Circuit Court for Baltimore City
Case No. 24-C-17-000085 MT

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 571

September Term, 2018

BETSERAI JOHNSON

v.

LAKEA LEE

Kehoe,
Leahy,
Salmon, James P.,
(Senior Judge, Specially Assigned)
JJ.

Opinion by Kehoe, J.

Filed: July 22, 2019

This is an appeal from a judgment of the Circuit Court for Baltimore City, the Honorable Sylvester B. Cox, presiding, entered in favor of Lakea I. Lee, a Baltimore City police officer who was involved in a motor vehicle collision with Betseria M. Johnson.[1] Ms. Johnson presents two issues on appeal, which we have consolidated and reworded:

> Whether the court erred as a matter of law in granting defendant's motion for judgment at the close of all evidence in a jury trial on the grounds of statutory immunity where evidence existed to permit the jury to decide the questions of negligence and gross negligence?

We will affirm the circuit court's decision.

Background

The traffic collision that gave rise to this litigation occurred on January 9, 2014 at 8:39 a.m. at the intersection of East 25th Street and Harford Road in Baltimore City. This is where a police cruiser operated by Officer Lee collided with an automobile driven by Ms. Johnson, a school administrator who was on her way to work.

In the early morning of January 9, 2014, Officer Lee was on patrol in her marked police vehicle. Around 8:30 a.m., the police dispatcher put out a call for "an assault in progress" on Cliftview Avenue, which was "around the corner" from Lee's location. At 8:34 a.m., Lee responded, stating that she would serve as backup for the primary responding officer. She then drove east on East 25th Street. Customarily, two or more officers respond to an assault call. Lee approached the intersection of East 25th Street and Harford Road, which

[1] This appeal is docketed as *Betserai Johnson v. Lakea Lee*. However, it is clear from the record that Ms. Johnson's first name is actually "Betseria."

is a signalized intersection. At this point, East 25th is a two-way street, with the lanes divided by a double-yellow line. At the intersection itself, the east-bound lane widened into three: dedicated left-turn only and right-turn only lanes onto Harford Road, and a middle lane reserved for through traffic. In order to reach the Cliftview Avenue address where the assault was in progress, Lee needed to proceed into this intersection and turn right onto Harford Road.

The parties are in agreement that, when Officer Lee approached the intersection, the traffic on East 25th Street was stopped at a red light and Ms. Johnson was in the right-turn only lane, waiting to turn right onto Harford Road. At this point, Johnson had a change of mind as to the best route to her workplace: instead of turning right onto Harford Road, she decided to proceed straight across the intersection in order to stay on East 25th Street. Johnson attracted the attention of the driver of the vehicle to her immediate left and signaled that she wished to proceed straight across the intersection in front of him. The driver indicated his acquiescence, and when the light changed, Johnson accelerated and drove into the intersection.

While this was going on, Officer Lee drew up behind the line of cars stopped on East 25th Street at the red light. Lee crossed the double-yellow line, advanced to the intersection, and then stopped at the red light. When the traffic light for eastbound East 25th Street changed from red to green, Lee turned right onto Harford Road just as Ms. Johnson drove into the intersection. The two vehicles collided. Ms. Johnson sued Officer Lee for negligence and gross negligence, and the case eventually was tried before a jury of the

Circuit Court for Baltimore City. The primary factual dispute at trial concerned the precautions that Officer Lee took or didn't take as she approached the intersection. We summarize the relevant evidence.

According to Officer Lee, she activated her vehicle's emergency lights and its siren before approaching the intersection. Additionally, she testified that whenever she moved her police cruiser, she looked in both directions for pedestrians and traffic.

Daniel Clark, a member of the Baltimore City Fire Department, testified that he was in an emergency vehicle stopped at the red light, and that Officer Lee had both her emergency lights and siren activated before the crash. Immediately after the crash, Clark told an investigating officer that "[t]he cop was going lights and sirens." In an affidavit dated January 12, 2018, Clark noted that Lee's cruiser had "active lights," but he did not explicitly mention the siren. Clark further asserted that Lee's police cruiser slowed down at the intersection before the collision. He elaborated by stating that Johnson's vehicle was in a right-turn-only lane and traveled straight about "20, 30 miles an hour" before "clip[ping] the front of the cop car" and coming to rest at the bumper of Clark's emergency vehicle.

