

STATE OF MICHIGAN
COURT OF APPEALS

TONI HAYES, as Conservator for TONY
TILLMAN, a Legally Incapacitated Person, and
BARBARA COOK, as Personal Representative for
the Estate of MONTERIUS COOK,

Plaintiffs-Appellees,

v

CITY OF TAYLOR and OFFICER PHILLIP
ALTON BIGGS,

Defendants-Appellants,

and

MARKALOWE STEEN,

Defendant.

UNPUBLISHED
March 15, 2012

No. 298781
Wayne Circuit Court
LC No. 08-015958-NI

DONOVAN RHYMES,

Plaintiff-Appellee,

v

CITY OF TAYLOR and OFFICER PHILLIP
ALTON BIGGS,

Defendants-Appellants,

and

MARKALOWE STEEN,

Defendant.

No. 298783
Wayne Circuit Court
LC No. 09-018179-NI

Before: MURPHY, C.J., and HOEKSTRA and MURRAY, JJ.

PER CURIAM.

In these consolidated appeals, defendants City of Taylor and Taylor Police Officer Alton Biggs appeal as of right the trial court's order denying their joint motion for summary disposition, which was based on their claims of governmental immunity. We reverse and remand for entry of judgment in favor of defendants.

These cases arose from a motor vehicle accident in which a stolen automobile, driven by defendant Markalowe Steen, struck a tree during a police pursuit, resulting in serious injuries to two of the passengers in the stolen vehicle, Tony Tillman and Donovan Rhymes, and causing the death of a third passenger, Monterius Cook. It is undisputed that Officer Biggs was engaged in a high speed pursuit of the stolen vehicle preceding the accident and that Biggs's vehicle made physical contact with the stolen vehicle before it struck the tree. In attempting to elude police, the stolen vehicle was being operated at excessive speeds, erratically, and in manner that endangered the lives of the participants in the pursuit and the driving public. Toni Hayes, as Tillman's conservator, and Barbara Cook, as Monterius Cook's personal representative, filed an action against defendants, alleging that they were liable for gross negligence and negligence under the motor vehicle exception to governmental immunity, MCL 691.1405. A separate similar lawsuit was filed by Rhymes. The two cases were consolidated at the trial court level.

Prior to the pursuit and accident, either Steen or Rhymes, or the two working together, stole a Dodge Stratus. The car's ignition was punched out and a long screwdriver was used as a makeshift ignition key. Subsequently, Tillman and Cook joined Steen and Rhymes, and the four men spent several hours together, much of which time entailed driving around and joyriding in the stolen vehicle made possible through use of the screwdriver. During this period, the men imbibed alcohol and smoked marijuana. At one point, they agreed to steal some diamond rings at a local mall jewelry store. Steen remained with the car as the three other men entered the jewelry store; however, their plan unraveled and no theft occurred. Later, the four men, using the stolen car, went to a BP gas station. While at the gas station, Tillman remained back at the car as Steen, Cook, and Rhymes went inside the station. Shortly thereafter, Cook and/or Rhymes were confronted by a station clerk about stealing or attempting to steal merchandise and they ran out of the station. Steen, Tillman, Cook, and Rhymes proceeded to speed away in the stolen vehicle, with Steen driving, as the BP clerk took down the car's license plate and contacted police. Subsequently, Officer Biggs spotted the stolen vehicle, activated his emergency lights, and unsuccessfully attempted to pull the car over. The pursuit then commenced, eventually leading to the accident. Steen testified that, during the chase, no one asked to get out of the vehicle, no one asked Steen to stop, and no one engaged in any conversation. Rhymes, who repeatedly attempted to invoke the Fifth Amendment during his deposition, testified that the passengers, including himself, continually asked Steen to let them out of the car. In a statement to police, Rhymes indicated that he told Steen to both "stop" and go faster at different points during the pursuit.

