

STATE OF MICHIGAN
COURT OF APPEALS

KIMBERLY BERMUDEZ, Personal
Representative for the Estate of ANTHONY
BERMUDEZ, DIANE CRANMER, Next Friend
of Shaun Cranmer and Kyle Cranmer, Minors, and
GLENN T. HEINTZELMAN, Personal
Representative for the Estate of JARED A.
HEINTZELMAN,

UNPUBLISHED
August 17, 2004

Plaintiffs-Appellees,

v

No. 249609
Ingham Circuit Court
LC No. 02-000384-NI

JANET A. LEE,

Defendant-Appellant,

and

CAPITAL AREA TRANSPORTATION
AUTHORITY, GLENN T. HEINTZELMAN and
KATHY L. HEINTZELMAN,

Defendants.

Before: Bandstra, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Defendant Janet A. Lee appeals as of right the order denying her motion for summary disposition pursuant to MCR 2.116(C)(7) and (10) as to plaintiffs' claims against her. We reverse.

Plaintiffs brought this negligence action for injuries and wrongful death arising out of a motor vehicle accident. Defendant Lee is an employee of Capital Area Transportation Authority (CATA) and operated the CATA bus involved in the motor vehicle accident. The accident occurred on the evening of February 9, 2002, on North Larch Street at the intersection of East Shiawassee in the City of Lansing. The intersection is controlled by a traffic signal. The CATA bus was traveling east on Shiawassee as it approached the Larch Street intersection. Plaintiffs' vehicle was driven by Jared Heintzelman and was traveling north on Larch Street. As the CATA bus proceeded through the intersection, it was struck by plaintiffs' vehicle. As a result of the

accident, two of the plaintiffs' decedents were killed and the other two occupants of the vehicle sustained serious injuries.

Plaintiffs sued defendant Lee in her capacity as the driver of the CATA bus involved in the accident. Defendant moved for summary disposition, arguing that her conduct did not amount to gross negligence and was not the proximate cause of plaintiffs' injuries, thereby entitling her to governmental immunity under MCL 691.1407. The trial court denied defendant's motion, concluding that there were genuine issues of material fact as to whether defendant's conduct constituted gross negligence.

In reviewing a motion for summary disposition because a claim is barred by governmental immunity, we must consider the affidavits, depositions, admissions, and other documentary evidence submitted by the parties, and determine whether they indicate that the defendant is entitled to immunity. *Pusakulich v City of Ironwood*, 247 Mich App 80, 82-83; 635 NW2d 323 (2001). In that the facts are not in dispute and reasonable minds could not differ concerning the legal effect of the facts, a determination whether the claim is barred is a question of law for the court to decide. We review de novo a trial court's grant or denial of summary disposition. *Diehl v Danuloff*, 242 Mich App 120, 123; 618 NW2d 83 (2000).

As an employee of CATA, a governmental agency, defendant Lee is entitled to governmental immunity if she was acting within the scope of her authority, was "engaged in the exercise or discharge of a governmental function," and her conduct did not "amount to gross negligence that is the proximate cause of the injury or damage." MCL 691.1407(2). The parties initially disagree on whether defendant Lee's conduct amounted to gross negligence. We need not decide this issue as we conclude that plaintiffs came forward with insufficient evidence to support a finding that Lee's actions here were "the" proximate cause of the accident.

To the contrary, three of the eye witnesses to the accident said that defendant's bus entered the intersection just shortly after the light on Shiawassee changed from green to yellow. This testimony was remarkably consistent. Defendant Lee testified that the light changed when the bus was a mere five to ten feet short of the intersection; passenger Sinclair estimated that the light turned yellow less than 20 feet before the bus entered the intersection and Derek Couzzins, another motorist who observed the accident, testified that the bus was approximately five yards from the intersection when the light changed to yellow. Further, this consistent testimony was uncontroverted. Although plaintiffs rely on the deposition testimony of cab driver Evert Smith, he actually only said that the light on Larch was green "when the bus was directly underneath the light . . . [a]fter the impact." Plaintiffs also rely on the expert testimony of an accident reconstructionist, Ernest Klein, but he concluded that, at the time the bus entered the intersection the light on Shiawassee "could have been yellow . . . as well as it could have been . . . red." Even considering this record in a light most favorable to plaintiffs, the only reasonable and non-speculative conclusion that could be drawn is that the light changed from green to yellow when the bus was only a small distance short of the intersection.

Thus, even considering the evidence in a light most favorable to plaintiffs, the light was not red on Shiawassee when the bus entered the intersection.¹ Consequently, a reasonable fact finder would almost certainly conclude that, when plaintiffs' car entered the intersection, the light on Larch was red.² That conclusion is buttressed by two of the eye witnesses, Sinclair and Couzzins, who testified that they saw plaintiffs' vehicle go through the red light into the intersection.