Baltimore Police Department Detective Christopher Izquierdo testified as an expert in traffic collision investigation and reconstruction. His investigation included reviewing witness statements, data stored on the patrol car's computer, a closed circuit-television ("CCTV") video recording of the accident, and a skid mark that he found at the accident scene. From all of this, he concluded that Officer Lee, with her emergency lights and siren

activated, was "going pretty slow, far below the posted speed limit" before the collision occurred. He testified that the patrol car's computer indicated that Officer Lee accelerated from 8 mph to 17 mph about two-and-a-half seconds before impact. He concluded that Johnson's vehicle drove straight into the intersection from the right-turn-only lane before colliding with Officer Lee's car and coming to rest at the bumper of Clark's emergency vehicle, which was stopped on Harford Road at a red light. The detective concluded that Officer Lee was not at fault for the collision, and that Johnson violated the law by failing to stop for the approaching police car when it had emergency signals activated.

On cross-examination, Izquierdo was questioned about the statement from Mike Cook, an eyewitness who did not testify at trial. Cook told Izquierdo that Officer's Lee' car had the lights activated but did not have the siren blaring.

For her part, Ms. Johnson asserted that she never saw Officer Lee's car or heard a siren before impact. According to her testimony, just before the accident, she was in the right-turn-only lane on eastbound East 25th Street at Harford Road. However, instead of turning right in the right-turn-only lane, Johnson "simply went straight." Shortly thereafter, she was "slammed into by the officer."

After the close of the evidence, Officer Lee moved for judgment pursuant to Md. Rule 2-519.[2] The arguments presented by the parties to the trial court were essentially the same as those presented to this Court, and we will discuss them presently. At this point, it's enough to say that the court granted the motion and this appeal followed.

Analysis

In considering a Rule 2-519 motion for judgment, the trial court:

> must consider the evidence, including the inferences reasonably and logically drawn therefrom, *in the light most favorable to the party against whom the motion is made*. If there is any evidence, no matter how slight, legally sufficient to generate a jury question, the motion must be denied.

Barrett v. Nwaba, 165 Md. App. 281, 289 (2005) (cleaned up; emphasis in original).

When we review a trial court's decision granting a motion for judgment, we apply the same analysis. *Id.* at 290. Before addressing the merits of Ms. Johnson's appellate contentions, however, we must address a preliminary matter.

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[2] Rule 2-519 states in pertinent part:

> (a) Generally. A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party, and in a jury trial at the close of all the evidence. . . .
>
> (b) Disposition. When a defendant moves for judgment at the close of the evidence offered by the plaintiff in an action tried by the court, the court may proceed, as the trier of fact, to determine the facts and to render judgment against the plaintiff. . . . When a motion for judgment is made [in a jury trial], the court shall consider all evidence and inferences in the light most favorable to the party against whom the motion is made.

1.

Md. Rule 8-501(a) requires an appellant to prepare a record extract "in every civil case in the Court of Special Appeals." Rule 8-501(c) states that an extract "shall contain all parts of the record that are reasonably necessary for the determination of the questions presented by the appeal and any cross-appeal." The extract filed by Ms. Johnson consists solely of the docket entries and a transcript of Judge Cox's bench opinion. It is impossible for this Court to address the merits of the appeal without reviewing the relevant testimony. Rule 8-501 unquestionably required Ms. Johnson to provide that testimony in her extract and she failed to do so.

Rule 8-501(m) provides that "[o]rdinarily, an appeal will not be dismissed for failure to file a record extract in compliance [with Rule 8-501(c)]." This is because "reaching a decision on the merits of a case is always a preferred alternative." *Rollins v. Capital Plaza Assocs., L.P.*, 181 Md. App. 188, 202-03 (2008) (cleaned up). Absent prejudice to the opposing party, dismissal is reserved for the relatively infrequent case that involves "a deliberate violation of the rule." *Id.* at 203. In light of her appellate contentions, Ms. Johnson's failure to include *any* of the relevant trial testimony could be characterized as a deliberate violation of Rule 8-501(c).