Defendants argued below that they were entitled to summary disposition because no duty of care was owed to any of the passengers in the stolen vehicle, where those passengers were wrongdoers and not innocent. The trial court found that there were genuine issues of material fact regarding whether the passengers were innocent persons to whom a duty was owed and,

accordingly, denied defendants' motion. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). The applicability of governmental immunity and the statutory exceptions to immunity are also reviewed de novo on appeal. *Snead v John Carlo, Inc*, __ Mich App __; __ NW2d __ (2011), slip op at 6. MCR 2.116(C)(7) provides for summary disposition where a claim is "barred because of . . . immunity granted by law." See *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). The moving party may submit affidavits, depositions, admissions, or other documentary evidence in support of the motion if substantively admissible. *Id.* The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. *Id.* The existence of a duty is an essential element of a negligence claim. *Otero v Warnick*, 241 Mich App 143, 147; 614 NW2d 177 (2000).

The cases here are controlled by *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000), which involved consolidated cases wherein passengers of vehicles being pursued by police were injured or killed in accidents connected to the pursuits. The *Robinson* Court held "that the police owe a duty to innocent passengers, but owe no duty to passengers who are themselves wrongdoers whether they help bring about the pursuit or encourage flight." *Id.* at 444. The Court stated that "if an innocent person is injured as a result of a police chase because a police car physically forces a fleeing car off the road or into another vehicle or object, such person may seek recovery against a governmental agency pursuant to the motor vehicle exception to governmental immunity and also against the officer operating the police vehicle if the individual police officer is 'the proximate cause' of the accident." *Id.* at 445 n 2. "A passenger who seeks to recover for injuries allegedly caused by a negligent police pursuit bears the burden of proving personal innocence as a precondition to establishing the duty element of a cause of action." *Id.* at 444. The Supreme Court further explained:

We conclude that it is irrelevant whether a wrongdoer is a driver or a passenger or whether an innocent person is inside or outside the vehicle. . . . [W]hatever their location, there is a duty to innocent persons, but not to wrongdoers. In other words, the police owe a duty to innocent persons whether those persons are inside or outside the vehicle. Conversely, the police owe no duty to a wrongdoer, whether the wrongdoer is the fleeing driver or a passenger.

Our conclusion that police officers giving chase owe a duty to innocent persons is consistent with the statutes governing operation of emergency vehicles. . . . The statutory references to endangering life and the safety of others demonstrate that the Legislature has placed a duty upon police officers toward innocent persons when they are giving chase.

We place on the plaintiff the burden of proving that a passenger was an innocent person and that the police therefore owed the passenger a duty. Where no genuine issue of material fact exists regarding the status of a passenger, summary disposition may be appropriate. However, when a genuine issue of material fact exists concerning whether a passenger is innocent or a wrongdoer, and thus whether the police owed a duty, the question is appropriately resolved by the trier of fact. . . . In the cases at bar, the issue of the passengers' status has not

been sufficiently developed, thereby making summary disposition on the basis of duty inappropriate at this time. [*Id.* at 451-453 (citations omitted).]

Here, we find as a matter of law that Tillman, Cook, and Rhymes were not innocent passengers; they were wrongdoers by any sense of the word. They spent hours joyriding in a stolen vehicle, stopping at times to drink alcohol and smoke marijuana, and the stolen nature of the Dodge Stratus would have been clearly evident given the use of a long screwdriver to operate the vehicle. After Tillman, Cook, and Rhymes, along with Steen, failed to complete their planned theft of diamond rings at the mall jewelry store, they eventually wound up at the BP gas station, where Cook and Rhymes engaged in shoplifting efforts, which then triggered the police pursuit. Cook, Rhymes, and Tillman's use of the stolen vehicle and the actions of Rhymes and Cook at the BP gas station all played a role in helping bring about the police pursuit that occurred. *Robinson*, 462 Mich at 444 ("no duty to passengers who are themselves wrongdoers whether they help bring about the pursuit or . . ."). Accepting Rhymes' testimony as true for purposes of summary disposition, the fact that Cook, Tillman, and Rhymes may have sought to exit the car and asked Steen to stop did not magically convert their statuses from "wrongdoers" to "innocent persons." Their united wrongful actions gave rise to the necessity of police involvement.

Reversed and remanded for entry of judgment in favor of defendants. We do not retain jurisdiction. Having prevailed in full, defendants are awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray