STATE OF MICHIGAN

COURT OF APPEALS

DORQTHY PALMER,

Plaintiff-Appellant,

v

BLUE WATER AREA TRANSPORTATION COMMISSION and MELANIE A. HUTCHINSON,

Defendants-Appellees,

and

JANE DOE,

Defendant.

UNPUBLISHED
October 29, 2013

No. 310840
St Clair Circuit Court
LC No. 10-002721-NI

Before: M.J. KELLY, P.J., and WILDER and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's judgment following a bench trial, which found no cause of action on her claims alleging defendants' negligence, negligent operation of a government vehicle, and gross negligence. We affirm.

The claims arose out of an incident on July 2, 2010, when plaintiff was getting on a bus owned and operated by defendant Blue Water Area Transportation Commission (BWATC) and driven by defendant Melanie A. Hutchinson. Plaintiff called BWATC and requested to be picked up through the dial-a-ride program. Hutchison was dispatched to pick up plaintiff at her home. When she arrived at the destination, Hutchinson stopped the bus and honked the horn several times to notify plaintiff. Plaintiff walked to the bus with her purse, cane, and a small shopping cart. When she got to the second step of the bus, plaintiff lost her balance.

Plaintiff presented several versions of what happened next. Plaintiff's complaint alleged that Hutchinson failed to wait for plaintiff to fully board the bus and sit in a seat before starting to move the bus, causing plaintiff to fall down the stairs and out of the bus. On her application for no-fault benefits, plaintiff wrote that she fell getting on the bus. At the bench trial, plaintiff testified that the bus lurched forward when she first lost her balance on the second step but that

she was able to regain her balance. She testified further that she got to the top of the stairs, sat down in the first passenger seat, and then realized she had not paid. When plaintiff got up to put money into the payment collection box, that was when the bus lurched again, and plaintiff fell down the stairs and out of the bus, landing on her back on the pavement.

Hutchinson testified at the bench trial that plaintiff tripped while coming onto the bus and regained her balance, only to lose her balance again when she reached the top of the steps and fell backward onto the pavement. Hutchinson maintained that the bus was in parking gear and her foot was on the brake at all times.

Following the bench trial, the trial court issued a written opinion in which the court found plaintiff to not be credible. The trial court noted, *inter alia*, that plaintiff had been "clearly inconsistent" by providing three different versions of what happened, whereas Hutchinson described the incident in a consistent manner. The trial court then determined that plaintiff's injury was not compensable because (1) the injury did not affect her ability to lead her normal life, (2) the evidence was insufficient to establish that any defendant acted grossly negligent, and (3) even under a negligence standard, plaintiff failed to establish that any acts of any defendant caused plaintiff's injuries.

Plaintiff argues on appeal that the trial court used the wrong standard when it dismissed plaintiff's claim, relying on the gross negligence standard in MCL 691.1407, rather than the correct simple negligence standard in MCL 691.1405. We disagree.

The interpretation and application of statutes presents a question of law that we review de novo. *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013). We review a bench trial's findings of fact for clear error. *Florence Cement Co v Vettraino*, 292 Mich App 461, 468; 807 NW2d 917 (2011). "A trial court's findings are clearly erroneous only when the appellate court is left with a definite and firm conviction that a mistake has been made." *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 130; 743 NW2d 585 (2007). This Court gives great deference to the trial court's superior ability to assess the credibility of the witnesses. *Ambs v Kalamazoo Co Rd Comm'n*, 255 Mich App 637, 652; 662 NW2d 424 (2003).

