

STATE OF MICHIGAN
COURT OF APPEALS

LEONARD GOODSON,

Plaintiff-Appellee,

v

SUBURBAN MOBILITY AUTHORITY FOR
REGIONAL TRANSPORTATION, a/k/a
SMART, MACOMB COUNTY ROAD
COMMISSION and DTE ENERGY,

Defendants,

and

CITY OF WARREN and MICHAEL GRAY,

Defendants-Appellants.

UNPUBLISHED

May 12, 2005

No. 253375

Macomb Circuit Court

LC No. 2002-003731-NO

ROBIN ZOLLARS,

Plaintiff-Appellee,

v

MICHAEL GRAY and CITY OF WARREN,

Defendants-Appellants,

and

SUBURBAN MOBILITY AUTHORITY FOR
REGIONAL TRANSPORTATION, a/k/a SMART,
TERRY DELAINE TRAMMER, and DTE
ENERGY,

Defendants.

No. 253376

Macomb Circuit Court

LC No. 2002-005314-NI

Before: Saad, P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

Defendants, the city of Warren and Michael Gray, appeal as of right from the trial court's orders denying their motions for summary disposition based on governmental immunity. MCR 2.116(C)(7). We reverse in part, affirm in part and remand.

Plaintiffs Leonard Goodson and Robin Zollars filed separate actions for injuries they sustained while riding the same SMART bus. Their actions were consolidated in the trial court. Both plaintiffs allege that they were injured when the bus driver abruptly stopped the bus to avoid hitting a vehicle driven by defendant Gray, who was driving a car owned by his employer, the city of Warren. Gray allegedly proceeded through an intersection against a red light¹ and crossed in front of the bus, which had a green light and the right of way, forcing the bus driver to brake suddenly to avoid striking Gray's vehicle, thereby causing both plaintiffs to be propelled forward, resulting in their injuries. There is no dispute that the bus never struck Gray's vehicle. The city of Warren and Gray² both moved for summary disposition, asserting that plaintiffs' actions were barred by governmental immunity. The trial court denied defendants' motions. Defendants now appeal as of right.

This Court reviews de novo a motion for summary disposition under MCR 2.116(C)(7) to determine if the moving party is entitled to judgment as a matter of law. *Sewell v Southfield Public Schools*, 456 Mich 670, 674; 576 NW2d 153 (1998). A party may support a motion under MCR 2.116(C)(7) with affidavits, depositions, admissions, or other documentary evidence. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994); MCR 2.116(G)(2). When reviewing a motion under MCR 2.116(C)(7), a court must consider all documentary evidence filed or submitted by the parties. MCR 2.116(G)(5). "However, 'the contents of the complaint must be accepted as true unless specifically contradicted by the affidavits or other appropriate documentation submitted by the movant.'" *Sewell, supra* at 674, quoting *Patterson, supra* at 434 n 6.

Absent a statutory exception, "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). A governmental function is an "activity which is expressly or impliedly mandated or authorized by constitution, statute or other law." *Tryc v Mich Veterans' Facility*, 451 Mich 129, 134; 545 NW2d 642 (1996), quoting *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 620; 363 NW2d 641 (1984). In this case, defendant Gray, an engineer with the city of Warren's engineering department, was traveling to a construction site to supervise construction at the time of the accident. The city of Warren's charter authorizes the city to create a division of engineering to oversee engineering work and building inspection. Warren Charter, § 7.21(d).

¹ At his deposition, Gray testified that he had a green light when he proceeded through the intersection.

² Hereinafter collectively referred to as "defendants."

Thus, the city of Warren, through defendant Gray, was engaged in the exercise of a governmental function at the time of the accident. To avoid the application of MCL 691.1407(1), plaintiffs allege that defendant Gray's conduct falls under the motor vehicle exception to governmental immunity.

This exception provides, in relevant part:

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.]

Defendants argue that the motor vehicle exception is not applicable because it is undisputed that there was no contact between the bus and Gray's vehicle, and that the bus never left the road or struck another vehicle or object.

