

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

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KYLE BAKER by his Next Friend  
HOWARD BAKER,

UNPUBLISHED  
April 18, 1997

Plaintiff-Appellant,

v

No. 186480  
Oakland Circuit Court  
LC No. 93-464974-NI

JIMMY LEE STEELE and  
HOLLY SCHOOL DISTRICT,

Defendants-Appellees.

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Before: Jansen, P.J., and Reilly and E. Sosnick,\* JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendants and denying his motion for leave to amend his complaint. We affirm in part, reverse in part, and remand for further proceedings.

This cause of action stems from an accident in which plaintiff, then six years old, was struck by a truck driven by defendant Jimmy Lee Steele. Plaintiff sustained serious injuries. Plaintiff filed his complaint on October 29, 1993, alleging that Steele, a school maintenance worker, was negligent, was acting within the course and scope of his employment, and that under agency law Holly School District is vicariously liable for his negligence. In his complaint, plaintiff did not specifically allege that Steele's conduct rose to the level of gross negligence. Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10), contending that plaintiff's claim was barred by the defense of governmental immunity, that plaintiff had failed to state a valid claim in avoidance of governmental immunity, and that no genuine issues of material fact existed because Steele was not acting within the scope of his employment and his conduct did not rise to the level of gross negligence.

Plaintiff filed a motion for leave to amend his complaint to specifically allege gross negligence, which was denied by the trial court. The trial court granted defendants' motions for summary

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\* Circuit judge, sitting on the Court of Appeals by assignment.

disposition, but the record is not clear which paragraph of MCR 2.116(C) formed the basis of the trial court's grant. The parties agree that it appears that the trial court relied on MCR 2.116(C)(10). When parties rely on matters outside the pleadings in their arguments in opposition to and in support of the claim, as these parties do, this Court will assume that the motion was granted pursuant to MCR 2.116(C)(10) or, in this case, MCR.2.116(C)(7). *Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 524; 542 NW2d 912 (1995).

This Court will review a trial court's grant of summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Michigan Mutual Ins Co v Dowell*, 204 Mich App 81, 86; 514 NW2d 185 (1994). When ruling on a grant of summary disposition pursuant to MCR 2.116(C)(7), based on a finding that the claim is barred by governmental immunity, this Court must consider all documentary evidence submitted by the parties and accept as true all well-pleaded allegations, construing them in favor of the nonmoving party. *Summers v Detroit*, 206 Mich App 46, 48; 520 NW2d 356 (1994). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for a claim. When ruling on such a motion, the court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to it and grant summary disposition only if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Rice v ISI Mfg, Inc*, 207 Mich App 634, 635-636; 525 NW2d 533 (1994).

The trial court granted summary disposition in favor of defendants, specifically finding that Steele was not acting within the scope of his employment and that Steele's actions did not rise to a level of gross negligence. In his claim against defendants, plaintiff relies on the gross negligence exception to governmental immunity found in MCL 691.1407(2); MSA 3.996(107)(2), which grants immunity from tort liability to employees of governmental agencies, "while in the course of employment" as long as the following requirements are met:

- (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
- (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
- (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

Thus, a government employee enjoys governmental immunity from his tortious conduct committed while he was acting within the course of his employment and within the scope of his authority (or what he reasonably believes to be the scope of his authority) and is engaged in a governmental function, as long as his negligent conduct does not amount to gross negligence. As long as the employee enjoys immunity, his government employer can not be found vicariously liable for injury or damage caused by

his conduct. *Ross v Consumers Power (On Rehearing)*, 420 Mich 567, 624-625; 363 NW2d 641 (1984).

Defendant Holly School District argues that it is entitled to summary disposition under MCR 2.116(C)(7) because plaintiff has not pleaded facts that justify application of an exception to governmental immunity. Plaintiff contends that his complaint does contain sufficient facts to allege gross negligence on the part of Steele. We find that defendant Holly School District is immune from liability in this case because plaintiff has not shown that it is vicariously liable for Steele's acts. In other words, Holly School District is not liable in this case because it, as the governmental agency, was engaged in the exercise or discharge of a governmental function (patrolling school grounds). MCL 691.1407(2)(b); MSA 3.996(107)(2)(b).

Vicarious liability may be imposed on a governmental agency only when its officer, employee, or agent, acting during the course of his or her employment and within the scope of his or her authority, commits a tort while engaged in an activity which is non-governmental or proprietary, or which falls within a statutory exception. *Ross, supra*, p 591-592. In this case, the activity, patrolling school grounds, was a governmental function because the activity relates to the operation of the school. See *Id.*, p 591; *Payton v Detroit*, 211 Mich App 375, 392-393; 536 NW2d 233 (1995). Further, the activity was not a proprietary one because patrolling the school grounds was not done primarily for profit. MCL 691.1413; MSA 3.996(113). Finally, plaintiff has not identified any statutory exception under which this activity would fall. We note that the gross negligence exception cannot apply as a statutory exception with respect to the school district because that exception relates only to the conduct of governmental officers, employees, members, or volunteers.