Under MCL 691.1407(1), "[a] governmental agency is generally immune from tort liability arising out of the exercise or discharge of its governmental functions." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 53; 760 NW2d 811 (2008). However, the "broad immunity afforded by the statute is limited by several narrowly drawn [statutory] exceptions." *Id.* One of the exceptions is called "the motor vehicle exception" and is found in MCL 691.1405, *In re Bradley Estate*, 494 Mich 367, 378 n 21; 835 NW2d 545 (2013), which provides that "[g]overnmental 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 691.1407(2) generally provides that a governmental agency's employee is immune from tort liability for an injury caused by the employee while in the course of employment if (a) the employee was acting within the scope of his authority, (b) the governmental agency was engaged in the exercise of a governmental function, and (c) the employee's conduct did not amount to

> gross negligence that was the proximate cause of the injury. [*Radu v Herndon & Herndon Investigations, Inc*, ___ Mich App ___; ___ NW2d ___ (Docket No. 304485, issued August 29, 2013), slip op, p 9.]

We conclude that the trial court did not err. First and foremost, the trial court in its opinion explicitly addressed both plaintiff's claim of negligence under MCL 691.1405 and plaintiff's claim of gross negligence under MCL 691.1407(2).

Further, the trial court determined that plaintiff failed to prove both negligence and gross negligence. To establish negligence, plaintiff had to show that (1) defendants owed her a duty, (2) there was a breach of that duty, (3) the breach caused plaintiff's injury, and (4) plaintiff had damages. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011). "Gross negligence," on the other hand, requires a plaintiff to prove that a defendant's conduct was "so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a); see also *Woodman v Kera, LLC*, 280 Mich App 125, 152; 760 NW2d 641 (2008). Thus, importantly, plaintiff had the burden to prove the element of causation in both instances. See MCL 691.1407(2)(c) (providing that governmental immunity does not extend to where a defendant's gross negligence *proximately caused* the injury); *Loweke*, 489 Mich at 162 (stating that an element of negligence includes causation).

The trial court provided multiple reasons for finding no cause of action. One of those reasons was that plaintiff failed to establish that any defendant actually caused plaintiff's injuries. This finding was not clearly erroneous. The trial court found plaintiff's testimony not credible because, in part, of the different explanations for the accident that she gave before trial, and we will defer to a trial court's credibility determination. *Ambs*, 255 Mich App at 652. Because the crucial element of causation was common to both causes of action and was not proven, the trial court did not err in finding no cause of action.

And because the trial court found that plaintiff did not establish the necessary element of causation, we need not consider plaintiff's other argument that the trial court also erred when it found that her injury was not a serious impairment of body function.[1]

Finally, plaintiff argues that the trial court erred when it did not allow plaintiff to introduce evidence of other incidents or accidents that occurred previously while Hutchison was driving the bus. Plaintiff argues that MRE 608(b) allows for the impeachment of a witness and that any past accidents are probative of both how Hutchison conducted herself in prior similar situations and "how truthful she might have been about the instant case." We disagree. Normally, this Court reviews a trial court's decision to admit or deny evidence for an abuse of discretion. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). But on appeal,

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[1] We note that MCL 500.3135 provides that a plaintiff making a tort claim for noneconomic damages under the no-fault act must, as a threshold, show a "serious impairment of body function." *Hunter v Sisco*, 300 Mich App 229, 241; 832 NW2d 753 (2013), citing *Hardy v Oakland Co*, 461 Mich 561, 566; 607 NW2d 718 (2000).

plaintiff failed to cite to the record on this issue, identifying what specific evidence was excluded at trial. An appellant may not merely announce a position and leave it to this Court to search for a factual basis for her claims. MCR 7.212(C)(7); *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 388; 689 NW2d 145 (2004). Therefore, plaintiff has abandoned this issue. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). Moreover, plaintiff's argument is without merit. Under MRE 608(b), specific instances of a witness's conduct may be inquired into on cross-examination only where they are "probative of truthfulness or untruthfulness." Plaintiff fails to explain how evidence of a person's past accidents is somehow probative of the person's "truthfulness or untruthfulness." Accordingly, plaintiff cannot establish how the trial court abused its discretion in excluding the evidence.

Affirmed. Appellees, as the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Michael J. Kelly
/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood