STATE OF MICHIGAN

COURT OF APPEALS

HENRY SEAGRAVES, Next Friend of GARY W. SEAGRAVES, LIP,

Plaintiff-Appellee,

v

MARK BRAMAN,

Defendant,

and

JOAN NEPH,

Defendant-Appellant.

UNPUBLISHED
December 20, 2007

No. 274996
ISABELLA CIRCUIT COURT
LC No. 05-004563-NO

Before: Donofrio, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

In this gross negligence action, defendant, Joan Neph,[1] appeals as of right from the trial court's denial of her motion for summary disposition. After reviewing the record we conclude that a reasonable juror could find that defendant was grossly negligent and that her conduct was the proximate cause of injuries suffered by plaintiff, Gary W. Seagraves,[2] therefore, we affirm and remand to the circuit court for trial.

I

The facts of this case are not in dispute and the trial court summarized them as follows:

> Plaintiff, Gary Seagraves, is a severely mentally disabled person and is a resident of the Mount Pleasant Center (MPC). At the time of the incident that gave rise to

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[1] The trial court granted summary disposition in favor of defendant State of Michigan, Department of Community Health, Mt. Pleasant Center, and defendant Mark Braman and they are not parties to this appeal.

[2] For purposes of this opinion, the term "plaintiff" refers to Gary W. Seagraves, the injured party.

> this case, Plaintiff was forty-two years old. On July 15, 2003, [Mark] Braman was supervising Plaintiff and three other patients on a patio adjacent to their residential care unit. Plaintiff's care status for outside supervision was "hands on." Before leaving the patio, Braman allegedly asked Defendant Neph to temporarily supervise Plaintiff and the three others. [Defendant] Neph sat next to Plaintiff on a bench that was on the outdoor patio. About 30 minutes later, a resident took a wheelchair that belonged to another resident and rode it down a short hill adjacent to the patio. [Defendant] Neph left Plaintiff sitting on the bench to take care of the wheel-chair situation. The bench, which was outside Plaintiff's residential unit, fronted Pickard Street in Mt. Pleasant. While [Defendant] Neph was putting the wheelchair away[, and] out of Plaintiff's sight, [a function] which took between five and ten minutes, Plaintiff walked out into the street and was hit by a bus. As a result, he suffered an open tibia/fibula fracture and complex nasal fractures. He now walks with a slight limp.

Plaintiff thereafter filed suit against the MPC, Braman, and defendant alleging grossly negligent supervision. The MPC, Braman, and defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). Finding that plaintiff could not overcome government immunity on behalf of the MPC, and that Braman could not be the proximate cause of plaintiff's injuries, the trial court granted summary disposition to both parties. However, the trial court held that summary disposition pursuant to MCR 2.116(C)(7) or (10)[3] was not proper against defendant because "a reasonable juror may find that she was grossly negligent and that her conduct was the proximate cause of [p]laintiff's injuries." This appeal followed.

II

A trial court's ruling on a motion for summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). This case involves the applicability of the governmental immunity statute, a question of law that is also reviewed de novo. *Baker v Waste Mgt of Michigan, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995).

III

Governmental immunity is addressed by the government tort liability act (GTLA). MCL 691.1401 *et seq*. That statute proscribes government liability for negligence with some exceptions. MCL 691.1407(2) provides individual immunity for governmental employees under certain circumstances. The statute states, in part:

> Except as otherwise provided in this section, . . . each officer and employee of a governmental agency . . . is immune from tort liability for an injury to a person . . . caused by the officer, employee . . . while acting on behalf of a governmental agency if all of the following are met:

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[3] The trial court stated in its opinion that because none of the defendants below had addressed the motion pursuant to MCR 2.116(C)(8) in their brief, that motion failed as well.

(a) The officer, employee . . . is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) The officer's, employee's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage. [MCL 691.1407(2); *Cooper v Washtenaw County*, 270 Mich App 506, 508; 715 NW2d 908 (2006).]

Employees of a governmental agency acting within the scope of their authority and in furtherance of a governmental function are immune from tort liability unless their conduct constitutes gross negligence that is the proximate cause of the injury. MCL 691.1407(2); *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000). The issue of gross negligence may be determined by summary disposition only where reasonable minds could not differ. *Jackson v Saginaw County*, 458 Mich 141, 146-147; 580 NW2d 870 (1998). Proximate cause is satisfied where gross negligence is the one most efficient and direct cause preceding the injury. *Rakowski v Sarb*, 269 Mich App 619, 636; 713 NW2d 787 (2006).

A. Gross Negligence

Defendant argues that the trial court should have granted summary disposition in her favor because no reasonable juror could conclude that a question of fact exists regarding whether she was grossly negligent when she lost track of plaintiff while chasing another resident who borrowed a wheelchair for a joy ride down a hill. A governmental employee, acting within the scope of her authority, is immune from tort liability unless she was grossly negligent, and her gross negligence was the proximate cause of the injury or damage. MCL 691.1407(2)(a)-(c). Gross negligence is "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a); *Xu v Gay*, 257 Mich App 263, 269; 668 NW2d 166 (2003). "Simply alleging that an actor could have done more is insufficient [to establish gross negligence] under Michigan law, because, with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result." *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). Instead, gross negligence suggests a willful disregard of precautions or measures to attend to safety and a singular disregard of substantial risks. *Id*.

