

STATE OF MICHIGAN
COURT OF APPEALS

FAY REYNOLDS, Personal Representative of the
Estate of ELLEN CLECKLEY, Deceased,

UNPUBLISHED
September 23, 2014

Plaintiff-Appellee,

v

No. 315375
Oakland Circuit Court
LC No. 2011-122737-NI

SUBURBAN MOBILITY AUTHORITY FOR
REGIONAL TRANSPORTATION,

Defendant,

and

NATHAN WAYNE HEARN,

Defendant-Appellant.

Before: RIORDAN, P.J., and CAVANAGH and TALBOT, JJ.

PER CURIAM.

Defendant, Nathan Wayne Hearn (Hearn), appeals as of right an order granting in part and denying in part his motion for summary disposition on the basis of governmental immunity. On appeal, Hearn argues that the trial court erred because his actions did not amount to gross negligence necessary to overcome the defense of governmental immunity, and even if Hearn was grossly negligent, his negligence was not the direct cause of the death of plaintiff's decedent, Ellen Cleckley. We disagree.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). However, if a party moved for summary disposition on multiple grounds and the trial court ruled on the motion without specifying the particular subrule under which it decided the issue, but considered material outside the pleadings, such as the deposition testimony in this case, this Court will treat the decision as one not based on MCR 2.116(C)(8). *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012). "This Court reviews de novo a trial court's grant of summary disposition under MCR 2.116(C)(7) and (C)(10)." *McLean v Dearborn*, 302 Mich App 68, 72; 836 NW2d 916 (2013).

A motion for summary disposition is proper under MCR 2.116(C)(7) when a claim is barred by immunity granted by law. *Seldon v Suburban Mobility Auth for Regional Transp*, 297 Mich App 427, 432; 824 NW2d 318 (2012).

A summary disposition motion brought under subrule (C)(7) “does not test the merits of a claim but rather certain defenses” that may eliminate the need for a trial. When reviewing a grant of summary disposition under subrule (C)(7), this Court accepts as true the plaintiff’s well-pleaded allegations and construes them in the light most favorable to the plaintiff. “If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts,” whether immunity bars the claim is a question of law for the court. Under this subrule, summary disposition may be granted when a claim is barred because of immunity granted by law. [*Nash v Duncan Park Com’n*, 304 Mich App 599, 630; 848 NW2d 435 (2014) (internal citations omitted).]

In reviewing a grant of summary disposition under MCR 2.116(C)(10), this Court considers the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Sallie v Fifth Third Bank*, 297 Mich App 115, 117-118; 824 NW2d 238 (2012). This Court is “limited to considering the evidence submitted to the trial court before its decision on the motions.” *Calhoun Co v Blue Cross Blue Shield of Mich*, 297 Mich App 1, 12; 824 NW2d 202 (2012). Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

Further, the applicability of governmental immunity is reviewed de novo as a question of law. *McLean v McElhane*y, 289 Mich App 592, 596; 798 NW2d 29 (2010).

MCL 691.1407(2) sets forth the standard for governmental immunity pertaining to individual actors and employees of governmental agencies, and provides, in pertinent part:

Except as otherwise provided in this section, . . . 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 . . . if all of the following are met:

- (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.

Neither party disputes that Hearn was acting within the scope of his authority as a bus driver for defendant Suburban Mobility Authority for Regional Transportation (SMART). Further, neither

party disputes that SMART is a transportation authority that constitutes a “governmental agency” for purposes of governmental immunity, MCL 691.1401(a), (e), and was performing a governmental function at the time of the accident, MCL 691.1401(b). Therefore, the only dispute on appeal is whether Hearn’s conduct constituted “gross negligence that is the proximate cause of the injury” to Cleckley. MCL 691.1407(2).

Hearn first contends that the trial court erred in finding that there was a genuine issue of material fact regarding whether his conduct rose to the level of gross negligence. We disagree.

“[G]ross negligence” is defined as “conduct so reckless as to demonstrate a substantial lack of concern whether an injury results.” MCL 691.1407(8)(a). “[T]he issue whether a governmental employee’s conduct constituted gross negligence under MCL 691.1407 is generally a question of fact,” *Tarlea v Crabtree*, 263 Mich App 80, 88; 687 NW2d 333 (2004) (internal quotation marks omitted), and summary disposition on the basis of governmental immunity is improper “if a question of fact exists so that factual development could provide a basis for recovery,” *Dextrom v Wexford Co*, 287 Mich App 406, 431; 789 NW2d 211 (2010). Evidence of ordinary negligence does not create a question of fact regarding gross negligence. *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999).

