STATE OF MICHIGAN

COURT OF APPEALS

DEBRA HAWKINS, Next Friend of D'ARLO HAWKINS, a Minor,

Plaintiff-Appellee,

v

DARRIN EASON,

Defendant-Appellant,

and

DETROIT PUBLIC SCHOOLS, DETROIT BOARD OF EDUCATION and A. K. TEMPLE,

Defendants.

UNPUBLISHED
June 22, 2004

No. 246168
Wayne Circuit Court
LC No. 00-034167-NO

Before: Neff, P.J., and Zahra and Murray, JJ.

PER CURIAM.

Defendant Eason appeals as of right from a circuit court order denying his motion for summary disposition based on governmental immunity. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson,* 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion premised on immunity granted by law is properly considered under MCR 2.116(C)(7). "This Court reviews the affidavits, pleadings, and other documentary evidence submitted by the parties and, where appropriate, construes the pleadings in favor of the nonmoving party. A motion brought pursuant to MCR 2.116(C)(7) should be granted only if no factual development could provide a basis for recovery." *Cole v Ladbroke Racing Michigan, Inc,* 241 Mich App 1, 6-7; 614 NW2d 169 (2000).

An employee of a governmental agency is immune from tort liability for an injury to a person caused by the employee while in the course of employment if (1) the employee is acting or reasonably believes he or she is acting within the scope of his or her authority, (2) the governmental agency is engaged in the exercise or discharge of a governmental function, and (3) the employee's conduct does not amount to gross negligence that is the proximate cause of the

injury. MCL 691.1407(2). In other words, "[a] governmental employee is not immune from tort liability for injuries to persons caused by the employee while in the course of employment if the employee's actions amount to gross negligence that is the proximate cause of the injury." *Stanton v Battle Creek*, 237 Mich App 366, 374; 603 NW2d 285 (1999), aff'd 466 Mich 611; 647 NW2d 508 (2002).

Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c). Thus, "evidence of ordinary negligence does not create a material question of fact concerning gross negligence." *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999). "Summary disposition is precluded where reasonable jurors honestly could have reached different conclusions with respect to whether a defendant's conduct amounted to gross negligence. However, where, on the basis of the evidence presented, reasonable jurors could not differ with respect to whether a defendant was grossly negligent, summary disposition should be granted." *Stanton, supra* at 375.

The evidence submitted by the parties with their briefs and at the hearings, taken in a light most favorable to plaintiff, showed that Eason used a football provided by the school, he threw it far down the field to a group of boys, including D'Arlo Hawkins, who were waiting to catch it, and that Hawkins saw the ball coming but turned away from it and then turned back and was struck in the eye.[1] It could be argued that defendant was negligent in throwing a ball with sufficient force to carry it thirty or forty yards to a group of fourth or fifth grade boys who were not skilled players. However, this was an activity Eason and the boys engaged in regularly, apparently without incident, and Eason had no reason to know that Hawkins, despite seeing the ball being thrown, would turn away from it and then turn back. Under the circumstances, defendant's conduct was not so callous as to rise to the level of gross negligence as that term is defined by statute. Accordingly, we find that the trial court erred in denying defendant's motion for summary disposition.

Reversed.

/s/ Janet T. Neff
/s/ Brian K. Zahra
/s/ Christopher M. Murray

[1] Because Hawkins admitted at his deposition that he was still on the field when Eason threw the ball, that he saw Eason throw the ball, and that he saw the ball coming toward him, his statements to the contrary in his subsequent affidavit do not create an issue of fact. *Dykes v William Beaumont Hosp,* 246 Mich App 471, 480-481; 633 NW2d 440 (2001).