STATE OF MICHIGAN

COURT OF APPEALS

KEVYN CLARK, a Minor, by his Next Friend and Mother, LETONIA CLARK,

Plaintiff-Appellee,

v

STATE OF MICHIGAN, HARRY HICKS, and NEIL WASSERMAN,

Defendants-Appellants.

and

TINA MCCRAY, as Guardian of JUAN MCCRAY, a Minor,

Defendant.

UNPUBLISHED
July 5, 2002

No. 231769
Wayne Circuit Court
LC No. 99-901932-NO

KEVYN CLARK, a Minor, by his Next Friend LETONIA CLARK,

Plaintiff-Appellee,

v

STATE OF MICHIGAN,

Defendant-Appellant.

No. 231854
Court of Claims
LC No. 99-017336-CM

Before: Zahra, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Defendants appeal by leave granted the circuit court's denial of their motion for summary disposition brought under MCR 2.116(C)(7) and (C)(8), in these consolidated cases alleging gross negligence by the government defendants and a public building defect claim.[1] We reverse.

Letonia Clark, next friend and mother of Kevyn Clark, alleged that Kevyn was sexually assaulted on February 16, 1998, when he was eight years old and a patient at an inpatient juvenile psychiatric facility operated by the Michigan Department of Community Health, the Hawthorn Center. Neil Wasserman is the director and CEO of the Hawthorn Center. Defendant Harry Hicks is the child care worker on shift in Kevyn's living area at the Hawthorn Center at the time of the incident. Juan McCray, twelve years old at the time, is the alleged perpetrator. Tina McCray is Juan's mother.

Defendants State of Michigan, Wasserman and Hicks filed a motion for summary disposition under MCR 2.116(C)(7) and (8). After the circuit court denied the motion, defendants filed an application for leave to interlocutorily appeal. This Court granted leave limited to the issues raised in defendants' application and consolidated the cases.

I

Defendants argue that the circuit court improperly denied their motion for summary disposition of plaintiff's gross negligence claim with regard to the state and Wasserman. We agree.

We review de novo the circuit court's determination to deny summary disposition. *Brennan v Edward D Jones & Co*, 245 Mich App 156, 157; 626 NW2d 917 (2001). On a motion under MCR 2.116(C)(7) all well pleaded allegations are accepted as true unless contradicted by affidavits or other appropriate documentation submitted by the movant. *Patterson v Kleiman*, 447 Mich 429, 433-434, 434 n 6; 526 NW2d 879 (1994). A motion under MCR 2.116(C)(7) should not be granted unless no factual development can provide a basis for recovery; however, if the pleadings show that a party is entitled to judgment as a matter of law, or if there is no genuine issue of material fact, summary disposition is proper. Bgg *nan*, *supra* at 157.

Section 7 of the governmental tort liability act, § MCL 691.1401 *et seq.*, states that except as otherwise provided in the act "all governmental agencies shall be immune from tort liability in all cases wherein the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). The act defines "governmental agency" as meaning the state or a political subdivision. MCL 691.1401(d). The term "governmental function" is to be broadly construed, and the statutory exceptions narrowly construed. *Kerbersky v Northern Michigan University*, 458 Mich 525, 529; 582 NW2d 828 (1998). Officers and employees of

[1] Plaintiff filed suit in circuit court and the court of claims. The parties stipulated to joinder of the cases.

governmental agencies are not subject to immunity if their conduct amounts to "gross negligence that is the proximate cause of the injury or damage." MCL 691.1407(2). The statute defines "gross negligence" as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c).

The Hawthorn Center, an in-patient facility operated by the Michigan Department of Community Health, is immune from tort liability when engaged in a governmental function. See MCL 691.1407(1) and (4)(b). There is no dispute that the Hawthorn Center was engaged in a governmental function.

