STATE OF MICHIGAN

COURT OF APPEALS

HEATHER MITCAVISH, Conservator of the Estate of NATHANIEL MORRISON, a minor,

Plaintiff-Appellant,

v

THOMAS STOUT and ELIZABETH HARVEY,

Defendants-Appellees.

UNPUBLISHED
February 15, 2000

No. 212843
Calhoun Circuit Court
LC No. 97-001948-NO

Before: Murphy, P.J., and Hood and Neff, JJ.

PER CURIAM.

Plaintiff Heather Mitcavish, conservator of the Estate of Nathaniel Morrison, a minor, appeals as of right from an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) and (10). We affirm.

Plaintiff claims that while Morrison was in first grade, he was sexually molested between ten and twenty times by an older female student, in a secluded, unlocked bathroom at the end of the school day. Plaintiff filed a complaint against defendants Thomas Stout, the school principal, and Elizabeth Harvey, Morrison's first-grade teacher, alleging gross negligence. Specifically, plaintiff claimed that defendants knew that Morrison had been the target of two physical assaults by other students, that defendants failed to supervise Morrison at the end of the day as he traveled to the parking lot to meet his mother, and that defendants failed to lock or supervise the secluded bathroom.

Defendants moved for summary disposition under MCR 2.116(C)(7), (8), and (10), and the trial court granted the motion under MCR 2.116(C)(7) and (10). On appeal, plaintiff contends that the trial court improperly granted summary disposition because a genuine factual dispute existed on the issue of foreseeability, and because a jury should determine whether defendants' conduct constituted gross negligence that is required to defeat defendants' governmental immunity.

Plaintiff claims that a jury should have decided whether defendants' conduct amounted to gross negligence, which would negate defendants' governmental immunity defense. We disagree.

We review the applicability of governmental immunity de novo. *Baker v Waste Mgt of Michigan, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995). To survive a motion for summary disposition under MCR 2.116(C)(7), a plaintiff must allege facts that justify the trial court in applying an exception to immunity. *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 134; 545 NW2d 642 (1996). Therefore, the plaintiff's claim is barred where the plaintiff cannot circumvent the governmental immunity defense. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994).

Defendants are immune from tort liability if they have not acted with "gross negligence." MCL 691.1407(2)(c); MSA 3.996(107)(2)(c). In relevant part, MCL 691.1407(2)(c); MSA 3.996(107)(2)(c) provides that "'gross negligence' means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." This statutory standard requires more than evidence of ordinary negligence to create a jury question. *Maiden v Rozwood*, 461 Mich 109. 122; 597 NW2d 817 (1999).

In *Vermilya v Dunham*, 195 Mich App 79, 80-81; 489 NW2d 496 (1992), we affirmed the grant of summary disposition under MCR 2.116(C)(7). In *Vermilya*, an elementary school student was injured when several students pushed over a steel soccer goal. *Id.* at 80-81. The father of the injured student sued the school's principal, alleging gross negligence; however, the trial court granted the principal's motion for summary disposition. *Id*. at 80-81, 83.

On appeal, we noted that the trial court properly granted summary disposition because reasonable minds could not conclude that the principal's conduct amounted to gross negligence. *Id*. at 83. When the principal learned of the soccer goal's unsafe condition two weeks before the student's accident, the principal took several measures to ensure the safety of the students. *Id*. For example, upon learning of the hazard, the principal asked the maintenance person to anchor the loose soccer goal, he warned students to stay away from the soccer goals, and he punished students for climbing the goals. *Id*.

In the present case, plaintiff argues that reasonable minds could disagree whether defendants' conduct amounted to gross negligence. Plaintiff argues that defendants knew that Morrison had been assaulted by two other students during his first-grade year, and that defendants failed to supervise a secluded bathroom in which an assault was foreseeable. However, plaintiff's deposition testimony indicates that defendants took measures to prevent the isolated assaults from recurring. Plaintiff claimed that Stout said he would talk with the student who chased and hit Morrison, and that Harvey apparently prevented Morrison's first-grade classmate from touching his buttocks. Moreover, defendants had no reason to believe that Morrison or any student would be subjected to sexual assaults by another student in the secluded, unlocked basement bathroom.

Plaintiff also argues that summary disposition was improper based on Stout's conversation with Morrison in which Stout allegedly told Morrison not to tell his parents every time a student touched him. However, plaintiff has mischaracterized Stout's action as "silencing" Morrison from reporting future assaults. To the contrary, the evidence supports the conclusion that Stout merely offered "life advice" to a young student, certainly a function well within the scope of the educational function of a principal.

At the most, defendants' conduct constitutes ordinary negligence; however, there are no facts that suggest that defendants' conduct demonstrated a reckless disregard for whether students were injured. Because plaintiff has failed to offer any facts that would lead reasonable minds to differ as to whether defendants' conduct constituted gross negligence, the trial court properly entered summary disposition on defendants' motion under MCR 2.116(C)(7).

Our disposition of this issue makes it unnecessary for us to address defendants' other issue on appeal regarding the trial court's grant of summary disposition under MCR 2.116(C)(10).

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Janet T. Neff