STATE OF MICHIGAN

COURT OF APPEALS

BOBBY HODGES, JR., Personal Representative of the Estate of DEBORAH HODGES, and BRITTANY HODGES,

Plaintiffs-Appellees,

v

CITY OF DEARBORN,

Defendant-Appellant,

and

PATRICK SPRESSER,

Defendant.

UNPUBLISHED
May 14, 2013

No. 308642
Wayne Circuit Court
LC No. 10-006102-NI

Before: BORRELLO, P.J., and K. F. KELLY and MURRAY, JJ.

PER CURIAM.

Defendant City of Dearborn appeals as of right an order denying, in part, its motion for summary disposition as to plaintiffs' claims. Plaintiffs are Brittany Hodges and Bobby Hodges Jr., representative of the estate of his deceased wife, Deborah Hodges. Plaintiffs alleged that defendant Patrick Spresser, a police officer for the City, acted negligently in responding to an emergency call and that his reckless driving caused the May 17, 2010 car accident, in which Deborah suffered fatal injuries and Brittany was injured. The trial court concluded that Spresser was not grossly negligent and dismissed the claims against him, but further concluded that there were questions of fact as to whether Spresser acted negligently, triggering the highway exception to governmental immunity, as well as whether Deborah was an uninsured owner of the vehicle and whether Brittany suffered a threshold injury. We reverse.

I. BASIC FACTS

On May 17, 2010, Spresser was in his police cruiser when he heard that there was a possible house fire with visible smoke nearby. Although another patrol car had been dispatched to the scene, Spresser sought and received permission to respond. He activated his lights and siren and headed to the scene. In the meantime, Deborah was driving Brittany to school at ITT Technical Institute in a Ford Explorer. Spresser's cruiser and the Explorer collided at the intersection of Outer Drive and Parker Street. The Explorer flipped several times. Deborah was

killed, but Brittany was able to crawl out the rear window. Later, it was determined that the smoke was caused by a homeowner burning leaves in his backyard.

Count I of plaintiffs' complaint alleged "negligence and/or gross negligence" as to Spresser:

> 23. At no time was Officer Patrick Spresser entitled to violate Michigan motor vehicle laws pursuant to any Michigan statute as he was not responding [to] an emergency call and/or any call for which his presence was needed as soon as possible. Indeed, Officer Patrick Spresser was not a firefighter and/or was not equipped to participate in extinguishing any fire.

Count II of the complaint alleged negligence against the City under the doctrine of respondeat superior. Finally, Count III of the complaint alleged negligent infliction of emotional distress.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7) (governmental immunity) and (C)(10) (no genuine issue of material fact), arguing that Spresser was immune from liability under MCL 691.1407 because he was not grossly negligent and was not the proximate cause of plaintiffs' injuries. Defendants also argued that Spresser was not negligent for purposes of the highway exception to governmental immunity. Defendants further argued that Deborah was an uninsured motorist for purposes of MCL 500.3135(2)(c), which prohibits an individual from collecting damages when she was operating a vehicle without the requisite security required under MCL 500.3101. Plaintiffs had admitted in response to defendants' requests to admit that the vehicle was not insured. Defendants also argued that Deborah could not claim damages because she was more than 50 percent at fault. Finally, defendants argued that Brittany did not sustain a threshold injury; "Brittany's pre-accident medical history includes epileptic seizures, syncope (i.e., fainting spells), an arachnoid cyst, mood disorders (post-traumatic stress disorder, anxiety, depression, and panic attacks), chronic back pain, and frequent use of prescription narcotics."