Accordingly, we find that the trial court did not err in granting summary disposition in favor of defendant Holly School District, albeit for different reasons. Holly School District cannot be vicariously liable in this case because the activity involved here, patrolling school grounds, is a governmental function which was non-proprietary and does not fall under a statutory exception to governmental immunity.

However, we reverse the trial court's grant of summary disposition in favor of defendant Steele because we find that there are questions of fact with respect to the questions of gross negligence and whether Steele was acting while in the course of his employment. The reasonableness of an actor's conduct in relation to an established standard of conduct is a question for the jury, not the court. *Tallman v Markstrom*, 180 Mich App 141, 144; 446 NW2d 618 (1989). In actions involving the gross negligence exception to governmental immunity, summary disposition may not be granted if "reasonable jurors could honestly have reached different conclusions with regard to whether the defendant's conduct amounted to gross negligence. However, if on the basis of the evidence presented, reasonable minds could not differ, then the motion for summary disposition should be granted." *Vermilya v Dunham*, 195 Mich App 79, 83; 489 NW2d 496 (1992).

In this case, Steele admitted that he had "a couple of beers" with dinner before he got into his truck and drove to his job that involved patrolling school grounds on "Devil's Night." Steele also

admitted that he saw children playing on North Holly Road about one-quarter of a mile from where the accident occurred. Steele saw plaintiff on the left side of the road at the curb, about one-quarter of a mile away before hitting him. Steele stated to the police officer at the scene that he was driving thirty-five miles an hour, although he testified at his deposition that he lowered his speed to thirty to thirty-five miles an hour when he saw the children. The police officer detected a “weak odor” of alcohol on Steele’s person and a PBT indicated a blood alcohol level of .059%.

Reasonable minds could differ regarding whether the described conduct amounted to gross negligence or “a substantial lack of concern for whether injury results.” Because reasonable minds could differ, granting summary disposition pursuant to MCR 2.116(C)(7) or (C)(10) on the issue of whether Steele’s conduct amounted to gross negligence was inappropriate.

Also at issue was whether Steele was acting within the course of his employment with Holly School District at the time of the accident. The parties presented contradictory documentary evidence to support their positions. Plaintiff presented the deposition of his father, who testified that shortly after the accident he heard Steele tell one of the police officers that he had been patrolling the schools. Holly School District presented Steele’s deposition denying that he stopped at any schools and the depositions of two police officers who were at the accident scene and denied that Steele had told them he had been patrolling schools or that they suggested this to plaintiff’s father. Further, it is undisputed that Steele had been assigned to patrol school yards on the night in question on an overtime basis and that the accident occurred at 5:50 p.m. The issue whether Steele was acting within the course of his employment is thus a credibility contest between plaintiff’s deponent and defendant’s witnesses and presents a factual dispute. The trial court apparently weighed the credibility of the deposition testimony of plaintiff’s father and that of defendant’s witnesses and found the latter more credible. This was impermissible. The grant of a motion for summary disposition where the credibility of witnesses or deponents is crucial is “especially suspect.” *Vanguard Ins Co v Bolt*, 204 Mich App 271, 276; 514 NW2d 525 (1994). The trial court is “not permitted to assess credibility or to determine facts” when deciding a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

Because reasonable minds could differ regarding whether Steele’s conduct amounted to gross negligence and because the trial court impermissibly assessed the credibility of witnesses to determine whether Steele was acting within the course of his employment, we reverse the grant of summary disposition with respect to defendant Steele.

Plaintiff next contends that the trial court abused its discretion when it refused to allow him to amend his complaint to allege gross negligence. We agree. When a party seeks leave to amend a complaint, the trial court should freely grant leave when justice so requires. *Feliciano v Dep’t of Natural Resources*, 158 Mich App 497, 500; 405 NW2d 178 (1987). “When deciding a motion for summary judgment or summary disposition which alleges failure to state a valid claim or defense or that no genuine issue as to any material fact exists, the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified. MCR 2.116(1)(5).” *Feliciano, supra*.

The trial court stated no reason for denying plaintiff's motion for leave to amend his complaint. "Failure of a trial court to specify its reasons for denying leave to amend requires reversal, unless the amendment would be futile." *Noyd v Claxton, Morgan, Flockhart & VanLiere*, 186 Mich App 333, 340; 463 NW2d 268 (1990). "An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face." *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 625; 403 NW2d 830 (1986). In this case, the issues in contention are whether Steele's conduct amounted to gross negligence and whether Steele was acting within the scope of his employment at the time of the accident. Because there is a genuine issue of material fact, plaintiff's amendment of his complaint to add allegations of gross negligence would not be a futile act. The trial court abused its discretion in denying plaintiff leave to so amend, and we reverse the denial of plaintiff's motion to amend his complaint.

The trial court's grant of summary disposition with respect to defendant Holly School District is affirmed. We reverse the grant of summary disposition in favor of defendant Steele and remand for further proceedings consistent with this opinion. Jurisdiction is not retained. Defendant Holly School District only, having prevailed in full, may tax costs pursuant to MCR 7.219.

/s/ Kathleen Jansen

/s/ Edward Sosnick

I concur in the result only.

/s/ Maureen Pulte Reilly