In *Robinson v City of Detroit*, 462 Mich 439, 444; 613 NW2d 307 (2000), our Supreme Court considered "the parameters of civil liability for governmental agencies and police officers when a police chase results in injuries or death to a person other than the driver of the fleeing vehicle." In doing so, the Court examined the statutory language "resulting from" in MCL 691.1405. The Court stated:

The motor vehicle exception requires that a plaintiff's injuries result from the operation of a government vehicle. MCL 691.1405 Because there is no case law that has previously examined the phrase "resulting from" we turn to the dictionary. The *American Heritage Dictionary, Second College Ed*, p 1054, defines "result" as: "To occur or exist as a consequence of a particular cause[;] To end in a particular way [;] The consequence of a particular action, operation or course; outcome." Given the fact that the motor vehicle exception must be narrowly construed, we conclude that plaintiffs cannot satisfy the "resulting from" language of the statute where the pursuing police vehicle did not hit the fleeing car or otherwise physically force it off the road or into another vehicle or object. [*Robinson, supra* at 456-457.]

Although *Robinson* involved a police chase, in *Curtis v City of Flint*, 253 Mich App 555, 560-562; 655 NW2d 791 (2002), the court applied the holding in *Robinson* to claims involving the operation of a motor vehicle in other types of cases.

In so holding, the majority [in *Robinson*] emphasized that a narrow reading of the phrase "resulting from," as used in MCL 691.1405, requires a more direct causal connection than the proximate cause "but for" analysis generally employed in cases alleging liability based on negligent conduct:

"The dissent suggests that there should be liability where a police vehicle forces an innocent intervening car to hit the fleeing vehicle causing injury to an innocent person in the fleeing vehicle. However, we do not believe such a scenario would fit within a narrow reading of the statutory requirement of "resulting from." The dissent's position would be more in accord with a

proximate cause "but for" analysis. However, the statute does not say that governmental agencies are liable for injuries or property damage "proximately caused" by the negligent operation of a motor vehicle. Rather, the statute says the injuries or property damage must result from the negligent operation of a motor vehicle. Because the Legislature did not utilize proximate cause language, we will not import such analysis here. [*Robinson, supra* at 457 n 14.]"

While there is no question that the facts of *Robinson* involved a police chase, or that the Court referenced those facts as well as the facts of other similar cases at several points in its opinion, there is nothing in the analysis employed in *Robinson* to suggest that its holding is to be limited to cases involving police pursuit of a fleeing vehicle. Although other aspects of the Court's opinion hinged on policy considerations exclusive to police pursuits, i.e., whether the police owe a duty to passengers in a fleeing vehicle, see *id.* at 450-453, the holding of the Court on the question at issue here is broader. Because the statute allows liability only for injuries "resulting from" the negligent operation of a government-owned vehicle, as opposed to a lesser "but for" standard, the motor vehicle exception will not apply unless there is physical contact between the government-owned vehicle and that of the plaintiff, or the government-owned vehicle physically forced the plaintiff's vehicle off the road or into another vehicle or object. This interpretation of the language used by the Legislature in drafting the motor vehicle exception is not limited to police chases. Under the narrow reading given the exception by the Court in *Robinson*, the nature of the governmental vehicle's use is immaterial.

Furthermore, the court in *Curtis* concluded that "the trial court correctly read *Robinson* to require that the emergency vehicle at issue here be physically involved in the collision that caused plaintiff's injuries, either by hitting plaintiff's vehicle or by physically forcing that vehicle off the road or into another vehicle or object." *Id.* at 562. Consequently, under the holding in *Curtis*, the motor vehicle exception to governmental immunity will not apply unless the government vehicle alleged to have been negligently operated was physically involved in the collision, either by hitting plaintiffs' vehicle or by physically forcing that vehicle off the road or into another vehicle or object.³ Therefore, because none of these occurred in the present case, the trial court should have granted the city of Warren's motion for summary disposition.

³ Plaintiffs attempt to distinguish *Robinson* and *Curtis* by pointing out that both cases involved an emergency vehicle responding to an emergency. However, the court in *Curtis* stated that *Robinson* applied to all government vehicles and the "nature of the governmental vehicle's use is immaterial." *Curtis v City of Flint*, 253 Mich App 555, 562; 655 NW2d 791 (2002). For the same reasons, plaintiff Goodson's attempt to equate the bus' sudden stop with being hit or forced off the road or into another vehicle or object, must fail. The fact that the practical effect of being forced to stop suddenly might be the same as being hit or forced off the road or into another vehicle or object does not change the fact that only those particular types of physical involvement by the government vehicle will satisfy the motor vehicle exception. *Id.*

Gray also argues that he cannot be held individually liable under the employee exception to governmental immunity. "Pursuant to MCL 691.1407(2), a governmental employee may be liable for grossly negligent conduct if that conduct is 'the proximate cause of the injury or damage.' MCL 691.1407(2)(c)." *Curtis, supra* at 562-563.

