STATE OF MICHIGAN

COURT OF APPEALS

MARGARET ALEX, Personal Representative of the Estate of JAMIE YOUNGO, Deceased,

Plaintiff-Appellant,

v

RICHARD CHARLES WILDFONG, JR., FRUITPORT TOWNSHIP FIRE DEPARTMENT, and FRUITPORT TOWNSHIP, a Michigan municipal corporation,

Defendant-Appellees.

UNPUBLISHED

No. 194121
Muskegon Circuit Court
LC No. 93-030820 NI

Before: Smolenski, P.J., and MacKenzie and Neff, JJ.

MacKENZIE, J. (dissenting).

I respectfully dissent. In my opinion, *Haberl v Rose*, 225 Mich App 254; 570 NW2d 664 (1997), upon which the majority relies, is inapposite because plaintiff's complaint in this case did not allege that Wildfong was liable under the civil liability statute, MCL 257.401(1); MSA 9.2101(1). Rather, liability was premised on violations of MCL 257.626; MSA 9.2326 (reckless driving), MCL 257.626b; MSA 9.2326(2) (careless driving), MCL 257.627; MSA 9.2327 (speed restrictions), MCL 257.684; MSA 9.2384 (failure to display lighted headlamps), MCL 257.632; MSA 9.2332 (speed exemption for emergency vehicles), and the common law duty to use due care. It seems fundamentally unfair to premise liability on a theory that was never pleaded by plaintiff.

I would hold that the trial court properly applied the gross negligence standard rather than the ordinary negligence standard as the basis of defendants' potential liability. MCL 691.1407(2); MSA 3.996(107)(2) governs individual immunity for lower-level governmental employees, including volunteers, and provides that they are immune from tort liability provided that they are acting within the scope of their authority, the governmental agency employing them is engaged in the exercise of a governmental function, and the employees are not grossly negligent. *Haberl* notwithstanding, in my opinion this statute is controlling. MCL 691.1407(2); MSA 3.996(107)(2) explicitly provides that governmental employees are immune from liability "[e]xcept as otherwise provided *in this section*."

Because the civil liability statute is not part of that section, it must give way to individual immunity. Consequently, I would hold that the gross negligence standard was properly applied with regard to defendant Wildfong pursuant to MCL 691.1407(2); MSA 3.996(107)(2).

As for the municipal defendants, governmental agencies may be held vicariously liable when their employee, acting during the course of employment and within the scope of authority, commits a tort while engaged in an activity that is nongovernmental or proprietary or that falls within a statutory exception to governmental immunity. *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 625; 363 NW2d 641 (1984). Fire fighting is a nonproprietary governmental function. See *Powell v Village of Fenton*, 240 Mich 94, 95; 214 NW 968 (1927). Thus, to hold the municipal defendants vicariously liable under *Ross*, Wildfong's conduct would have to fall within one of the statutory exceptions to governmental immunity. A statutory exception exists when injuries result from the ordinary negligence of a governmental employee operating a government-owned motor vehicle. That exception does not apply in this case, however, because the vehicle involved was a privately owned vehicle. *Fiser v Ann Arbor*, 417 Mich 461; 339 NW2d 413 (1983), and *Ewing v Detroit*, 214 Mich App 495; 543 NW2d 1 (1995), upon which plaintiff relies, are distinguishable since those cases both involved government-owned cars. Furthermore, *Haberl* notwithstanding, I am of the opinion that neither the civil liability statute nor MCL 257.603; MSA 9.2303, exempting drivers of authorized emergency vehicles from provisions of the motor vehicle code, give rise to vicarious liability. Again, MCL 691.1407(1); MSA 3.996(107)(1) explicitly provides that governmental agencies are immune from liability "[e]xcept as otherwise provided *in this act*." Neither the civil liability statute nor the emergency vehicles statute is an exception to governmental immunity enumerated in the governmental immunity act. But for *Haberl*, therefore, I would hold that because Wildfong's conduct did not fall within a statutory exception to governmental immunity as required under *Ross*, the municipal defendants were not vicariously liable for the death of plaintiff's decedent.

Finally, even if I agreed with the holding of *Haberl* and with the majority's conclusion that it applies to this case as it was pleaded and tried, I am persuaded that there are important policy reasons for not extending *Haberl* to the facts of case. A large percentage of firefighters in this state are either volunteers or on part-time status. In order to get to the scene of a fire, these individuals must be on call and must use their own vehicles, equipped for emergency runs. By holding these firefighters to an ordinary negligence standard rather than the gross negligence standard when responding to an emergency call, and by making them individually liable, this Court is raising a significant disincentive to serve as a volunteer firefighter to the detriment of rural areas and small communities throughout the state. Accordingly, I would affirm.

/s/ Barbara B. MacKenzie