STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH MILLER,

Plaintiff-Appellant,

v

LIVONIA SCHOOL DISTRICT and WALTER YAUCH,

Defendants-Appellees.

UNPUBLISHED
February 19, 1999

No. 203581
Wayne Circuit Court
LC No. 96-621558 NO

Before: Gribbs, P.J., and Saad and P.H. Chamberlain*, JJ.

MEMORANDUM.

Plaintiff appeals by right the trial court's grant of summary disposition for defendants Livonia Public School District and Walter Yauch, on the basis of governmental immunity, in this personal injury action arising out of injuries plaintiff sustained while working for defendant Quality Screw Products, Inc. ("QSP"), pursuant to a "cooperative vocational education training" program at plaintiff's high school in the Livonia Public School District. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

We reject plaintiff's argument that his co-op placement at QSP was not a governmental function because his "general help" work there was unrelated to his educational and career goals in drafting and engineering. A "governmental function" is an activity "expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f); MSA 3.996(101)(1)(f), incorporating the governmental function definition established in *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 620; 363 NW2d 641 (1984). This definition is to be broadly applied and requires only that there be some constitutional, statutory or other legal basis for the activity in which the agency was engaged. *Harris v University of Michigan Board of Regents*, 219 Mich App 679, 684; 558 NW2d 225 (1996).

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

Improper performance of an activity authorized by law is, despite its impropriety, still "authorized" within the meaning of the *Ross* governmental function test. *Richardson v Jackson Co*, 432 Mich 377, 385; 443 NW2d 105 (1989); *Gracey v Wayne Co Clerk*, 213 Mich App 412, 420; 540 NW2d 710 (1995). Determination whether an activity was a governmental function must focus on the general activity and not the specific conduct involved at the time of the tort. *Pardon v Finkel*, 213 Mich App 643, 649; 540 NW2d 774 (1995), lv den 453 Mich 903 (1996).

Plaintiff has not persuaded us that the general activity of placing students in cooperative education work sites exceeds the school district's broad authority under the Revised School Code. See generally, MCL 380.11a; MSA 15.4011a. See also, e.g., 1987 AACS, R 340.1799d, establishing the qualifications for "work-study coordinators." Although plaintiff contends that the specific co-op placement at issue in this case was not sufficiently related to his educational and career goals to qualify as a true "vocational education program," mere improper performance of a cooperative vocational education job placement program is insufficient to establish that the co-op program itself is not an authorized governmental function. *Richardson v Jackson Co*, *supra*.

Plaintiff's reliance upon *Bokano v Wayne-Westland Comm Schools*, 114 Mich App 79; 318 NW2d 573 (1982), is unavailing. *Bokano* is not only factually distinguishable here, but the reasoning in *Bokano* is faulty because it is based upon Justice Moody's formulation of the so-called "essence of/to governing" governmental function test, which focuses upon whether the activity in question, due to its unique character or governmental mandate, can be effectively accomplished only by government. Because the governmental function test applied in *Bokano* was later rejected by the Michigan Supreme Court in *Ross*, *supra*, *Bokano* was effectively overruled in *Ross*. See *Jenkinson v DNR*, 159 Mich App 376, 378-379; 406 NW2d 301 (1987).

Alternatively, plaintiff argues that even if a governmental function is involved in this case, summary disposition is still inappropriate because a genuine issue of material fact exists as to whether defendant Yauch's conduct amounted to "gross negligence," which is defined by MCL 691.1407(2)(c); MSA 3.996(107)(2)(c) as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." We disagree.

If reasonable jurors could honestly reach different conclusions as to whether conduct constitutes gross negligence under MCL 691.1407(2)(c); MSA 3.996(107)(2)(c), the issue is a factual question for the jury. However, if reasonable minds could not differ, the issue may be determined by summary disposition. *Jackson v Saginaw Co*, 458 Mich 141, 146; 580 NW2d 870 (1998), quoting *Vermilya v Dunham*, 195 Mich App 79, 83; 489 NW2d 496 (1992).

"Gross negligence" requires more than ordinary negligence, such as a complete failure to take any steps to avoid a known danger. See, e.g., *Tallman v Markstrom*, 180 Mich App 141; 446 NW2d 618 (1989) (teacher allowed student to use a table saw unequipped with guarding and/or operator protective devices); *Nelson v Altmont Comm Schools*, 931 F Supp 1345 (ED Mich, 1996) (school principal's mishandling of matter after being placed on notice of teacher's improper relationship with student). Accordingly, summary disposition has been found appropriate in cases where the

defendant has taken at least some, albeit unsuccessful, steps to prevent injury. See e.g., *Jackson v Saginaw Co, supra,* 458 Mich at 151 (physician's failure to use laryngoscopic examination for diagnosis does not indicate substantial lack of concern where physician administered various other tests and medications); *Lindberg v Livonia Schools,* 219 Mich App 364, 368; 556 NW2d 509 (1996) (welding instructor not grossly negligent for failing to inquire as to handicapped student's abilities and limitations where instructor did ask how handicap could be accommodated, provided student with acceptable safety equipment and saw to it that student was periodically monitored); *Vermilya v Dunham, supra,* 195 Mich App at 82 (school principal not grossly negligent for failing to prevent soccer goal tip-over accident where principal, upon becoming aware that goals could be tipped over, asked maintenance supervisor to determine how to anchor goals and instructed students to stay off the goals).

Here, the undisputed evidence shows that defendant Yauch did take at least some steps to ensure safety at co-op job placements. Yauch made regular visits to inspect the safety of job sites such as QSP, sometimes unannounced. He also met regularly with co-op students to discuss and evaluate their job placements. Furthermore, unlike the situation in *Tallman, supra*, there is nothing to indicate that Yauch had any notice that the students placed at QSP were assigned to work on machines such as the drill press. To the contrary, Yauch testified that he did not intend or anticipate plaintiff's working on any such machines at QSP. While Yauch may have failed to communicate any restriction against using machinery to plaintiff or QSP, this does not suggest a substantial lack of concern regarding plaintiff's safety.

Plaintiff contends that Yauch's placement of plaintiff at QSP amounts to a violation of § 3 of the Youth Employment Standards Act (YESA), MCL 409.103; MSA 17.731(3), which generally prohibits the employment of minors in or about "hazardous or injurious" occupations. It is debatable whether plaintiff's intended "general help" work constituted "hazardous or injurious" employment as defined by the Department of Labor. Moreover, the cooperative vocational education training agreement signed on behalf of the employer and the school district arguably constitutes the kind of agreement or contract that would exempt plaintiff's employment from the requirements of the YESA. See MCL 409.118; MSA 17.731(18). See also 1988 AACS, R 408.6206. In any event, while a statutory violation may indicate a breach of the ordinary standard of care, a mere violation of the YESA, without more, provides no indication whether Yauch demonstrated the kind of substantial lack of concern about injury to plaintiff necessary to establish "gross negligence" as defined by MCL 691.1407(2)(c); MSA 3.996(107)(2)(c).

Affirmed.

/s/ Roman S. Gribbs
/s/ Henry William Saad
/s/ Paul H. Chamberlain