Plaintiffs responded that Spresser was not entitled to immunity because only firefighters were permitted to speed in response to a call of a possible fire. Plaintiffs argued that a jury could find that Spresser was travelling too fast for the conditions and Deborah's act of entering the intersection prior to Spresser gave her the right of way. Plaintiffs disputed that Deborah was the owner of the Explorer at the time of the accident; in fact, her son, Colin, was the owner and titleholder. Deborah had given the non-operational vehicle to Colin three years prior to the accident. It was only a few weeks before the accident that the vehicle began running at all. Because he believed the vehicle was safe to drive, Colin gave Deborah permission to drive it. Although Deborah was the last registrant of the Explorer, plaintiffs argued that she ceased being an owner or registrant upon transferring ownership and possession to Colin. Further, plaintiffs argued that there was no basis to conclude that Deborah was more than 50 percent at fault.

Finally, plaintiffs contended that there was a factual dispute as to Brittany's injuries. They argued that Brittany suffered from psychological injuries, a closed head injury, and an exacerbation of her seizure disorder, resulting in the inability to go to school or work.

The trial court entered a written order, granting in part and denying in part defendants' motion. After setting forth the parties' arguments, the trial court concluded:

> This Court is satisfied that there are questions of fact whether Officer Spresser was acting outside the scope of his authority by rushing to a fire and whether the Officer's driving speed was so reckless because the automobile had no overhead emergency lights. However, this Court is more than satisfied that Officer Spresser was acting in a governmental function and he was not the proximate cause of the accident; he clearly was not the most immediate direct cause because Officer Spresser had the right-of-way and the minor Plaintiff Brittany heard the siren. Therefore, gross negligence is not established and Defendants['] Motion for Summary Disposition on this issue is GRANTED.
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> This Court is satisfied that there is a question of fact as to whether Officer Spresser was negligent in his duties because he is not a fireman and his rate of speed may have been excessive. Therefore, Defendants['] Motion for Summary Disposition on this issue is DENIED.
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> This Court is also satisfied that Plaintiff Deborah used the vehicle as if she was the owner, however, pursuant to MCL § 500.3101(2)(h)(i) she was not the owner because she did not use the vehicle for a period greater than 30-days.
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> This Court is also satisfied that the governmental immunity statute, MCL § 691.1405 has a motor vehicle exception that limits damages to bodily injury and that the Wrongful Death Act does not trump the exception.
>
> Finally, this Court is satisfied that Plaintiff Brittany may have had pre-existing injuries, however, the affidavits create a question of fact as to the serious impairment of a bodily function threshold and therefore the Court herby DENIES this portion of the Motion for Summary Disposition.

Defendants filed a motion for reconsideration regarding: "(1) whether Officer Spresser was negligent; (2) whether Deborah Hodges owned the vehicle and whether she was more than 50% at fault for the accident; and (3) whether Brittany Hodges sustained a serious impairment of a body function arising out of the accident." The trial court denied defendants' motion, finding: "No palpable error: (1) Question of fact whether officer's speed was excessive for fire; (2) question of fact whether Mom was 50% at fault as owner of uninsured vehicle (< than 30 days); (3) Question of fact re SIBF [serious impairment of a bodily function]. Spresser out, no gross negligence." Defendants now appeal as of right.

II. STANDARD OF REVIEW

> We review de novo a trial court's determination regarding a motion for summary disposition. Under MCR 2.116(C)(7), the moving party is entitled to summary disposition if the plaintiff's claims are barred because of immunity granted by law. The moving party may support its motion for summary disposition under MCR 2.116(C)(7) with affidavits, depositions, admissions, or other documentary evidence, the substance of which would be admissible at trial. The contents of the complaint are accepted as true unless contradicted by the evidence provided.

> In relation to a motion under MCR 2.116(C)(10), we similarly review the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law."
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> . . .We review de novo questions of statutory interpretation. The primary goal of statutory interpretation is to discern the intent of the Legislature. To do so, we begin with the language of the statute, ascertaining the intent that may reasonably be inferred from its language. When the language of a statute is unambiguous, the Legislature's intent is clear and judicial construction is neither necessary nor permitted. [*Odom v Wayne County*, 482 Mich 459, 466-467; 760 NW2d 217 (2008) (internal quotations, citations, and footnotes omitted).]

III. GOVERNMENTAL IMMUNITY

The City argues that the trial court erred in failing to grant summary disposition on plaintiffs' negligence claim. We agree.

MCL 691.1405 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 . . . [Emphasis added.]

To establish a prima facie case of negligence, a plaintiff must prove: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Loweke v Ann Arbor Ceiling & Partition Co*, 489 Mich 157, 162; 809 NW2d 553 (2011). However, "the motor vehicle exception must be narrowly construed." *Robinson v City of Detroit*, 462 Mich 439, 456-457; 613 NW2d 307 (2000).

At least in the context of high-speed chases and the danger posed to innocent by-standers, an "officer's conduct should be compared to 'that care which a reasonably prudent man would exercise in the discharge of official duties of like nature under like circumstances.'" *Fiser v Ann Arbor*, 417 Mich 461, 470; 339 NW2d 413 (1983), overruled in part *Robinson*, 462 Mich 439, (2000) (internal quotations and citation omitted). While the general rule is that the reasonableness of a defendant's conduct is a question of fact for the jury, if reasonable jurors could not disagree regarding the reasonableness of the defendant's actions, the issue should be decided as a matter of law. *Fiser*, 417 Mich at 470. When all reasonable persons would agree or there are overriding public policy concerns, the question of reasonable care is for the court to decide as a matter of law. *Case v Consumers Power Co*, 463 Mich 1, 7; 615 NW2d 17 (2000).

Plaintiffs argue that Spresser violated MCL 257.632, which provides:

> The speed limitation set forth in this chapter shall not apply to vehicles when operated *with due regard for safety* under the direction of the police when traveling in emergencies or in the chase or apprehension of violators of the law or of persons charged with or suspected of a violation, nor to fire department or fire

> patrol vehicles when traveling in response to a fire alarm, nor to public or private ambulances when traveling in emergencies. This exemption shall apply only when the driver of the vehicle while in motion sounds an audible signal by bell, siren or exhaust whistle as may be reasonably necessary or when the vehicle is equipped with at least 1 lighted lamp displaying a flashing, oscillating or rotating red or blue light visible under normal atmospheric conditions from a distance of 500 feet to the front of such vehicles, unless the nature of the mission requires that a law enforcement officer travel without giving warning to suspected law violators. This exemption shall not however protect the driver of the vehicle from the consequences of a *reckless disregard* of the safety of others. [Emphasis added.]

Plaintiffs' claim that Spresser was not protected by the statute because the statute only permitted the fire department to respond to fire emergencies must fail. While the statute does specifically apply to "fire department or fire patrol vehicles when traveling in response to a fire alarm," such language does nothing to limit the preceding phrase for police "traveling in emergencies." Plaintiffs use hind-sight to argue that no "emergency" existed because the incident was not a house fire and was only a neighbor burning leaves. However, at the time Spresser responded, the report was of a possible house fire with visible smoke – a clear emergency. There is simply no reason to believe that the statute did not apply to Spresser. A possible house fire was an emergency and Spresser was entitled to respond. Additionally, a police officer's decision to *respond* to a possible emergency does not fall within the motor vehicle exception to governmental immunity; rather, a plaintiff's injuries must result from the operation of the governmental vehicle. *Robinson*, 462 Mich at 457-458. Thus, Spresser's decision to react to the emergency cannot be questioned under the motor vehicle exception; only his operation of the cruiser can. Accordingly, the trial court erred to the extent it concluded that there was a question of fact as to whether Spresser "was acting outside the scope of his authority by rushing to a fire" and "was negligent in his duties because he is not a fireman." Spresser did not have to be a fireman responding to a fire to be protected under the statute.

Plaintiffs further argue that, even if Spresser was responding to an emergency, he was no longer protected by the statute because he acted recklessly. The trial court concluded that Spresser's "rate of speed may have been excessive" and there was a question of fact as to "whether the Officer's driving speed was so reckless because the automobile had no overhead emergency lights." While an officer's physical handling of a motor vehicle during the course of responding to an emergency call may constitute negligent operation of a motor vehicle, *Newton v Michigan State Police*, 263 Mich App 251, 268; 688 NW2d 94 (2004), the trial court's conclusion does not comport with its other findings that "Officer Spresser had the right-of-way and the minor Plaintiff Brittany heard the siren." As demonstrated by the in-car video, Spresser's lights and sirens were activated and cars were slowing down and pulling over to the side. The siren could be heard inside the Explorer because Brittany heard it. Despite that, Deborah pulled into the direct path of the police cruiser and failed to yield. A driver confronted by an approaching emergency vehicle is required to stop and yield the right of way. MCL 257.653. There are no factual disparities nor is there any conflicting evidence in this case. While it is true that Spresser was traveling in excess of the speed limit, there is simply nothing in the record or the video to suggest that he acted recklessly or negligently.

IV. DEBORAH WAS THE OWNER OF THE EXPLORER

The City next argues that the trial court erred in failing to find as a matter of law that Deborah was an uninsured owner and, therefore, was precluded from seeking damages as a result of the accident. We agree.

"[T]he fact that a tort action arising from a motor vehicle accident may be pursued against a governmental entity does not except the action from the application of the no-fault act." *Hannay v Department of Transp*, ___ Mich App ___; ___ NW2d ___ (2013) slip op p 3. MCL 500.3135(2)(c) provides that "[d]amages shall not be assessed in favor of a party who was operating his or her own vehicle at the time the injury occurred and did not have in effect for that motor vehicle the security required by section 3101[1] at the time the injury occurred." MCL 500.3101(2)(h)(*i*) sets forth that an "owner" includes "[a] person renting a motor vehicle or having the use thereof, under a lease or otherwise, for a period that is greater than 30 days." While Colin may be the title holder to the Explorer, there can be multiple "owners" of a vehicle. *Iqbal v Bristol West Ins Group*, 278 Mich App 31, 38; 748 NW2d 574 (2008).

In *Ardt v Titan Ins Co*, 233 Mich App 685, 690-691; 593 NW2d 215 (1999), this Court explained:

> The statutory provisions at issue operate to prevent users of motor vehicles from obtaining the benefits of personal protection insurance without carrying their own insurance through the expedient of keeping title to their vehicles in the names of family members. Because we infer from these provisions that they were enacted in furtherance of the sound public policy imperative that users of motor vehicles maintain appropriate insurance for themselves as indicated by their actual patterns of usage, we hold that "having the use" of a motor vehicle for purposes of defining "owner," . . . means using the vehicle in ways that comport with concepts of ownership. The provision does not equate ownership with any and all uses for thirty days, but rather equates ownership with "having the use" of a vehicle for that period. Further, we observe that the phrase "having the use thereof" appears in tandem with references to renting or leasing. These indications imply that ownership follows from proprietary or possessory usage, as opposed to merely incidental usage under the direction or with the permission of another.

"[I]t is not necessary that a person actually have used the vehicle for a thirty-day period before a finding may be made that the person is the owner. Rather, the focus must be on the nature of the person's right to use the vehicle." *Twichel v MIC General Ins Corp*, 469 Mich 524, 530; 676 NW2d 616 (2004). Our Supreme Court explained:

> Once again, M.C.L. § 500.3101(2)(g)(i) defines "owner" as "[a] person renting a motor vehicle or having the use thereof ... for a period that is greater than 30 days." (Emphasis added.) Reading this language in the manner suggested by

[1] MCL 500.3101 provides, in relevant part: "The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance."