This panel raised the issue of the failure to comply with Rule 8-501 with counsel at oral argument. Officer Lee did not assert that she was prejudiced. After our colloquy with Ms. Johnson's counsel, we are satisfied that her failure to file an extract that complied with Rule 8-501 was not willful but rather stemmed from counsel's lack of familiarity with the

rule. Moreover, were we to dismiss this appeal, Ms. Johnson might file a malpractice action against her current counsel. Resolving such claims can be burdensome for trial courts. *See, e.g., Suder v. Whiteford, Taylor & Preston, LLP*, 413 Md. 230, 241–44 (2010) (discussing the "trial–within–a–trial" approach to legal malpractice actions). For these reasons, we will address Ms. Johnson's appellate contentions on their merits.

2.

The issue before the trial court was whether Lee was entitled to claim the statutory partial immunity established for operators of emergency vehicles who are involved in accidents while performing emergency services. *See* Courts and Judicial Proceedings ("CJP") Article § 5-639 and Transportation Article ("TA") § 19-103(b).[3] Judge Cox

[3] CJP § 5-639states in relevant part (emphasis added):

> (a)(1) In this section the following words have the meanings indicated.
> (2) "Emergency service" has the meaning stated in § 19-103 of the Transportation Article.
> (3) "Emergency vehicle" has the meaning stated in § 11-118 of the Transportation Article.
> (b)(1) An operator of an emergency vehicle, who is authorized to operate the emergency vehicle by its owner or lessee, *is immune from suit in the operator's individual capacity for damages resulting from a negligent act or omission while operating the emergency vehicle in the performance of emergency service*.
> (2) This *subsection does not provide immunity . . . for gross negligence of the operator*.
>
> • • •

(Footnote continued. . .)

construed those statutes as providing immunity from actions for damages based upon negligence but not for cases involving gross negligence. Assessing the evidence in the light most favorable to Ms. Johnson as the non-moving party, the court concluded that the evidence showed that Lee was operating an emergency vehicle and was engaged in providing emergency services at the time of the accident. The court further concluded that, although a jury could conclude that Lee was negligent, there was no evidentiary basis for the jury to conclude that she had been grossly negligent.

To this Court, Ms. Johnson presents two arguments as to why the trial court erred in granting the motion for judgment. The first is that CJP § 5-639 and TA § 19-103(b) do not apply to this case. The second is that, even if the statutes do apply, there was legally sufficient evidence before the jury for it to reasonably conclude that Lee's operation of her vehicle was grossly negligent. Neither of these contentions is persuasive.

TA § 19-103 states:

> (a)(1) In this section the following words have the meanings indicated.
> (2) "Emergency service" means:
> (i) Responding to an emergency call;
> (ii) Pursuing a violator or a suspected violator of the law; or
> (iii) Responding to, but not while returning from, a fire alarm.
> (3) "Emergency vehicle" has the same meaning as in § 11-118 of this article.
> (b) An operator of an emergency vehicle, who is authorized to operate the emergency vehicle by its owner or lessee while operating the emergency vehicle in the performance of emergency service as defined in subsection (a) of this section shall have the immunity from liability described under § 5-639(b) of the Courts and Judicial Proceedings Article.

• • •

A.

CJP § 5-639 and TA § 19-103(b) establish partial immunity for the operator of an *emergency vehicle* when the vehicle is involved in an accident that occurs in the *performance of emergency service*. The italicized terms in the previous sentence are defined in TA § 19-103(a). Johnson implicitly concedes that Lee was driving an emergency vehicle at the time of the accident, and, in any event, a police car is indisputably such a vehicle. *See* TA § 11-118 (defining "emergency vehicle" as including "[v]ehicles of federal, State, or local law enforcement agencies"). Nonetheless, Johnson asserts that the statute does not apply to this case for two reasons.

Her first argument is that Officer Lee is not entitled to assert qualified public official immunity because operating a motor vehicle is a ministerial, as opposed to a discretionary, governmental activity. Johnson's statement of the law is correct in the abstract—qualified public official immunity applies to discretionary, but not to ministerial, actions and no one asserts that Officer Lee was acting in a discretionary capacity when she drove into the intersection. But in the present case, Officer Lee is not asserting qualified public official immunity, which is a common law doctrine, as a defense but rather the separate and distinct statutory immunity established by CJP § 5-639 and TA § 19-103(b). That Officer Lee might be able to assert qualified public official immunity as a defense against certain causes of action (although not in the present case) does not mean that qualified public official immunity is the only form of immunity available to her. *See, e.g., Maryland Board of Physicians v. Geier*, ___ Md. App. ___, 2019 WL 2611121, at *40 (2019) ("[I]t is not

uncommon for Maryland government officials and employees to enjoy multiple layers of immunity from both common-law and statutory sources, each with its own criteria and purpose, one or more of which might apply to an official's action.").