With regard to the proximate cause element, this Court in *Curtis, supra* at 563, stated:

In *Robinson, supra* at 458-459, 462, the Court held that the phrase "the proximate cause," as used in MCL 691.1407(2)(c), is not synonymous with "a proximate cause," and that to impose liability on a governmental employee for gross negligence, the employee's conduct must be "the one most immediate, efficient, and direct cause preceding an injury." As with the Court's holding regarding the motor vehicle exception, there is no indication that its holding regarding the proximate cause necessary to impose tort liability on a governmental employee applies only to cases involving police chases:

"As to [MCL 691.1407(2)](c), in *Dedes [v Asch, 446 Mich 99, 107; 521 NW2d 488 (1994)]*, this Court effectively interpreted 'the proximate cause' in subsection (c) to mean 'a proximate cause.' The Court further explained that 'the proximate cause does not mean 'sole' proximate cause. *Id.* We overrule *Dedes* to the extent that it interpreted the phrase 'the proximate cause' in subdivision (c) to mean 'a proximate cause.' The Legislature's use of the definite article 'the' clearly evinces an intent to focus on one cause. The phrase 'the proximate cause' is best understood as meaning the one most immediate, efficient, and direct cause preceding an injury." [Quoting *Robinson, supra* at 458-459.]

In *Curtis*, the plaintiff's vehicle struck another vehicle after the driver of the second vehicle abruptly changed lanes to allow the government vehicle, an emergency vehicle, to pass. The *Curtis* court concluded that the proximate cause of the plaintiff's injuries was the driver who changed lanes and stopped his vehicle in front of the plaintiff's car to get out of the way of the emergency vehicle. *Curtis, supra* at 563.

In contrast to the facts in *Curtis*, plaintiffs here alleged that they were injured when the bus driver was forced to slam on the brakes to avoid hitting Gray's vehicle when he ran a red light and crossed in front of the bus. There was no third vehicle involved. Under these facts, we believe that a jury could conclude that Gray's conduct was "the one most immediate, efficient, and direct cause preceding an injury."

We also reject defendant Gray's argument that the facts are insufficient to support a finding that he was grossly negligent. "'[G]ross negligence' means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c). "[E]vidence of ordinary negligence does not create a material question of fact concerning gross negligence.'" *Costa v Community Emergency Medical Services, Inc, 263 Mich App 572, 578; 689 NW2d 712 (2004)*, quoting *Maiden v Rozwood, 461 Mich 109, 122-123; 597 NW2d 817 (1999)*.

The bus driver testified at his deposition that he had the green light as he was proceeding through the intersection and that Gray drove in front of him, requiring him to quickly slam on the

brakes. This evidence supports an inference that Gray proceeded through the intersection against a red light. Whether conduct in proceeding through a busy intersection against a red light, into the path of an oncoming bus, is conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results is a factual question to be decided by the jury. Plaintiffs therefore established a genuine issue of material fact regarding whether Gray was grossly negligent.⁴ Therefore, the trial court properly denied defendant Gray's motion for summary disposition.

Defendants further argue that plaintiff Goodson failed to state a claim for nuisance as an exception to governmental immunity. In his amended complaint, however, Goodson abandoned any claim for nuisance against the city of Warren and instead alleged a nuisance claim only against DTE Energy. Because Goodson is no longer pursuing a nuisance claim against the city of Warren, we need not consider this issue.

We reverse the trial court's denial of summary disposition as to defendant city of Warren and affirm as to defendant Gray. We remand this case to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Michael R. Smolenski

⁴ Defendants' reliance on *Evans v Hackard*, 29 Mich App 291; 185 NW2d 104 (1970), remanded on rehearing 386 Mich 786 (1971), for the position that running a red light is evidence of only negligence, not gross negligence, is misplaced. After the Supreme Court remanded the case to this Court for reconsideration, this Court concluded that the question whether the defendant's conduct in running a red light amounted to gross negligence was for the jury to decide. *Evans v Hackard (After Remand)*, 40 Mich App 580, 581-582; 199 NW2d 233 (1972).