STATE OF MICHIGAN

COURT OF APPEALS

KEITH ZACHOW and SHARON ZACHOW,

Plaintiffs-Appellants,

v

COUNTY OF MACOMB and COLLEEN BURKE, f/k/a COLLEEN GRASSA,

Defendants-Appellees.

UNPUBLISHED
July 30, 1996

No. 177669
LC No. 93-005318-NI

Before: Hood, P.J., and Griffin and J. F. Foley,* JJ.

PER CURIAM.

In this personal injury action, plaintiffs appeal by right an order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). We affirm.

I

On February 6, 1991, defendant Colleen Burke, a Macomb County deputy sheriff, stationed her marked police vehicle in the grassy median between a road to monitor traffic speed with her radar. When she decided to pursue a speeding motorist, she realized that her car was stuck in the mud. After defendant Burke quit trying to free her vehicle, she radioed dispatch for a tow truck and waited in her car with the lights off.

Plaintiff Keith Zachow responded to the call. Zachow parked his truck on the shoulder of the road with part of his truck protruding onto the road. Zachow then approached Burke to discuss how the car should be towed. As Zachow reentered his tow truck, he sustained injury when his truck was struck in the rear by another automobile.

Plaintiffs filed suit alleging negligence against both defendant Burke and defendant Macomb County with regard to the operation of the sheriff's vehicle and the failure to take adequate precautions

* Circuit judge, sitting on the Court of Appeals by assignment.

for plaintiff's safety. Further, plaintiffs alleged gross negligence against defendant Burke. Plaintiff Sharon Zachow claimed a loss of consortium.

Claiming governmental immunity, defendants moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). In response, plaintiffs argued that governmental immunity was inapplicable on the ground that defendant Burke's negligent operation of a motor vehicle was a proximate cause of Zachow's injury. See MCL 691.1405; MSA 3.991(105). Plaintiffs further argued that defendant Burke was grossly negligent in unnecessarily parking in the median of the road and failing to properly alert oncoming motorists of potential danger. The trial court granted summary disposition on the negligence counts pursuant to MCR 2.116(C)(10), ruling that parking a police car in a median does not constitute negligent operation of a motor vehicle under MCL 691.1405; MSA 3.991(105), and that the automobile lost its character as a motor vehicle once it became stuck in the mud. Further, the trial court determined that defendant Burke had not been grossly negligent under MCL 691.1407(2)(c); MSA 3.996(107)(2)(c) and granted summary disposition for defendant Burke pursuant to MCR 2.116(C)(10).

II

We review the trial court's ruling on a motion for summary disposition de novo to determine whether the pleadings or the uncontroverted documentary evidence establish that defendants are entitled to judgment as a matter of law. MCR 2.116(I)(1); *Kennedy v Auto Club of Michigan*, 215 Mich App 264, 266; 544 NW2d 750 (1996). The existence of either circumstance merits a grant of summary disposition. *Kennedy*, *supra* at 266.

III

On appeal, plaintiffs first contend that they presented sufficient evidence to create a genuine issue of material fact that defendant Burke's use of her police car constituted the negligent operation of a motor vehicle under MCL 691.1405; MSA 3.996(195). We disagree. MCL 691.1407; MSA 3.996(197), provides all governmental agencies immunity from tort liability when the agency is engaged in the exercise of a governmental function. However, MCL 691.1405; MSA 3.996(105), the negligent operation of a motor vehicle exception, states:

> 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 owner, . . .

Logically, a vehicle must be in "operation" for a jury to find "negligent operation" of that vehicle. "Negligent operation of a motor vehicle may occur even though the vehicle is standing still as long as it is being used or employed in some specific function or to produce some desired work or effect." *Wells v Dep't of Corrections*, 79 Mich App 166, 169; 261 NW2d 245 (1977); see also *Nolan v Bronson*,

185 Mich App 163, 177; 460 NW2d 284 (1990); *Orlowski v Jackson State Prison*, 36 Mich App 113, 116; 193 NW2d 206 (1971).

Here, defendant Burke's vehicle was stuck in the mud in the median between the road. When defendant Burke radioed for a tow, she had already quit trying to free the vehicle from the mud. Accordingly, Burke's vehicle was not in a "state of being at work" or "in the active exercise of some function" at the time of the accident. Instead, the patrol car was stuck in the mud in an area not designed for traffic and away from the location where Zachow was injured. Therefore, we conclude that at the time and place of the alleged injury there was no "operation" of a motor vehicle.

Further, even if defendant Burke's activities prior to radioing for a tow could be considered "negligent operation of a vehicle," we conclude that her conduct was not a proximate cause of plaintiff's injury. To establish a prima facie case of negligence, a plaintiff must prove that (1) the defendant owed plaintiff a duty, (2) the defendant breached the duty, (3) the defendant's breach of duty was a proximate cause of the plaintiff's damages, and (4) the plaintiff suffered damages. *Ewing v Detroit (On Remand)*, 214 Mich App 495, 497; 543W2d 1 (1995); *Jackson v Oliver*, 204 Mich App 122, 125; 514 NW2d 195 (1994); see also *Brisboy v Fibreboard Corp*, 429 Mich 540, 547; 418 NW2d 650 (1988). "Although proximate cause is usually a factual issue to be decided by the trier of fact, the court should rule as a matter of law if reasonable minds could not differ." *Derbeck v Ward*, 178 Mich App 38, 44; 443 NW2d 812 (1989), citing *Paparelli v General Motors Corp*, 23 Mich App 575; 179 NW2d 263 (1970).