Johnson's second contention is that, based upon the evidence, the jury could have reasonably concluded that Officer Lee was not "performing an emergency service" at the time of the accident and so TA § 19-103 does not apply to this case. For the purposes of § 19-103, "emergency service" includes "responding to an emergency call." Johnson asserts that Lee was not responding to an emergency call. This contention is not persuasive.

One defect, and it is a fatal one, with her argument is that its factual premise is based upon various provisions of Baltimore City Police Department General Order G-1. However, General Order G-1 was not entered into evidence at trial.[4]

In any event, we conclude that Lee was performing an emergency call when she responded to another officer's request for backup in a case involving an on-going assault. The language of CJP § 5-639 or TA § 19-103, similar language in other statutes, and Maryland caselaw supports this conclusion.

[4] Johnson did cross-examine Lee about various provisions of General Order G-1. Lee admitted that she was not familiar with all aspects of the order, nor with certain procedures followed by the Department's dispatchers. But Lee's lack of familiarity with police matters that were outside of her duty assignments does not mean that the jury was permitted to speculate about what was, and was not, contained in Order G-1.

The term "emergency" is not defined in either CJP § 5-639 or TA § 19-103. Under such circumstances, it is incumbent upon us to ascertain the General Assembly's intent by using well-established methods of statutory interpretation. One such method is recourse to a dictionary. *Montgomery County v. Deibler*, 423 Md. 54, 67 (2011). Two leading online dictionaries define "emergency" thus:

> [A]n unforeseen combination of circumstances or the resulting state that calls for immediate action [or] an urgent need for assistance or relief.

https://www.merriam-webster.com/dictionary/emergency (visited July 7, 2019),

and:

> a dangerous or serious situation, such as an accident, that happens suddenly or unexpectedly and needs immediate action.

https://dictionary.cambridge.org/us/dictionary/english/emergency (visited July 7, 2019).

The term "assault" encompasses a wide spectrum of criminal behavior that includes inflicting or attempting to inflict life-threatening physical injuries, including injuries by means of a firearm. *Compare* Criminal Law ("CL") Article §§ 3-301–03 (setting out the elements of first-degree and second-degree assault). A police officer's request for the assistance of another officer at the scene of an on-going assault is a situation that "calls for immediate action" so Lee was performing an emergency service when she responded to the request for backup.

This conclusion is supported by the way that the General Assembly has defined "emergency" in other parts of the Maryland Code. *See McNeil v. State*, 356 Md. 396, 419 (1999). Criminal Procedure Article ("C.P.") § 2-101(b) defines "emergency" as:

> a sudden or unexpected happening or an unforeseen combination of circumstances that calls for immediate action to protect the health, safety, welfare, or property of a person from actual or threatened harm or from an unlawful act.

"Emergency" has a similar definition in Public Safety Article § 2-412(a)(2):

> "Emergency" means a sudden or unexpected happening or an unforeseen combination of circumstances that calls for immediate action to protect health, safety, welfare, or property from actual or threatened harm or from an unlawful act.

Case law from the Court of Appeals supports Officer Lee's interpretation of "emergency call." For instance, in *Taylor v. Mayor and City Council of Baltimore*, the Court of Appeals identified a police officer's response to "a call that a fellow officer was 'down' or needed assistance" as an emergency under § 19-103 of the Transportation Article. 314 Md. 125, 126, 129 (1988). Likewise, the Court of Appeals in *Mayor & City Council of Baltimore v. Hart* found a Baltimore City Police Department general order concerning emergency calls to include "[c]alls for service, either reported or on view describing incidents involving personal injury or the potential for personal injury, reported to be in progress or having just occurred." *Hart*, 395 Md. 394, 403 (2006). Classifying a dispatch call for an assault in progress as an emergency is consistent with § 19-103's language, as well as the natural and ordinary meaning of the phrase "emergency call."

These authorities lead us to conclude that Lee was performing an emergency service when the accident with Johnson occurred.