Hearn testified at his deposition that he never saw Cleckley get up from her seat near the bus stop at the intersection of Bowers Street and Old Woodward Avenue in downtown Birmingham, Michigan. As he pulled away from the bus stop and began to turn onto Old Woodward Avenue, he felt the bus go over a “bump,” looked into his side mirror, saw Cleckley laying on the ground, and heard a passenger yell, “She fell.” Hearn further testified that he never saw Cleckley near the front of the bus, nor did his bus hit the curb when he tried to make the turn onto Old Woodward Avenue. However, Gary Laskowsky, an eyewitness, testified that Cleckley was banging on the side of the bus with her fist as she chased it, and the passengers on the bus appeared to notice because it looked like they were trying to get the driver to stop. Additionally, Paige Spagna, another eyewitness, testified that she saw the bus drive up onto the curb of the sidewalk, where the front, right-hand side of the bus “hit” or “clipped” Cleckley while she was standing on the curb, and her body fell under the wheels of the bus. There is a question of fact whether Hearn was merely operating the bus in a reasonable manner when Cleckley fell into the street and under the wheels of the bus, or if he drove the bus up and onto the sidewalk when he knocked Cleckley to the ground and subsequently ran her over. Though evidence of normal negligence does not create a genuine issue regarding gross negligence, *Maiden*, 461 Mich at 122-123, here, the difference in testimony between at least one eyewitness and Hearn establishes a dispute between mere negligence and gross negligence. Such a dispute in testimony leads to a genuine issue of material fact whether Hearn was grossly negligent. *Dextrom*, 287 Mich App at 431.

Hearn also contends that the trial court erred in finding a genuine issue of material fact regarding Hearn’s alleged gross negligence because it relied on two factors that should not have been considered: (1) Hearn’s alleged motive to ignore Cleckley because she previously filed a complaint against him, and (2) DNA evidence that had yet to return from the lab. However, as this Court’s review of a grant or denial of summary disposition is de novo, *McLean*, 302 Mich App at 72, and Spagna’s testimony is sufficient to create an issue of material fact regarding Hearn’s alleged gross negligence, the trial court’s reliance on these factors is irrelevant. “The

fact that the trial court reached the right result for the wrong reason is not grounds to reverse on appeal.” *Gray v Pann*, 203 Mich App 461, 464; 513 NW2d 154 (1994).

Hearn also contends that the trial court erred in finding that there was a genuine issue of material fact regarding whether his conduct was the proximate cause of Cleckley’s injuries. We disagree.

It is insufficient for plaintiff to overcome defendants’ motion for summary disposition merely by showing there is a genuine issue of material fact whether Hearn’s conduct constituted gross negligence. Plaintiff must also show a genuine dispute that Hearn’s alleged gross negligence was the proximate cause of Cleckley’s injuries. The gross negligence exception to governmental immunity is only met when a plaintiff proves that the governmental employee’s conduct amounts to “gross negligence *that is the proximate cause of the injury or damage.*” MCL 691.1407(2)(c) (emphasis added). “[P]roximate cause” has been defined as “the one most immediate, efficient, and direct cause preceding an injury.” *Robinson v City of Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000). Much like a determination regarding “gross negligence,” the determination whether a governmental employee’s conduct “proximately caused the complained-of injury under MCL 691.1407 is generally a question of fact, but, if reasonable minds could not differ, a court may grant summary disposition.” *Briggs v Oakland Co*, 276 Mich App 369, 374; 742 NW2d 136 (2007).

Hearn argues that his conduct was not the proximate cause of Cleckley’s injuries because the testimony showed that Cleckley fell into the street while chasing after the bus. They argue that it was Cleckley’s fall, not Hearn’s operation of the bus, that led to her injuries. However, again, Spagna testified that she saw the bus drive up onto the sidewalk, “clip[]” Cleckley, knock her to the ground in the street, and then run her over. Despite Hearn’s testimony that his bus never drove up onto the curb, the difference in testimony constitutes a genuine issue of material fact. Unlike some cases cited by Hearn in which this Court found that the governmental employees’ actions were not the proximate cause of the complained-of injury, see, e.g., *Oliver v Smith*, 290 Mich App 678; 810 NW2d 57 (2010) (holding that the plaintiff’s wrist and hand injuries could be attributed to the plaintiff, as well as the defendant, and therefore, the defendant’s acts alone cannot be the sole, proximate cause of the plaintiff’s injuries); *Love v City of Detroit*, 270 Mich App 563; 716 NW2d 604 (2006) (holding that the fire itself, not the firefighters negligence in attempting to stop the fire, was the proximate cause of the decedents’ injuries); *Kruger v White Lake Twp*, 250 Mich App 622; 648 NW2d 660 (2002) (holding that the plaintiff’s injuries were more directly attributable to her escape than to the defendants’ conduct), there is a genuine dispute between Spagna’s testimony and Hearn’s testimony regarding material facts at issue. A reasonable jury could believe Spagna’s testimony, that Hearn’s bus “jumped” the curb onto the sidewalk, causing Cleckley to fall. Such a question of fact is best left to the jury. *Briggs*, 276 Mich App at 374. Therefore, the trial court properly concluded that summary disposition was improper.

Affirmed.

/s/ Michael J. Riordan
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot