

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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FANNIE BOOKER, as Next Friend of ERNEST  
FRANKLIN, a Minor,

UNPUBLISHED  
March 23, 2010

Plaintiff-Appellee,

v

No. 290071  
Wayne Circuit Court  
LC No. 2007-719014-CZ

DETROIT PUBLIC SCHOOLS and CYNTHIA  
PATTON-JOHNSON,

Defendants-Appellants,

and

JUVON HORACE,

Defendant.

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Before: Servitto, P.J., and Bandstra and Fort Hood, JJ.

PER CURIAM.

Defendants-appellants appeal by right from the order of the trial court denying their motion for partial summary disposition predicated on governmental immunity. We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

**I. Facts**

Plaintiff filed suit in July 2007, asserting that Ernest Franklin, a student suffering from cerebral palsy and partial paralysis, while at his school for handicapped children, was assaulted by a teacher's aid, defendant Juvon Horace.<sup>1</sup> Plaintiff further complained that reporting such misconduct to the school's principal, defendant Patton-Johnson, brought no remedial action.

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<sup>1</sup> Plaintiff asserts that on September 27, 2006, Horace violently pushed Franklin onto a concrete floor, then did so again as Franklin tried to stand. Plaintiff reports that for this misconduct, Horace pleaded guilty to an assault charge in criminal court.

Plaintiff further alleged that Horace had a history of abusing children at the school, and thus the school district had notice of the danger he posed to the handicapped children in his case.

Plaintiff proceeded under six theories: Count I, 42 USC 1983—Due Process; Count II, 42 USC 1983—Equal Protection; Count III, Persons with Disabilities Civil Rights Act<sup>2</sup>; Count IV, assault and battery; Count V, gross negligence; Count VI, intentional infliction of emotional stress. Defendants-appellants moved the trial court for summary disposition in connection with counts IV, V, and VI pursuant to MCR 2.116(C)(7) (governmental immunity) and (C)(10) (failure to provide evidentiary support). After hearing oral argument the trial court denied the motion, noting only that plaintiff had alleged gross negligence.

## II. Analysis

This Court reviews a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). When deciding a motion under MCR 2.116(C)(7), the court must consider the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. See *Amburgey v Sauder*, 238 Mich App 228, 231; 605 NW2d 84 (1999). Similarly, "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

Governmental agencies are generally immune from tort liability for actions taken in furtherance of governmental functions. MCL 691.1407(1). "[T]he immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed." *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000) (emphases in the original). A governmental function is defined as "an activity . . . expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f). The fact that the operation of a municipal school district is a governmental function is not in dispute.

### A. Institutional Immunity: Detroit Public Schools

Our Supreme Court provided some guidance on how a governmental agency might become liable for its employee's tort:

Even when the tort is committed during the employee's course of employment and is within the scope of the employee's authority, the governmental agency is not automatically liable. Where the individual tortfeasor is acting on behalf of an employer, the focus should be on the activity which the individual was engaged in at the time the tort was committed. A governmental

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<sup>2</sup> MCL 37.1101 *et seq.*

agency can be held vicariously liable only when its officer, employee, or agent, acting during the course of employment and within the scope of authority, commits a tort while engaged in an activity which is nongovernmental or proprietary, or which falls within a statutory exception. The agency is vicariously liable in these situations because it is in effect furthering its own interests or performing activities for which liability has been statutorily imposed. However, if the activity in which the tortfeasor was engaged at the time the tort was committed constituted the exercise or discharge of a governmental function (*i.e.*, the activity was expressly or impliedly mandated or authorized by constitution, statute, or other law), the agency is immune pursuant to § 7 of the governmental immunity act. [*Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 624-625; 363 NW2d 641 (1984).]

See also *Richardson v Jackson Co*, 432 Mich 377, 385; 443 NW2d 105 (1989) (“Improper performance of an activity authorized by law is, despite its impropriety, still ‘authorized’ within the meaning of the *Ross* governmental function test.”).

In this case, there is no suggestion that Horace was not acting in the course of his employment, and within the scope of his authority, when he assaulted Ernest Franklin. His position of teacher’s aid suggests authorization to assist in classroom management and discipline. Horace’s alleged excesses in pushing Franklin to the floor, then, constituted improper performance of an activity otherwise authorized by law. See *Richardson*, 432 Mich at 385.

But neither is there any suggestion that educating persons with disabilities is a nongovernmental or proprietary activity. Accordingly, the school district is immune unless a statutory exception to the immunity statute applies. See *Ross*, 420 Mich at 625. The only exception plaintiff puts forward is that for gross negligence, which is set forth in MCL 691.1407(2)(c). However, that provision subjects individual governmental agents to liability for gross negligence, not governmental agencies:

[W]ithout regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if . . . [t]he officer’s employee’s members’ or volunteer’s conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

Because there is no suggestion that the activity in which the alleged tortious conduct occurred was nongovernmental or proprietary, and because gross negligence does not implicate a governmental agency, the trial court erred in denying the motion for summary disposition in connection with defendant the Detroit Public Schools.

#### B. Individual Immunity: Principal Patton-Johnson

MCL 691.1407(2) provides that every “officer and employee of a governmental agency . . . shall be immune from tort liability for injuries to persons . . . caused by the officer [or] employee . . . while in the course of employment or service.” Subsection (2)(c), however, establishes an exception where the state agent’s conduct constitutes “gross negligence that is the proximate cause of the injury or damage.” For purposes of this provision, “the proximate cause” invokes not the ordinary common law principles of causation, including as among multiple tortfeasors, but instead means “the *one* most immediate, efficient, and direct cause preceding an injury.” *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000) (emphasis added).

This case concerns allegations that Horace engaged in assaultive behavior against Ernest Franklin. Horace, then, was obviously the “one most immediate, efficient, and direct cause” of the resulting injuries. It strains at credulity to attribute greater proximity of causation of those injuries to an administrator who allowed the assailant to work with the victim than to the assailant himself.

Because, under plaintiff’s factual allegations, Horace, not his school’s principal, was the person who most immediately, efficiently, and directly caused Franklin’s injuries, the trial court erred in denying the motion for summary disposition in connection with Patton-Johnson.

### III. Conclusion

For these reasons, we conclude that the trial court erred in denying defendants’ motion for summary disposition in connection with the claims of assault and battery, gross negligence, and intentional infliction of emotional distress. We therefore reverse the trial court’s decision to deny partial summary disposition, and remand this case to that court for proceedings consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

/s/ Deborah A. Servitto  
/s/ Richard A. Bandstra  
/s/ Karen M. Fort Hood