As the director of the Hawthorn Center, Wasserman is immune from tort liability unless his conduct was grossly negligent. Plaintiff submitted documentary evidence in response to defendants' motion for summary disposition that in February 1998, when Kevyn was assaulted, Wasserman was the director and CEO of the Hawthorn Center, was in charge of administering the Center's programs, all staff reported to him through intermediate supervision, and he was responsible for the Center's day to day operations. Wasserman testified at deposition that the Center was licensed to hold 118 patients, and that in 1999 approximately 325 staff were employed (mostly nursing staff, which includes child care workers). Wasserman testified that the Center's patients are generally aged four to eighteen, are referred by community mental health offices, evaluated by in-house staff, and are assigned to living units "by age and sex roughly." There are six living areas. Five of the living units have twenty people, and one has eighteen people. Each unit has from one to four bedrooms.

Wasserman testified that the admissions committee, of which he was not a member, made the final determination regarding which patients are housed in what living area, and that he did not participate in that process, or in the process of changing patients' living situations. Wasserman testified that he had no control over the placement of inpatients, did not review the psychological assessments or intake of patients, and that the admissions committee, headed by a clinical director, did so. He testified that he did not directly participate in the decisions regarding patient placement in particular bedrooms within the living areas, and that treatment teams (the ward psychiatrist, psychologist, social worker, and nursing staff) made those decisions. Wasserman testified that he had no personal involvement in the individual placement of patients at the Hawthorn Center, and that his responsibility for patient placement was one of "periodically" being asked to give final approval to staff recommendations for general assignments of patients to living areas. Contrary to plaintiff's assertion, Wasserman did not testify that he was "aware of McCray's criminal and violent propensities," rather, he testified that he had no idea about McCray's assessment when he first came to Hawthorn Center, and had no firsthand knowledge whatever regarding McCray.

Plaintiff submitted below an affidavit of an expert in behavior disorders opining that Wasserman "knew or should have known before and during Juan McCray's admission that he was a juvenile who put himself and others at risk, including but not limited to sexual aggression." The affidavit further stated that "information drawn from Defendant McCray during the admission process is replete with warnings about violence and sexual aggression," and that "Juan McCray's behavior at the Hawthorn Center was consistently out of control; there was a clear picture of a juvenile capable of predator behavior." The affidavit stated that Wasserman, as director of the Center, "should have heeded to these warnings," and that his failure to act was

"so reckless as to show a substantial lack of concern for whether an injury results, gross negligence."

Contrary to plaintiff's assertions, Wasserman testified that he did not participate in patient placement decisions, but rather, that staff teams made those determinations. Given that plaintiff presented no evidence that Wasserman participated in the decision to house Kevyn with Juan, and other staff or staff teams were responsible for placing patients, we conclude that plaintiff presented insufficient evidence to raise a genuine issue of fact whether Wasserman's conduct was grossly negligent. Wasserman was thus immune.

As discussed above, the State is not *directly* liable because the Hawthorn Center was engaged in a governmental function. The State can be *vicariously* liable for Wasserman's conduct only if Wasserman, during the course of his employment and within the scope of his authority, committed a tort while engaged in an activity that is nongovernmental or proprietary, or that falls within a statutory exception. *Ross v Consumers Power (On Rehearing)*, 420 Mich 567, 625; 363 NW2d 641 (1984). Plaintiff does not contend that Wasserman was engaged in a nongovernmental, or proprietary activity. The State and Wasserman should have been dismissed under MCR 2.116(C)(7).

II

Relying on *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000), overruling *Dedes v Asch*, 446 Mich 99, 107; 521 NW2d 488 (1994), defendants argue that the circuit court erred in denying Harry Hicks' motion for summary disposition with respect to plaintiff's gross negligence claim because Hicks' alleged gross negligence was not the proximate cause of plaintiff's injuries. We agree.

Harry Hicks testified at deposition that he had been a child care worker at Hawthorn Center for twenty-seven years. He testified that his general responsibilities were to direct care of the children, including following the handling orders the doctors write, teaching them better social skills and daily living behaviors, and role modeling. Hicks testified that he did not recall any order being written up that Juan McCray was a high risk for sexual assault around February 1998. Hicks testified that the patients' psychological assessments done at intake were kept in patients' records, but that he did not routinely or normally review them in their entirety, and he could not remember any reason why he would necessarily do that. Hicks testified that he was not aware that McCray was a high risk for sexual assault. He testified that in February 1998, the ratio of child care workers to patients in his area was ten to two. Hicks testified that he was on shift on February 16, 1998, from 3:00 pm to 11:00 p.m., and that the incident in question occurred around 4:30 in the dorm room where Kevyn and Juan lived with two other persons. Hicks testified that he was on a careful watch at the time, doing 15-minute checks on Juan McCray, when he came upon the two boys in the dorm room, the door of which was open, Kevyn was face down on the floor with his pants pulled down and buttocks exposed and Juan was laying next to him on the floor. Hicks reported it to the nurse in charge of the living area and may have reported it to the doctor on call. He separated the boys, took Kevyn to the nursing office, and gave a statement to the police. Hicks testified that he was not sure why Juan had been on careful watch.

