

STATE OF MICHIGAN
COURT OF APPEALS

DENISE HARPER, Individually and as Next
Friend of ODESSA MURPHY and VANESSA
MURPHY,

UNPUBLISHED
May 28, 2009

Plaintiff-Appellant,

v

ANGELA M. BROADEN and DETROIT BOARD
OF EDUCATION,

No. 284795
Wayne Circuit Court
LC No. 06-632178-NO

Defendants-Appellees.

Before: Jansen, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition for defendants based on governmental immunity, MCR 2.116(C)(7). We affirm.

Plaintiff's suit arises out of a pair of schoolyard fights involving her twin daughters, Vanessa and Odessa Murphy. The first fight, between Vanessa and a classmate, Charmagne Thomas, occurred on the playground during recess. The girls were brought to the office of defendant Angela Broaden, the school principal, who talked to the girls and then suspended them both for fighting. Broaden called plaintiff so she could pick Vanessa up from school; Broaden asked if plaintiff would like to take Odessa home too, but plaintiff said she would just take Vanessa home. Broaden said this was unusual; plaintiff "always took both girls home" after such an incident. According to Broaden, neither plaintiff nor Vanessa said anything about the possibility of a second fight involving Odessa. About two and one-half hours after the fight involving Vanessa, there was a fight in a classroom involving Odessa and several other girls. This fight did not involve Charmagne Thomas. Odessa and three of the other girls were suspended; Odessa was allegedly injured as a result of the fight.

Plaintiff filed suit alleging gross negligence and civil rights violations. In the gross negligence count, plaintiff alleged that Broaden acted with "reckless disregard for a known risk of injuries" by "allowing the said assaultors liberty to continue their desire of continuing assaultive behavior, inside of said school." The civil rights counts alleged that defendants deprived Vanessa and Odessa of their right to obtain an education free of assaults and that their "flawed policies" exposed Vanessa and Odessa to cruel and unusual punishment.

Defendants moved for summary disposition, arguing that they were protected from liability by governmental immunity. The trial court held a brief hearing on the motion, noted that it had read Broaden's deposition, and held that the school board was immune because it was a governmental entity and plaintiff had not pleaded in avoidance of immunity. The court also held that plaintiff as a matter of law had failed to establish that Broaden acted with gross negligence. In accord with these findings, the court granted summary disposition for both defendants.

On appeal, plaintiff does not pursue her civil rights claims, but argues only that the trial court erred in finding no question of fact regarding whether Broaden acted with gross negligence.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The applicability of governmental immunity is a question of law that we also review de novo on appeal. *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004).

Immunity for a governmental employee is an affirmative defense that the employee must raise and prove. *Odom v Wayne Co*, 482 Mich 459, 479; 760 NW2d 217 (2008). When a defendant raises immunity as a defense against a negligence claim, the court must determine if the individual caused an injury or damage while acting in the course of employment or service or on behalf of his governmental employer and whether the individual was acting or reasonably believed that he was acting within the scope of his authority, if the governmental agency was engaged in the exercise or discharge of a governmental function, and if the individual's conduct amounted to gross negligence that was the proximate cause of the injury or damage. *Id.* at 479-480. "Gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). If reasonable jurors could honestly reach different conclusions as to whether conduct constitutes gross negligence, the issue is a factual question for the jury. *Jackson v Saginaw Co*, 458 Mich 141, 146-147; 580 NW2d 870 (1998).

In this case, the trial court did not err in finding that plaintiff failed to establish a question of fact regarding Broaden's alleged gross negligence. Plaintiff does not dispute that Broaden's enforcement (or lack thereof) of the school's suspension policies was within the scope of her authority and constituted engaging in a governmental function. Rather, plaintiff asserts that the attack was foreseeable and thus Broaden had an obligation to prevent it. Plaintiff contends that even though Broaden knew the other girls planned to attack Odessa, she let them roam the school freely, contrary to the school's policies. These assertions have no factual support. In her deposition, Broaden explained the school's policies and the steps she took to implement them. She offered to let plaintiff remove Odessa from school but plaintiff declined to do so. Plaintiff's assertion that it was not her but the girls' older sister who came to pick up Vanessa does not contradict Broaden's statement that she was willing to let Odessa leave school that day. Her willingness to do so contradicts plaintiff's allegation that Broaden lacked concern for whether an injury would result. In plaintiff's own deposition, she stated that she herself did not know who was in this alleged "gang" that wanted to assault Odessa, and that she told Broaden two months before the incident that it was going to happen. Plaintiff does not explain what else would have

been reasonable for Broaden to do short of suspending students who had not yet violated any school rules.

Affirmed.

/s/ Kathleen Jansen

/s/ Joel P. Hoekstra

/s/ Jane E. Markey