B.

Johnson's second argument is that the evidence was sufficient for a jury to conclude that Lee was grossly negligent. Again, this argument is unpersuasive.

A gross negligence claim "sets the evidentiary hurdle" at a "higher elevation" than ordinary negligence. *Beall v. Holloway-Johnson*, 446 Md. 48, 64 (2016). Gross negligence is (emphasis added):

> an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another, and also implies a thoughtless disregard of the consequences without the exertion of any effort to avoid them. Stated conversely, a wrongdoer is guilty of gross negligence or acts wantonly and willfully only when *he inflicts injury intentionally or is so utterly indifferent to the rights of others that he acts as if such rights did not exist*.

Barbre, 402 Md. at 187.

Our review of the evidence in the light most favorable to Ms. Johnson leaves us satisfied that there was no factual basis for a reasonable jury to conclude that Officer Lee had been grossly negligent. In her brief, Johnson asserted that Lee's actions "violated Baltimore Police Department policies" and "General Orders." However, these policies and orders were never admitted into evidence. Unadmitted exhibits are not evidence. *See Billman v. State Deposit Ins. Fund Corp.*, 80 Md. App. 333, 343–45 (1989) (Trial court erred in denying motion for a new trial after it was discovered that jurors considered several documents that were not properly admitted into evidence.). In *Billman*, we explained that it is "a fundamental element of trial by jury that the information jurors glean about the case

before them should come solely from the evidence presented at trial and not from extraneous sources." *Id.* at 343.

Furthermore, a violation of a statute or regulation would, at most, establish evidence of ordinary negligence, not gross negligence or negligence *per se*. *See Polakoff v. Turner*, 385 Md. 467, 478 (2005); *State v. Gibson*, 254 Md. 399, 400-01 (1969).

Viewing the evidence in the light most favorable to Johnson, the evidence established that Officer Lee had activated her emergency lights but not her siren before she entered the intersection. Her testimony that she stopped before entering the intersection was unrebutted, as was the evidence that she was driving below the speed limit when the accident occurred.

While it is usually for the trier of fact to decide whether a defendant's conduct amounts to gross negligence, there are cases in which the evidence is such that no fact-finder could reasonably find gross negligence. In those circumstances, it is appropriate for the trial court to grant a motion for judgment. *See Cooper v. Rodriguez*, 443 Md. 680, 708–09 (2015) ("Whether or not gross negligence exists necessarily depends on the facts and circumstances in each case, and is usually a question for the jury and is a question of law only when reasonable people could not differ as to the rational conclusion to be reached." (cleaned up)). Assessing the evidence in the light most favorable to Ms. Johnson, no rational factfinder could conclude that Officer Lee "inflict[ed] injury intentionally" or was "so utterly indifferent to the rights of others that [she] act[ed] as if such rights did not exist."

Barbre, 402 Md. at 187. Moreover, Maryland caselaw is clear that Lee's conduct did not rise to the level of gross negligence.

In *Boyer v. State*, 323 Md. 558 (1991), people were killed in an automobile collision with an intoxicated driver, who was being pursued by a state trooper. *See id.* at 563. In addition to suing the drunk driver, the estate also sued the trooper for gross negligence. *See id.* at 564. The Court of Appeals ruled in favor of the trooper, holding that a police officer did not act with "wanton and reckless disregard for others" merely because he "drove at high speeds on a road congested with traffic in an attempt to apprehend a suspected intoxicated driver," "did not immediately activate his emergency equipment," and "violated police procedures." *Id.* at 579-80. This Court employed similar reasoning in *Khawaja v. Mayor & City Council, City of Rockville*, 89 Md. App. 314 (1991). This case concerned another automobile collision between a third-party vehicle and a police cruiser, which allegedly ran a red light in response to an emergency. *See id.* at 316. We held that allegations that a police officer failed to activate a siren and intentionally sped through a red light were insufficient to sustain a gross negligence finding. *See id.* at 318. Applying the reasoning of *Boyer* and *Khawaja* to the present case, Officer Lee's alleged act of entering an intersection at low speed, without sounding her siren, but with her emergency lights activated did not rise to the level of gross negligence.

In summary, we agree with Judge Cox's analysis of the evidence and his understanding of the law.

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS AFFIRMED. APPELLANT TO PAY COSTS.