

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT E. BRUMFIELD,

Plaintiff-Appellant,

v

EDWARD CLARK LABAIR and MICHIGAN
DEPARTMENT OF TRANSPORTATION,

Defendants-Appellees.

UNPUBLISHED

June 18, 2009

No. 284263

Oakland Circuit Court

LC No. 2006-073160-NI

Before: O’Connell, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court’s order granting defendants’ motion for summary disposition, declining to find a question of fact regarding the motor vehicle exception to governmental immunity, MCL 691.1405. Because the trial court properly granted defendants’ motion for summary disposition, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was injured on May, 2, 2005, at about 1:35 in the afternoon when the vehicle he was driving rear-ended defendants’ large, orange dump truck equipped with an “attenuator” (crash pad) and an operational directing light board on the rear. The truck was the rear-most unit of a work convoy inspecting bridges on M-10. Plaintiff’s complaint alleged that defendant LaBair was grossly negligent, and that defendant Michigan Department of Transportation (MDOT) was liable for LaBair’s negligent operation of its motor vehicle. Defendants moved for summary disposition under MCR 2.116(C)(7) (governmental immunity) and MCR 2.116(C)(8) (failure to state a claim).

We review de novo a trial court’s decision to grant or deny a motion for summary disposition. *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Likewise, the applicability of governmental immunity is a question of law that we review de novo on appeal. *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004).

MDOT's Liability

In relevant part, the motor vehicle exception to governmental immunity reads:

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 [MCL 691.1405.]

Exceptions to governmental immunity are to be narrowly construed. *Maskery v Univ of Mich Bd of Regents*, 468 Mich 609, 614; 664 NW2d 165 (2003). A plaintiff asserting a claim against a governmental entity must plead the claim in avoidance of immunity by averring facts indicating that the pertinent conduct was not the exercise of a governmental function or was subject to an exception to immunity. *Odom v Wayne County*, 482 Mich 459, 478-479; 760 NW2d 217 (2008). Under the motor vehicle exception, the agency is liable only where the motor vehicle is being operated as a motor vehicle. *Chandler v Muskegon Co*, 467 Mich 315, 320; 652 NW2d 224 (2002). This “encompasses activities that are directly associated with the driving of a motor vehicle.” *Id.* at 320 n 7.

Plaintiff asserts that the trial court erred in finding as a matter of law that MDOT's truck was not being operated as a motor vehicle because several facts are in dispute. Plaintiff contends that the truck had been stopped on the shoulder and then it suddenly moved into the left lane, leaving him insufficient time to react. He cites his own affidavit in support. However, this argument fails because it is premised on plaintiff's contention that LaBair's truck was moving. But plaintiff is deemed to have admitted that LaBair's truck was stationary. On October 2, 2007, defendants served plaintiff with a request for admission and interrogatories, including one that requested him to admit:

[t]hat on May 2, 2005, at approximately 1:36 p.m. you were driving in the left hand lane of northbound M-10 (Lodge Freeway) when you struck from behind a stationary MDOT vehicle with a mounted, lighted arrow board and an impact attenuator that was positioned in the left hand travel lane.

Plaintiff did not respond to the request for answers within the 28 days allowed by MCR 2.312(B)(1). Defendants then moved for summary disposition, but the trial court extended the time allowed for plaintiff to answer to December 7, 2007. The trial court also ordered: “That if Plaintiff does not respond to Defendants’ October 7, [sic] 2007 Request for Admissions and Interrogatories by December 7, 2007, all of Defendants’ October 7, [sic] 2007 Request for Admissions SHALL BE DEEMED ADMITTED.”

On December 3, 2007, plaintiff responded to defendants’ motion, but did not timely serve defendants with his answers to the request for admissions as ordered. In accord with the express terms of the trial court’s order, plaintiff is deemed to have admitted striking the stationary truck. MCR 2.312(D)(1) provides in relevant part, “A matter admitted under this rule is *conclusively established* unless the court on motion permits withdrawal or amendment of an admission.” (Emphasis added.) Plaintiff provides no reason why he did not meet the time limit set by the trial court (twice, since he first missed the court rules’ 28-day response period and then missed

the order's express deadline). The trial court did not need to review other evidence regarding whether the truck was moving because plaintiff admitted it was not. In any event, other evidence suggested the truck was stopped for a period of time before the accident. The time frame as reported by witnesses varied from a few minutes to 10 to 15 minutes. Other vehicles proceeding on M-10 heeded the directional light board and went around the convoy. The reporting police officer noted that plaintiff stated, "he thought the MDOT vehicle was moving when he realized it was stopped."

Given that the truck was not being driven at the time of the accident, LaBair was not engaged in an activity "directly associated with the driving of a motor vehicle." *Chandler, supra* at 320 n 7; see also *Poppen v Tovey*, 256 Mich App 351, 355; 664 NW2d 269 (2003). At the time it was struck, the truck together with its operational directing light board was serving as a traffic control device around the convoy. We conclude that the trial court correctly found that the stationary truck was not being operated when the accident occurred and thus the motor vehicle exception to governmental immunity did not apply.

LaBair's Liability

An employee of a governmental agency is immune from liability for injury if, while in the course of employment:

- (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[; and]
- (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).]

In contrast to a claim against a governmental agency, when a claim is asserted against a governmental employee, immunity is an affirmative defense and the employee has the burden to raise and prove entitlement to immunity. *Odom, supra* at 479.

As can be seen, the agency can be liable where there is merely negligence but the employee must be found grossly negligent to be held liable. "Gross negligence" is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a).

The parties do not dispute that the first and second elements of the statute are met. Plaintiff argues that a question of fact exists regarding whether LaBair can prove the third element and asserts that the matter should go to a jury. Plaintiff identifies the following facts as showing LaBair's gross negligence:

He was in a large truck on the left-hand lane of the northbound Lodge Freeway in the middle of the afternoon. His truck was the only truck in the

convoy of a mobile bridge inspection unit, and contrary to the [applicable professional] guidelines, he did not place any signs warning of a maintenance operation, any signs advising motorists to slow down, any cones in the road or any other indicators that a lane was closed. He then abruptly left the shoulder and entered the lane of traffic, at a point where it was too late for Appellant to take any action to avoid the crash.

Defendants point out that for LaBair to be liable, not only must his conduct be grossly negligent but also that it must be “*the proximate cause of the injury or damage.*” MCL 691.1407(2)(c) (emphasis added). It must be the “one most immediate, efficient, and direct cause” of the injury. *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000). The trial court could not have ignored plaintiff’s own conduct in rear-ending the MDOT truck as a contributing cause of the accident.

At most, LaBair’s conduct was ordinary negligence. See, e.g., *Fundunburks v Capital Area Transp Auth*, 481 Mich 873; 748 NW2d 804 (2008) (bus driver was not grossly negligent where she was unaware she closed the door on a passenger trying to exit); *Beals v Walker*, 416 Mich 469, 481; 331 NW2d 700 (1982) (violations of rules and regulations only constitute evidence of ordinary negligence). Additionally, plaintiff’s own conduct in rear-ending the truck created a rebuttable presumption of his own negligence. MCL 257.402(a). Given that the truck was stopped with proper operating equipment including a lighted directing sign board, there are no facts rebutting the presumption that plaintiff’s own lack of care while driving caused the accident.

Affirmed.

/s/ Peter D. O’Connell
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio