

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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BERNARD GRECHESKI, Personal  
Representative of the Estate of JOHN  
GRECHESKI,

Plaintiff-Appellant,

v

NEWAYGO COUNTY BOARD OF ROAD  
COMMISSIONERS, NICHOLAS AUW,  
NICHOLAS EATON, GREGG MANCHIP and  
DAVID LINDENAU,

Defendants-Appellees.

UNPUBLISHED  
July 18, 2006

No. 263291  
Newaygo Circuit Court  
LC No. 03-018682-NO

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BERNARD GRECHESKI, Personal  
Representative of the Estate of JOHN  
GRECHESKI,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

No. 263311  
Court of Claims  
LC No. 04-000040-MZ

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Before: Talbot, P.J., and Owens and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition to all defendants. We affirm.

Plaintiff's decedent, a prison inmate, was killed by a branch of a falling tree while working on a prison work crew with the Newaygo County Board of Road Commissioners (Road Commission). The decedent was feeding tree branches into a wood chipper, while another inmate was cutting down a fifty-foot tree. Road Commission employee Nicholas Auw saw that the tree was going to fall near the area of the wood chipper and moved the truck and the attached

wood chipper. The decedent was not wearing a hardhat while working, and a branch from the falling tree penetrated his cranium. Emergency personnel were called three to five minutes after the incident. Eleven minutes later, they pronounced the decedent dead at the scene.

Plaintiff first argues that the trial court erred in concluding that all defendants were entitled to governmental immunity. We disagree. We first note that although plaintiff appeals the grant of summary disposition to the Road Commission, plaintiff affirmatively agreed at a motion hearing that there were no claims against the Road Commission as an entity, and his only claims were against individual Road Commission employees. Thus, plaintiff's challenge to the grant of summary disposition to the Road Commission itself is waived. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (waiver is an intentional relinquishment of a known right). We review the grant of summary disposition on the basis of governmental immunity to the individual defendants de novo. *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003).

Governmental immunity for tort liability is broad, and exceptions to immunity are narrowly construed. *Robinson v Detroit*, 462 Mich 439, 455; 613 NW2d 307 (2000). MCL 691.1407(2)(c) provides an exception to governmental immunity when a government employee's conduct amounts to gross negligence, and that conduct is the proximate cause of the plaintiff's injuries. MCL 691.1407(7)(a) defines gross negligence as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." Although generally whether a governmental employee's conduct constituted gross negligence is a question for the fact-finder, a court may grant summary disposition in favor of a defendant when reasonable minds could not find gross negligence from the evidence presented. *Tarlea v Crabtree*, 263 Mich App 80, 88; 687 NW2d 333 (2004).

We conclude the trial court did not err in finding that plaintiff failed to establish gross negligence by any of the individual defendants. Plaintiff alleged the Road Commission employees were grossly negligent by (1) failing to provide the decedent with a hardhat, and (2) in not alerting the decedent that a tree was falling in his direction, but instead moving equipment out of the way. Both allegations suggest only ordinary negligence on the Road Commission employees' parts. Evidence of ordinary negligence does not create a factual question regarding gross negligence. *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999). Instead, plaintiff must show "almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks." *Tarlea, supra* at 90. In other words, gross negligence exists if an objective observer could reasonably conclude from watching an actor that the actor was unconcerned about the safety of those in his charge. *Id.*

The evidence presented to the trial court suggested that hardhats were available to the inmates, but the inmates refused to wear them. Additionally, although Auw moved equipment out of the way of the tree, evidence suggested he did this as the inmate cutting the tree made his final cut, and he did not have any knowledge that the tree branch was going to strike the decedent. This Court has noted that "[s]imply alleging that an actor could have done more is insufficient under Michigan law, because, with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result." *Tarlea, supra*. Although this was a tragic accident, there was simply no evidence of gross negligence on the part of the Road Commission employees.