The affidavit of one of plaintiff's experts, Dr. Lybarger, stated that Hicks "should have known before and during McCray's admission that he was a juvenile who put himself and others at risk, including but not limited to sexual aggression," and that Hicks' "inappropriate supervision was so reckless as to show a substantial lack of concern for whether injury results, gross negligence."

Assuming, arguendo, that Hicks' conduct was grossly negligent, the Supreme Court in *Robinson, supra*, held that the phrase "the proximate cause" in MCL 691.1407(2)(c) means that the employee's conduct amounting to gross negligence must have been "the one most immediate, efficient, and direct cause of the injury or damage." *Robinson, supra* at 459.

Plaintiff argues that *Robinson* does not apply because it is factually distinguishable and involved motor vehicles, and that if *Robinson* does apply this Court should refuse to apply it and follow the dissent in *Robinson.*[2] Neither assertion has merit. The *Robinson* Court's language regarding the phrase "the proximate cause" in MCL 691.1407(2)(c), quoted *supra,* is not limited:

> As to subsection (c), in *Dedes, supra* at 107, this Court effectively interpreted "the proximate cause" in subsection (c) to mean "a proximate cause." The Court further explained that "the" proximate cause does not mean "sole" proximate cause. *Id.* **We overrule *Dedes* to the extent that it interpreted the phrase "the proximate cause" in subdivision (c) to mean "a proximate cause."** The Legislature's use of the definite article "the" clearly evinces an intent to focus on one cause. The phrase "the proximate cause" is best understood as meaning the one most immediate, efficient, and direct cause preceding an injury." [*Robinson,* 462 Mich at 458-459. Emphasis added.]

There is no indication, and plaintiff cites no authority in support of his argument, that the *Robinson* Court's holding regarding proximate cause applies only to cases involving police chases and motor vehicles, as plaintiff argues. Further, this Court has no authority to opt to apply the *Robinson* dissent.

On the record before us, the most immediate, efficient, and direct cause of plaintiff's injuries was Juan McCray's alleged sexual assault on Kevyn. Thus, reversal is required under *Robinson, supra*.

III

Defendants argue that the circuit court erred in denying their motion for summary disposition under MCR 2.116(C)(8) of plaintiff's public building defect claim. We agree.

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[2] At argument, plaintiff asserted for the first time that *Robinson* should be applied prospectively only. However, this argument is not preserved, and, even though a question of law, is not properly before us. Plaintiff did not raise the prospective/retroactive issue in the circuit court, and did not raise it in her brief on appeal. Nor did plaintiff file a supplemental brief.

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). All well pleaded factual allegations are accepted as true, together with any inferences reasonably drawn therefrom. *Id.*

Statutory exceptions to governmental immunity are to be narrowly construed, including the public building exception. *Horace v Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). In order for the public building exception to governmental immunity to apply, the defect or condition must be "of the building itself," *id.* at 756, and the condition of the building must have caused the injury. *Reardon v Dep't of Mental Health*, 430 Mich 398, 410-411; 424 NW2d 248 (1988).

Plaintiff's second-amended complaint alleged that the Hawthorn Center was a defective building for "failure to have proper residencies for persons such as Defendant Juan McCray;" "failure to have proper observation for dangerous behavior that would cause harm to others, such as complained of;" and "failure to have any type of observation and/or monitoring devices for the residence rooms." Assuming that plaintiff pleaded a dangerous or defective condition in the building itself, plaintiff did not plead or present evidence to show that such a condition caused Kevyn's injury. *Reardon, supra.* Plaintiff's public building exception claim should have been dismissed.

Reversed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Helene N. White