry of an order granting summary disposition in favor of defendant. We do not retain jurisdiction. Defendant, as the prevailing party, may tax costs.

/s/ Elizabeth L. Gleicher
/s/ Kirsten Frank Kelly
/s/ Amy Ronayne Krause