STATE OF MICHIGAN

COURT OF APPEALS

ANA CABRERA, as Next Friend of LISA CABRERA, and JOSE CABRERA,

Plaintiffs-Appellants,

v

MARK S. WERLEY,

Defendant-Appellee.

UNPUBLISHED
November 16, 2001

No. 226183
Ottawa Circuit Court
LC No. 98-031610-CZ

Before: Gage, P.J., and Jansen and O'Connell, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition in favor of defendant under MCR 2.116(C)(7) (claim barred by immunity) and (10) (no genuine issue as to any material fact and defendant entitled to judgment as a matter of law). We affirm.

Ana and Jose Cabrera are the parents of Lisa Cabrera. On November 3, 1997, Lisa was involved in a fight at her high school with another student, Terry Garcia. During or after gym class, the two students exchanged words and Lisa hit Terry in the face. Terry fell or was pushed to the ground, Lisa then straddled Terry, and punched her in the head and chest while threatening to kill her. Kathy Kreps, a physical education teacher, attempted to break up the fight, but was kicked by Lisa and knocked to the ground. Defendant Mark Werley, also a physical education teacher, noticed the altercation and pushed Lisa off Terry. Defendant restrained Lisa on the floor and told her to calm down. Defendant released Lisa when she assured him that she had calmed down; however, she lunged at Terry again, trying to kick and hit her. Defendant again grabbed Lisa from behind and fell backward. However, in the course of falling, the two became entangled and Lisa struck the gym floor on the right side of her face. The impact caused a broken nose and dislocated jaw.

Plaintiffs filed suit on August 12, 1998, alleging negligence,[1] assault and battery, gross negligence, "violation of common law liability for student's injuries proximately caused," and

[1]At the motion hearing, plaintiffs' counsel stated that the claim was actually for "excessive force" and did not sound in negligence. A review of the complaint reveals that the count indeed appears to be a negligence count because it alleges defendant's unreasonable and negligent conduct.

two derivative claims by the parents. Defendant moved for summary disposition, contending that plaintiffs had not shown gross negligence and that under the School Code, defendant was permitted to use reasonable force. See MCL 380.1312. The trial court granted summary disposition, concluding that there was no evidence that defendant used unreasonable force.

We first address plaintiffs' argument that the trial court erred in refusing to consider witness statements and a police statement made by defendant that were attached to plaintiffs' response brief. The handwritten statements were made by students who witnessed the incident and there is a handwritten police report indicating defendant's statement to the police shortly after the incident. The trial court did not err in refusing to consider these statements because they are unsworn statements that would clearly be inadmissible as substantive evidence. MCR 2.116(G)(6) requires that affidavits, admissions, depositions, or other documentary evidence offered in opposition to a motion for summary disposition under subsections (C)(7) or (10) shall be considered to the extent that the content or substance would be admissible as evidence. See also, *Maiden v Rozwood*, 461 Mich 109, 119, 121; 597 NW2d 817 (1999) (the substance or content of the supporting proofs must be admissible in evidence and the reviewing court should evaluate a motion under subsections (C)(7) and (10) by considering the substantively admissible evidence actually proffered in opposition to the motion). Unsworn averments and inadmissible hearsay do not satisfy the court rule, *Marlo Beauty Supply, Inc v Farmers Ins Group of Companies*, 227 Mich App 309, 321; 575 NW2d 324 (1998), nor do statements in police reports, *Maiden, supra*, pp 124-125.

Plaintiff also argues that summary disposition should not have been granted for defendant because the issue of the reasonableness of his actions is a question of fact for a jury.

Under the School Code, a teacher may use reasonable physical force on a student to maintain order and control in a school setting. MCL 380.1312(4). The statute specifically provides that a teacher may use physical force to, among other things, "quell a disturbance that threatens physical injury to any person." MCL 380.1312(4)(d). Further, in determining whether the teacher has acted in accordance with § 1312(4), "deference shall be given to reasonable good-faith judgments made by that person." MCL 380.1312(7). This Court has held that the general rule is that a teacher is immune from liability for reasonable physical force or punishment used on a student to maintain discipline. *Willoughby v Lehrbass*, 150 Mich App 319, 340; 388 NW2d 688 (1986). Factors to consider in assessing reasonableness are the nature of the punishment, the child's age and physical condition, and the teacher's motive in inflicting the punishment. *Id.*

Here, plaintiffs have failed to submit admissible evidence that a material factual dispute exists with regard to whether defendant's conduct was unreasonable. The evidence indicates that defendant attempted to break up a fight instigated by Lisa upon another student. Defendant initially pulled Lisa off Terry and restrained her on the floor until she calmed down. Defendant released Lisa when she assured him that she was calm; however, after being released she immediately lunged at Terry to kick and hit her. Defendant again restrained Lisa while standing behind her, but she continued to kick her legs. As defendant again attempted to hold Lisa on the floor, Lisa turned her head and struck the floor. Indeed, Lisa testified at her deposition that she believed that defendant intended to break up the fight and was trying to calm her down. There is absolutely no evidentiary support for plaintiffs' contention that defendant "body slammed" Lisa to the floor.

Plaintiffs' reliance on *Widdoes v Detroit Public Schools*, 218 Mich App 282; 553 NW2d 688 (1996) is entirely misplaced inasmuch as that case did *not* hold that the teacher's conduct in grabbing a student's arm and escorting him out of the gym constituted unreasonable force. Rather, this Court affirmed the circuit court's ruling that the teacher did not violate the corporal punishment prohibition in § 1312 of the School Code and remanded to the State Tenure Commission to determine whether the teacher violated any policy of the Detroit Public Schools prohibiting the use of excessive force. After remand to the State Tenure Commission, this Court rather strongly held that the teacher's actions did not constitute excessive force. *Widdoes v Detroit Public Schools*, 242 Mich App 403; 619 NW2d 12 (2000).

Lastly, we find no error with respect to the trial court's statement that the use of reasonable force in the School Code is akin to the reasonable force that police officers are allowed to use. The trial court was merely using an analogy in determining whether there was evidence that defendant's conduct was unreasonable. Because the trial court's conclusion that the evidence showed that defendant's actions were reasonable, even taken in a light most favorable to plaintiffs, was correct, there is no basis to reverse the trial court. Consequently, because the evidence proffered by plaintiffs does not create a material factual dispute as to whether defendant's conduct was unreasonable, summary disposition was properly granted n favor of defendant.

Affirmed.

/s/ Hilda R. Gage
/s/ Kathleen Jansen
/s/ Peter D. O'Connell