

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD DARRELL SMITH, a Minor,
by his Next Friend LENA M. SMITH,

UNPUBLISHED
June 24, 1997

Plaintiff-Appellant,

v

No. 192957
Washtenaw Circuit Court
LC No. 94-1521 NO

LINCOLN CONSOLIDATED SCHOOLS
and LARRY DOMAS,

Defendants-Appellees.

Before: Gage, P.J., and Reilly and Hoekstra, JJ.

MEMORANDUM.

The Washtenaw Circuit Court granted defendants' motion for summary disposition based on governmental immunity principles, rejecting plaintiff's effort to fit the case within the gross negligence exception, MCL 691.1407(2); MSA 3.996(107)(2). Plaintiff appeals by right. The case is being decided without oral argument pursuant to MCR 7.214(E).

At the outset, this Court notes that the briefs of both parties and the opinion of the trial court address only issues of "gross negligence" under the Governmental Immunity Act. The controlling statute, however, is the School Code. MCL 380.1312(4)-(8); MSA 15.41312(4)(8). Under the statute, it is clear that the principal issue is whether defendant Domas exercised only necessary reasonable physical force upon plaintiff, and he is entitled to deference if his actions reflect a reasonable, good-faith judgment as to the appropriate response to the situation with which he was presented.

The trial court has not addressed this issue at all, instead applying a definition of "gross negligence" found in *Burnett v City of Adrian*, 414 Mich 448; 326 NW2d 810 (1982), which is neither the test for governmental immunity under §7(2) of the Governmental Immunity Act nor the current test for "gross negligence" under general tort jurisprudence in this State, *Dedes v Asch*, 446 Mich 99; 521 NW2d 488 (1994). This Court is a reviewing Court, and will not make that determination in the first instance. On remand, however, the trial court should note that whether an

appropriate degree of physical force was used may properly be a triable issue of fact. *Willoughby v Lehrbass*, 150 Mich App 319; 388 NW2d 688 (1986).

With respect to the school district, however, summary disposition was properly granted. Defendant Domas, individually, can be liable only if his actions involve unreasonable use of physical force, and thus only if such actions were outside the scope of his authority. A governmental agency can be held vicariously liable only when its officer, employee, or agent, acting during the course of employment and within the scope of authority, commits a tort while engaged in an activity that is nongovernmental or proprietary or that falls within a statutory exception. Thus, the school district cannot be vicariously liable for any tortious conduct by defendant Domas. *Gracey v Wayne County Clerk*, 213 Mich App 412, 421; 540 NW2d 710 (1995), *overruled in part on other grds American Transmissions, Inc v Attorney General*, 454 Mich 135; ___ NW2d ___ (1997).

Affirmed as to defendant school district, vacated and remanded as to defendant Domas. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Maureen Pulte Reilly
/s/ Joel P. Hoekstra