In sum, the available record supports the conclusion drawn by Sergeant David Ellis, the police accident investigator/reconstructionist who opined that:

As the bus entered the intersection at Larch the traffic light turned yellow or amber colored . . . In all I find that the Oldsmobile entered the intersection on a red light . . . In the totality of the circumstances I find fault rests solely with the Oldsmobile for failing to yield right of way at a lighted intersection.

Defendant Lee's actions, even if they rose to the level of gross negligence, were at most "a" proximate cause of the accident, not "the" proximate cause. *Robinson v Detroit*, 462 Mich 439, 482-483; 613 NW2d 307 (2000). Plaintiff failed to come forward with sufficient evidence to avoid the immunity afforded to defendant Lee by the statute and the trial court erred in failing to grant her summary disposition. MCL 691.1407(2).

We reverse and remand. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ Joel P. Hoekstra

¹ We note that all accounts estimated the bus' speed to be at least 30 miles per hour, which is more than 40 feet per second. Thus, it would have taken the bus less than half a second to traverse the distance between where it was when the light changed and the perimeter of the intersection, consistent with the account of passenger Sinclair who estimated that it was "probably a second." Further, defendant's expert testified that the traffic signal at the intersection displays a yellow light to oncoming Shiawassee traffic for four seconds before it changes to red.

² Even if the fact finder was to somehow conclude that, contrary to the consistent eye witness testimony that the events here occurred in a "split second," there was sufficient time for the Larch signal to turn green before plaintiffs' vehicle entered the intersection, plaintiffs still would have contributed to the accident by failing to allow the intersection to clear before doing so.

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FITZGERALD, J. (*dissenting*).

The majority concludes that it need not decide whether plaintiffs came forward with sufficient evidence to support a finding that defendant Lee's conduct amounted to gross negligence because they conclude that plaintiffs did not come forward with sufficient evidence to support a finding that Lee's actions were "the" proximate cause of the accident. I disagree.

In denying Lee's motion for summary disposition, the trial court concluded that there was a factual issue with regard to whether Lee's conduct amounted to gross negligence. I agree with this conclusion.

Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c). If reasonable jurors could honestly reach different conclusions as to whether conduct constitutes gross negligence under

MCL 691.1407(2)(c), the issue is a factual question for the jury. *Jackson v Saginaw County*, 458 Mich 141, 146-147; 580 NW2d 870 (1998).

In this case, plaintiffs alleged that defendant Lee operated the CATA bus in a reckless manner by failing to keep the bus under control, failing to maintain a proper look-out for other traffic and traffic conditions, failing to obey traffic devices, failing to yield to traffic with the right-of-way, and failing to operate the bus at a careful and prudent speed. Viewing the facts in the light most favorable to plaintiffs, defendant Lee expressed that she was in a hurry to run her route, she went through an amber light at the intersection immediately preceding the intersection where the collision occurred, she was traveling in excess of the posted speed limit, and she passed through a red light when proceeding through the intersection where the collision occurred. Reasonable minds could conclude that defendant Lee should have recognized that speeding in a bus through an intersection without the right of way could result in a collision.¹ Reasonable minds could disagree about whether such conduct demonstrated “a substantial lack of concern for whether an injury results.” MCL 691.1407(2).

The trial court did not address the issue of whether Lee’s actions were “the” proximate cause of the injuries. The majority states that “even considering the evidence in a light most favorable to the plaintiffs, the light was not red on Shiawassee when the bus entered the intersection,” and that “a reasonable fact finder would almost certainly conclude that, when plaintiffs’ car entered the intersection, the light on Larch was red.” Thus, the majority concludes that Lee’s actions were at most “a” proximate cause of the accident. I disagree.

Defendant Lee argues on appeal, consistent with the argument at the hearing on the motion, that Lee could not be “the” proximate cause of the accident because the plaintiffs alleged in their complaint that the conduct of Jerald Heintzelman was a proximate cause of the accident. However, an accident can have more than one proximate cause. The issue is whether Lee was “the” proximate cause of the accident. At the hearing on the motion, counsel for plaintiffs and defendant Lee agreed that there was conflicting testimony, and that a credibility contest would be presented, with regard to the color of the lights on both Larch and Shiawassee at the time the parties entered the intersection. Under these circumstances, I would affirm the order denying Lee’s motion for summary disposition.

/s/ E. Thomas Fitzgerald

¹ I am cognizant of past Supreme Court decisions holding that “mere excessive speed by itself does not constitute willful and wanton misconduct in the operation of an automobile” or gross negligence. See, e.g., *Piscopo v Fruciano*, 307 Mich 433, 437; 12 NW2d 329 (1943); *Bielawski v Nicks*, 290 Mich 401; 287 NW 560 (1939). The present case is factually distinguishable in that it involves a city bus, as well as additional allegations of negligence beyond mere excessive speed.