In this case, plaintiff's diagnosis is profound mental retardation and autism. The record also showed that plaintiff did not have common safety skills, rather when outside of the MPC building he had no safety skills and required an "enhanced level of supervision." An MPC Quarterly Review dated July 13, 2003 stated that plaintiff "continues to need staff direct and almost constant physical guidance to transport outside the building [plaintiff] is so focused on his preferred activity that he is not focusing on his safety and what is going on around him." The record shows that Christopher Demler, a manager at MPC, testified during deposition that plaintiff's outdoor supervision level was "hands-on" meaning that "[a staff member's] hands have to be on him. You have to hold his hand."

When the incident occurred, there is evidence that defendant was in charge of plaintiff's care since Braman alleged that he asked defendant to care for plaintiff while he stepped away to use the restroom. Thus, there is evidence that defendant was solely responsible for plaintiff's

supervision at the time of the incident. There is also evidence that defendant was aware of MPC's policy regarding the "hands-on" level of supervision plaintiff required at all times while outside of MPC. There is also evidence in the record that defendant knew that plaintiff had an affinity for the smell of gasoline and an inclination to wander to cars when unattended. Record evidence shows that the area where plaintiff sat outside the facility fronted on Pickard Street where buses and other automobiles regularly traveled. Further, there is evidence that defendant carried a Personal Protection Device with her that she could have used to call for assistance when she left plaintiff to tend to the wheelchair mishap.

This case contains evidence that defendant affirmatively walked away from plaintiff leaving him unattended near a street regularly used for vehicular travel without regard for: plaintiff's serious mental disability rendering him helpless, his past conduct exhibiting a propensity to wander to cars and the smell of gasoline, and the MPC "hands on" policy.[4] There is also evidence that defendant had access to a communication device that she could have used to call for assistance, yet she did not. The evidence reveals that defendant was not attentive to her duties with regard to plaintiff's care and supervision. In fact, her affirmative actions suggest a willful disregard of precautions or measures to tend to plaintiff's safety as well as a singular disregard of substantial risks well known to her. *Tarlea, supra* at 90. As such, we conclude that the evidence presented was sufficient to create a question of fact regarding whether defendant exhibited "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a); *Xu, supra* at 269.

B. Proximate Cause

Defendant also argues that the trial court should have granted summary disposition in her favor because no reasonable juror could conclude that a question of fact exists regarding whether her activities constituted the proximate cause of plaintiff's injury when plaintiff is a developmentally disabled person who left the MPC and walked or ran into the side of a bus. Under the GTLA, government employees may be liable for grossly negligent conduct only if that conduct is "the" proximate cause of the injuries. MCL 691.1407(2). "The proximate cause" is "the one most immediate, efficient, and direct cause preceding an injury." *Robinson, supra* at 459. Thus, it is insufficient if the defendant's actions are simply "a" proximate cause. *Tarlea, supra* at 92. A court may grant summary disposition under MCR 2.116(C)(7) if reasonable jurors could not find that the government employee was "the" proximate cause of the injuries. *Robinson, supra* at 463, citing *Moll v Abbott Laboratories*, 444 Mich 1, 28 n 36; 506 NW2d 816 (1993).

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[4] While defendant's violation of the "hands-on policy" instituted by the MPC does not create a presumption of negligence or "impose a legal duty cognizable in negligence," nevertheless it may constitute some evidence of negligence. *Summers v Detroit*, 206 Mich App 46, 52; 520 NW2d 356 (1994). Also see *Candelaria v B C Gen Contractors, Inc* 236 Mich App 67, 82 n 5; 600 NW2d 348 (1999) (Violation of an ordinance or an administrative regulation constitutes evidence of negligence).

The evidence shows that because defendant left plaintiff unattended he walked into a bus. Plaintiff had no safety skills and had a propensity to wander off in search of items that smelled of gasoline. Thus, after reviewing the record, we agree with the trial court's reasoning that

> Plaintiff would not have walked out into the street had Defendant Neph not left him alone. Given Plaintiff's history, if left alone, it was almost guaranteed that he would wander off. This makes her decision to leave him the one most immediate and direct cause of Plaintiff's injuries.

In other words, working backwards from the injury, there were no other more direct causes of plaintiff walking into the bus other than defendant's affirmative act of leaving plaintiff--a virtually helpless individual drawn to the smell of gasoline--unattended near a street. Thus, we conclude that the evidence presented was sufficient to create a question of fact regarding whether defendant's conduct was "the" proximate cause of plaintiff's injuries.[5] *Robinson, supra* at 459.

IV

Defendant is not immune from liability pursuant to MCL 691.1407(2) because the factual support for plaintiff's allegations is sufficient for a reasonable juror to conclude that defendant was grossly negligent and that defendant's alleged gross negligence was the proximate cause of plaintiff's injuries. MCR 2.116(C)(7) and MCR 2.116(C)(10).

Affirmed and remanded to the circuit court for trial. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Mark J. Cavanagh

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[5] Our decision is in accord with the dissenting opinion that our Supreme Court adopted in *Dean v Childs*, 262 Mich App 48; 684 NW2d 894 (2004) rev'd in part 474 Mich 914 (2005). In *Dean*, our Supreme Court reversed this Court's holding that the alleged grossly negligent acts of a supervising firefighter in fighting a house fire could have constituted the proximate cause of the death of victims in a house fire. Instead it adopted Judge Griffin's dissenting opinion that ""the most immediate, efficient, and direct cause," of the tragic deaths of plaintiff's children was the fire itself, not defendant's alleged gross negligence in fighting it[.]" (citations and footnotes omitted.) *Id*. at 61. In *Dean*, the firefighter did not create the fiery condition that was the admitted cause of the victims' death. Unlike the facts of *Dean*, here, it is plain that defendant's choice to leave plaintiff unattended near a street did in fact create the condition responsible for plaintiff's injuries.