"Proximate cause" means a cause that operates to produce a particular consequence without intervention of any independent, unforeseen cause without which the injury would not have occurred. *Ewing, supra* at 449; *Derbeck, supra* at 44, citing CJI2d 15.01, comment. Where injury is produced by numerous causes, an actor's negligence will be considered a proximate cause only if it is a "substantial factor" in bringing about the injury. *Derbeck, supra* at 44, citing *Brisboy, supra* at 547-548. Factors to be considered in determining whether a party's negligence is a substantial factor are:

> (a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;
>
> (b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;
>
> (c) the lapse of time. [*Poe v Detroit*, 179 Mich App 564, 576-577; 446 NW2d 523 (1989), citing 2 Restatement Torts, 2d, § 433, p 432.]

A cause that actively operates to produce harm after defendant's negligence is an "intervening cause" that may relieve a defendant from liability. *Poe, supra* at 577; see *Cobb v Fox*, 113 Mich App 249; 260-261; 317 NW2d 583 (1982).

In the present case, defendant Burke's decision to drive her vehicle onto the median may have been a "but for" factual cause of the accident. However, defendant Burke's decision to drive onto the median would have been harmless had it not been for plaintiff's action of leaving his truck protruding into the road and the oncoming driver's failure to avoid plaintiff's truck. This third-party negligence, occurring significantly after and independent of defendant Burke's alleged negligence, constitutes independent and not reasonably foreseeable intervening negligence without which Zachow's injury would not have occurred. We reject plaintiff's claim that the "negligent operation" exception should apply in this case because Zachow would not have traveled to the scene had it not been for defendant Burke's alleged misuse of her vehicle. Accepting plaintiffs' line of reasoning would mean a cause of action would lie under MCL 691.1405; MSA 3.996(105) regardless of how or by whom an injury was caused, so long as the injured person had altered his or her course in response to or to assist a government official who had committed a negligent act. Such a result would obviate the long-standing distinction between the concepts of "but for" and "proximate" causation. Accordingly, we conclude that defendant Burke's actions were not a substantial cause of plaintiff's injury. See *Derbeck, supra*.

IV

Next, plaintiffs claim that the trial court erred in summarily dismissing their claim that defendant Burke was grossly negligent in failing to take precautions to insure Zachow's safety. MCL 691.1407(2)(c); MSA 3.996(107)(2)(c) provides that governmental officers and employees are immune from tort liability for actions for which he or she reasonably believes to be within his or her authority so long as the officer's "conduct does not amount to gross negligence that is the proximate cause of the injury or damage." "Gross negligence" is defined in MCL 691.1407(2)(c); MSA 3.996(107)(2)(c) as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."

In a negligence action, a party fails to state an actionable claim if defendant owes plaintiff no duty to protect plaintiff against the alleged harm. *Schultz v Consumers Power Co,* 443 Mich 445, 449; 506 NW2d 175 (1993); *Harrison v Director of Dep't of Corrections,* 194 Mich App 446, 456; 487 NW2d 799 (1992). Whether a duty exists is a question of law for the court. *Id.* Generally, an individual has no duty to protect someone who is endangered by the conduct of a third person. *Brown v Jones,* 200 Mich App 212, 215-216; 503 NW2d 735 (1993); *Marcelletti v Bathani,* 198 Mich App 655, 664; 500 NW2d 124 (1993). An exception to this rule applies "where one stands in a special relationship with either the victim or the person causing the injury." *Marcelletti, supra* at 664; *Harrison, supra* at 456. A "special relationship" will generally be established only when one person entrusts himself to the control and protection of another with a consequent loss of control to protect himself. *Terrell v LBJ Electronics,* 188 Mich App 717, 720; 470 NW2d 98 (1991); *Perez v KFC Nat'l Management Co, Inc,* 183 Mich App 265; 454 NW2d 145 (1990). Furthermore, a "special relationship" duty will be imposed only where defendants' actions or inactions directly influence the plaintiff and the plaintiff is a person who is "readily identifiable as (being) foreseeably endangered." *Marcelletti, supra* at 665. A police officer only owes a duty to a specific individual if his or her performance would affect the individual in a manner different in kind from the way that officer's

performance would affect the public at large. *Gazette v Pontiac*, 212 Mich App 162, 170-171; 536 NW2d 834 (1995); *Brown v Shavers*, 210 Mich App 272, 274-275; 532 NW2d 856 (1995), appeal held in abeyance for decision in *White v Humbert*, 206 Mich App 459, 462; 522 NW2d 681 (1994). Further, the plaintiff must justifiably rely on the promises or actions of the governmental agency or official. *Gazette*, *supra* at 170-171; *Brown*, *supra* at 275.

Defendant neither caused plaintiff to position his tow truck in the roadway nor had reason to know that plaintiff had parked in such a dangerous manner. Further, Zachow does not contend that he requested defendant Burke to take special safety precautions or that she assumed control of insuring the safety of plaintiff's truck. Nor does plaintiff allege that he entrusted himself to defendant's protection and control. On the contrary, it was Zachow, an experienced tow truck operator, who took affirmative steps to warn oncoming drivers of the situation by illuminating the flashing warning lights atop his vehicle. There is no reason defendant Burke should have anticipated that Zachow, a sophisticated user in the sense that he came prepared with oscillating warning lights, should have required any special assistance in protecting against an obvious hazard of his profession. Accordingly, we conclude that plaintiffs failed to present a genuine issue of material fact whether defendant had a special relationship with plaintiff that would give rise to a duty to protect plaintiff against having his truck hit by an oncoming automobile. Further, we conclude that reasonable jurors could not find that defendant Burke's failure to light flares constituted gross negligence. See *Vermilya v Dunham*, 195 Mich App 79, 83; 489 NW2d 496 (1992).

Affirmed.

/s/ Harold Hood
/s/ Richard Allen Griffin
/s/ John F. Foley