Additionally, plaintiff did not establish gross negligence on the part of defendant David Lindenau, an employee of defendant Department of Corrections (MDOC). Plaintiff alleged that Lindenau was negligent in failing to supply the decedent with a hardhat, failing to immediately contact emergency personnel, allowing inmates to use a chainsaw, and transporting the other inmates back to the correctional facility before obtaining medical care for the decedent. Again, failing to supply the decedent with a hardhat is only evidence of, at most, ordinary negligence, as is allowing an inmate to operate a chainsaw. Additionally, Lindenau submitted an affidavit to the trial court that contradicted plaintiff's assertion that he failed to promptly contact emergency personnel. There was no evidence submitted to the trial court from which it could conclude that Lindenau was grossly negligent. Therefore, we conclude that the trial court properly granted summary disposition to the individual defendants.

We also conclude that summary disposition on the basis of governmental immunity was properly granted to the MDOC. Plaintiff alleged that the proprietary function exception to governmental immunity applied to the MDOC in this case. MCL 691.1413 provides:

The immunity of the governmental agency shall not apply to actions to recover for bodily injury or property damage arising out of the performance of a proprietary function as defined in this section. Proprietary function shall mean any activity which is conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding, however, any activity normally supported by taxes or fees.

Hence, two tests must be satisfied under the proprietary function exception to governmental immunity; “[t]he activity (1) must be conducted primarily for the purpose of producing a pecuniary profit, and (2) it cannot be normally supported by taxes and fees.” *Coleman v Kootsillas*, 456 Mich 615, 621; 575 NW2d 527 (1998). To determine whether the activity was intended to generate a profit, one must consider whether there actually was profit and how any generated revenue was spent. *Davis v Detroit*, 269 Mich App 376, 379; 711 NW2d 462 (2006). If a governmental agency conducts an activity on a self-sustaining basis, it will not be subject to the proprietary function exception. *Harris v Univ of Michigan Bd of Regents*, 219 Mich App 679, 690; 558 NW2d 225 (1996).

Plaintiff presented no evidence to support his allegation that the MDOC was running the work crew program for pecuniary gain. And evidence presented by the MDOC showed the opposite; the MDOC had lost money on the work crew program for the three fiscal years preceding the summary disposition motion, and any money made from the program was applied toward the costs of running it. The primary purpose behind the program was to provide inmates with work assignments off MDOC grounds, not to make a profit. Further, “keeping [prison inmates] occupied, and offering them job training are all activities that are normally supported by taxes or fees.” *Russell v Dep’t of Corrections*, 234 Mich App 135, 139; 592 NW2d 125 (1999). Therefore, we conclude that the trial court correctly granted summary disposition to the MDOC.

Plaintiff also alleged claims under 42 USC 1983 against the individual defendants claiming that the decedent's death violated his rights under the Eighth and Fourteenth Amendments. Assuming these claims were proper against all the individual defendants, we find plaintiff failed to make the necessary showing of deliberate indifference.<sup>1</sup>

Deliberate indifference is “a state of mind more blameworthy than negligence.” *Farmer v Brennan*, 511 US 825, 835; 114 S Ct 1970; 128 L Ed 2d 811 (1994). A official is deliberately indifferent when the official “knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw that inference.” *Id.* at 837. As discussed earlier, plaintiff has alleged, at most, ordinary negligence on the part of the individual defendants. “[I]njury caused by negligence does not constitute a ‘deprivation’ of any constitutionally protected interest.” *Lewellen v Metropolitan Gov’t of Nashville and Davidson Co, Tennessee*, 34 F3d 345, 348 (CA 6, 1994), citing *Collins v City of Harker Heights*, 503 US 115, 128-129; 112 S Ct 1061; 117 L Ed 2d 261 (1992). Plaintiff’s evidence of potential negligence by the defendants was not sufficient to support a showing of deliberate indifference under either the Eighth or Fourteenth Amendment. *Jackson v Detroit*, 449 Mich 420, 430; 537 NW2d 151 (1995). Therefore, the trial court correctly dismissed plaintiff’s claims against the individual defendants.

Affirmed.

/s/ Michael J. Talbot  
/s/ Donald S. Owens  
/s/ Christopher M. Murray

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<sup>1</sup> Plaintiff acknowledges that his § 1983 claims against the MDOC as an entity fail because of its Eleventh Amendment immunity.