> plaintiff requires substitution of the phrase "having used the vehicle" for the phrase "having the use thereof."
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> Nothing in the plain language of M.C.L. § 500.3101(2)(g)(i) requires (1) that a person has at any time actually used the vehicle, or (2) that the person has commenced using the vehicle at least thirty days before the accident occurred. The statute merely contemplates a situation in which the person is renting or using a vehicle for a period that is greater than thirty days. [*Twichel*, 469 Mich at 530-531.]

Additionally, under the Motor Vehicle Code, the "owner" of a motor vehicle includes one who holds legal title, who rents, or who has exclusive control of the vehicle for more than 30 days. MCL 257.37.[2]

The trial court should have determined that Deborah's estate was precluded from seeking damages as a matter of law where Deborah was the vehicle's owner. Plaintiffs treat as dispositive the fact that the vehicle was titled to Colin; however, a vehicle may have more than one owner. Thus, it was possible for both Colin and Deborah to own the Explorer. The undisputed facts demonstrate that Colin left the Explorer at the Hodges' and performed all repair work there. The evidence also demonstrates that Colin never registered it in his own name; instead, Deborah was the last registered owner and the license plate affixed to the Explorer was registered to a different car that the Hodges owned. Additionally, Hodges testified that he had every intention of getting insurance for the Explorer, but the accident occurred before he had a chance to do so. There would be no reason to obtain insurance unless the Hodges believed themselves to be the Explorer's owners. Accordingly, the trial court erred in failing to grant the City summary disposition where the record compels a finding that Deborah was one of the vehicle's owners.

V. DEBORAH WAS MORE THAN 50 PERCENT AT FAULT

MCL 500.3135(2)(b) provides that "[d]amages shall be assessed on the basis of comparative fault, except that damages shall not be assessed in favor of a party who is more than 50% at fault."

As previously discussed, the trial court found that "Officer Spresser had the right-of-way and the minor Plaintiff Brittany heard the siren." As demonstrated by the in-car video, Spresser's lights and sirens were activated and cars were slowing down and pulling over to the side. The siren could be heard inside the Explorer because Brittany heard it. Despite that, Deborah pulled into the direct path of the police cruiser and failed to yield. A driver confronted by an approaching emergency vehicle is required to stop and yield the right of way. MCL 257.653. This failure to yield was *the* proximate cause of the accident. Accordingly, the trial court should have granted the City's motion for summary disposition where Deborah was more than 50 percent at fault.

[2] A court may consider the Motor Vehicle Code's definitions, even when a term is specifically defined in the no-fault act. See *Twichel*, 469 Mich at 531-532.

VI. BRITTANY DID NOT SUFFER A THRESHOLD INJURY

Finally, the City argues that the trial court should have granted it summary disposition as to Brittany's claims where Brittany did not suffer a threshold injury. We agree.

MCL 500.3135(1) provides that "[a] person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." At issue in this case is whether Brittany suffered a serious impairment of a body function. A serious impairment of body function is an objectively manifested impairment of an important body function that affects the person's general ability to lead his normal life. MCL 500.3135(7); *McCormick v Carrier*, 487 Mich 180, 190; 795 NW2d 517 (2010).

The determination whether a plaintiff has suffered a serious impairment of body function is a question of law for the court only if there is no factual dispute concerning the nature and extent of a plaintiff's injuries or there is a factual dispute concerning the nature and extent of the injuries but the dispute is not material to whether the plaintiff has suffered a serious impairment of body function. MCL 500.3135(2)(a); *McCormick*, 487 Mich at 192-193. Before determining the issue as a matter of law, a trial court must determine whether there is a factual dispute regarding the nature and extent of the injuries. *McCormick*, 487 Mich at 215.

McCormick clearly sets forth the three statutory requirements to establish a serious impairment of body function: "(1) an objectively manifested impairment (2) of an important body function that (3) affects the person's general ability to lead his or her normal life." *Id.* at 195. "Objectively manifested" is "an impairment that is evidenced by actual symptoms or conditions that someone other than the injured person would observe or perceive as impairing a body function." *Id*. at 196. Because the term "impairment" relates to the impact of damage that arises from an injury, the focus is how the injury affected a particular body function, not the actual injury. *Id*. A plaintiff must introduce evidence demonstrating a physical basis for subjective complaints of pain and suffering, which generally, but not always, requires medical documentation. *Id*. at 198. "Important body function" refers to a function of significance and will vary depending on the person. *Id*. at 199. Therefore, the inquiry regarding an important body function is "an inherently subjective inquiry that must be decided on a case-by-case basis." *Id*.

The phrase "affect the person's ability to lead his or her normal life" means "to have an influence on some of the person's capacity to live in his or her normal manner of living." *Id*. at 202. This is a subjective, fact specific inquiry to be resolved on a case-by-case basis. *Id*. "Determining the effect or influence that the impairment has had on a plaintiff's ability to lead a normal life necessarily requires a comparison of the plaintiff's life before and after the accident." *Id*.

The trial court concluded that "Plaintiff Brittany may have had pre-existing injuries, however, the affidavits create a question of fact as to the serious impairment of a bodily function threshold." It is true that an aggravation of a preexisting condition can constitute a compensable injury. *Fisher v Blankenship*, 286 Mich App 54, 63; 777 NW2d 469 (2009). However, the evidence in this case, even when taken in a light most favorable to plaintiff, does not indicate that Brittany suffered from a threshold injury.

Many, if not all, of Brittany's problems predated the accident. As evidenced by her medical records, Brittany was treated for both physical and psychological problems. She personally witnessed her boyfriend's overdose and, as a result, suffered from post-traumatic stress, anxiety, and depression. Brittany also had anger issues that predated the accident. She told counselors that her father was abusive. She also clearly had problems with school, as indicated by her poor performance for the first three years of high school. Although Brittany enjoyed martial arts, she had a pre-existing back injury that limited her ability to enjoy the activity. Brittany also fell down the stairs, injuring her back and neck. Again, the injury predated the accident.

Brittany has submitted evidence from two different experts in support of her claim that she continues to suffer from a closed head injury, but the experts' opinions are problematic. For example, Dr. Gerald A. Shiener included a comment that Brittany "continues to experience neck pain and she 'just found out' that she may be suffering from seizures." Brittany was fully aware of the fact that she had a seizure disorder that predated the accident. Dr. Shiener also notes that "[a] careful review of her psychosocial history reveals that she was functioning well without impairment prior to this accident." However, Brittany had been previously diagnosed with post traumatic stress disorder, anxiety, and depression, which she was treating with a variety of prescription drugs and counseling. Thus, Dr. Shiener's opinion does not appear to be based on Brittany's actual medical or mental health history.

Even if plaintiffs' experts created an issue of fact as to whether Brittany suffered an objectively manifested impairment of an important body function, the determination of "the effect or influence that the impairment has had on a plaintiff's ability to lead a normal life necessarily requires a comparison of the plaintiff's life before and after the accident." *McCormick*, 487 Mich at 202. There is absolutely no record evidence that Brittany's life is any different after the accident. She did not work before the accident and continued to be unemployed after. She continued to attend school. Brittany admitted that she could not drive before the accident because of her seizure disorder. It was the seizure disorder that impacted Brittany's ability to engage in many of the activities of life. In comparing her life before and after the accident, Brittany failed to establish an effect upon her ability to lead a normal life.

Finally, we note that, to the extend Brittany argues that she "was caused to suffer the terrible experience of being present for and watching her mother die from injuries inflicted upon her in the horrific crash," such independent claims for emotional damages are precluded under MCL 691.1405. See *Hunter v Sisco*, ___ Mich App ___; ___ NW2d ___ (Docket No. 306018, issued April 2, 2013) slip op, pp 6-7. Accordingly, the trial court should have granted the City's motion for summary disposition.

Reversed.

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray