

STATE OF MICHIGAN
COURT OF APPEALS

Estate of ROBERTO ANDERSON.

MARIA ANDERSON, Personal Representative for
the Estate of ROBERTO ANDERSON,

UNPUBLISHED
April 19, 2012

Plaintiff-Appellee,

v

DOUGLAS F. THOMPSON and MATTHEW J.
MURPHY,

No. 295317
Genesee Circuit Court
LC No. 08-089832-NO

Defendants-Appellants.

Before: M. J. KELLY, P.J., and FITZGERALD and DONOFRIO, JJ.

PER CURIAM.

In this wrongful death action, defendants Douglas Thompson and Matthew Murphy appeal by right the circuit court's order denying their motion for summary disposition premised on governmental immunity. On appeal, we conclude that the trial court correctly determined that there were fact questions concerning whether Thompson and Murphy were grossly negligent and whether their negligence was the proximate cause of Roberto Anderson's death. For that reason, we affirm.

I. BASIC FACTS

Roberto Anderson was twelve-years-old at the time of the incident at issue and attended the sixth grade at Swartz Creek Middle School. Thompson and Murphy were physical education instructors at Swartz Creek and were both certified to teach aquatics.

On April 23, 2008, Thompson and Murphy were supervising students in the school's pool. Murphy's seventh grade class was on its last day of swim lessons and Thompson's sixth grade class, which included Roberto Anderson, was visiting the pool for the first time. Two classes would not normally use the pool at the same time, but, because the gym was occupied, Thompson decided to take his class to the pool before its originally scheduled start date. There were also three special education students in the pool, who were being independently supervised.

Although there were, at this point, more than 50 students in attendance, Thompson and Murphy decided to let the students have free swim time. While the students were splashing around in the pool, Thompson left the deck area to enter attendance on a computer in a room overlooking the pool. Murphy remained to supervise the students, but also apparently supervised a make-up swim test for one student.

At some point during this free swim time, Roberto Anderson slipped under the water. When Thompson returned from entering attendance, he saw Roberto at the bottom of the pool and immediately jumped in after him. Murphy and Thompson removed Roberto from the pool and began efforts to resuscitate him. Emergency responders arrived shortly thereafter and moved Roberto to a hospital. Roberto Anderson died several days later.

Roberto Anderson's mother, Maria Anderson, was appointed to be the personal representative of Roberto's estate. She sued Thompson and Murphy in October 2008 as the personal representative of her son's estate. She alleged that Thompson and Murphy engaged in grossly negligent conduct that ultimately led to her son's death.

Murphy and Thompson moved for summary disposition on the ground that governmental immunity barred Maria Anderson's claims. The trial court determined that there was a question of fact as to whether Murphy and Thompson engaged in grossly negligent conduct that was the proximate cause of Roberto Anderson's death. Accordingly, it denied the motion. Murphy and Thompson then appealed to this Court.

II. IMMUNITY FOR GOVERNMENTAL EMPLOYEES

A. STANDARDS OF REVIEW

On appeal, Thompson and Murphy argue that the trial court erred when it determined that there were questions of fact concerning whether they engaged in grossly negligent conduct that was the proximate cause of Roberto Anderson's death.¹ This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009).

A trial court properly grants summary disposition under MCR 2.116(C)(7) where a claim is barred by immunity granted by law. A party may support or defend a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). In determining whether a claim is barred by immunity, this Court reviews the evidence in the light most favorable to the nonmoving party. *Zwiers v Growney*, 286 Mich App 38, 42; 778 NW2d 81 (2009). If the submissions demonstrate that there is a factual dispute as to whether immunity applies, summary disposition is not appropriate. *Id.*

¹ Because Thompson and Murphy have not claimed that the trial court erred to the extent that it denied their motion under MCR 2.116(C)(8), we shall limit our analysis to whether the trial court should have granted their motion under MCR 2.116(C)(7) or (C)(10).

A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden*, 461 Mich at 120. A party may be entitled to summary disposition under MCR 2.116(C)(10) if, “[e]xcept as to the amount of damages, there is no genuine issue as to any material fact” This Court reviews a motion brought under this subsection by considering the affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in the light most favorable to the party opposing the motion to determine whether there are genuine issues of material fact. *Maiden*, 461 Mich at 120.

B. GROSS NEGLIGENCE

Our Legislature has provided governmental employees with immunity from tort liability. See MCL 691.1407(2). However, the Legislature limited the immunity to those situations where—in relevant part—the employee’s “conduct does not amount to gross negligence that is the proximate cause of the injury or damage.” MCL 691.1407(2)(c). As this Court has explained, in order to survive a motion premised on governmental immunity, Maria Anderson had to present sufficient evidence that a jury could find that Murphy and Thompson were grossly negligent:

In order to survive a motion for summary disposition premised on the immunity afforded to governmental employees, the plaintiff must present evidence sufficient for a reasonable finder of fact to conclude that the employee was grossly negligent. If there is no question of fact about whether the allegedly negligent conduct rises to the level of gross negligence, the court may decide the question as a matter of law. Evidence of ordinary negligence will not be sufficient to survive a motion for summary disposition. *Maiden*, 461 Mich at 122-123 (“[E]vidence of ordinary negligence does not create a material question of fact concerning gross negligence.”); see also *Costa v Community Emergency Med. Servs., Inc.*, 475 Mich 403, 411, 716 NW2d 236 (2006) (noting that the gross-negligence exception applies to situations “in which the contested conduct was substantially more than negligent”). Rather, there must be evidence that the employee engaged in “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.” MCL 691.1407(7)(a); see also *Maiden*, 461 Mich at 123. [*LaMeau v City of Royal Oak*, 289 Mich App 153, 176-177; 796 NW2d 106 (2010), rev’d not in relevant part 490 Mich 949 (2011).]

Maria Anderson presented evidence that Thompson gave his students only cursory instruction—five minutes rather than the normal 15 minutes—on pool safety despite the fact that they had not used the pool before. Although Thompson asked those students who thought they could swim to demonstrate it by swimming the length of the pool, his students were not given the full, school-approved swimming test before being allowed in the deep end. From this, a reasonable jury could infer that Roberto might have been left with the impression that he could swim in the deep end. A violation of a rule or ordinance also gives rise to the presumption of ordinary rather than gross negligence, but when this evidence is viewed along with the other evidence, Thompson’s failure to give the required test strengthens the conclusion that reasonable minds could differ on whether his conduct was grossly negligent. See *Klinke v Mitsubishi Motors Corp*, 458 Mich 582, 592; 581 NW2d 272 (1998). Further, both Thompson and Murphy admitted that they did not know if Roberto Anderson was among the students who did not take

the one-lap swim test and there was evidence to suggest that Thompson did not instruct those students that did not know how to swim to stay in the shallow end.

Maria Anderson also presented evidence that a student told Thompson that Roberto could not swim, and that Thompson responded: “we’ll just have him try.” This testimony supports an inference that Thompson knew that Roberto was a weak swimmer and was indifferent to the risk. Moreover, the evidence showed that Thompson did not inform Murphy that any of his students were untrained or poor swimmers, or that any had been warned to stay away from the deep end. The evidence also showed that Thompson left his students in Murphy’s care so that he could take the opportunity to enter attendance, even though he was not under any constraints to do so. In addition, Maria Anderson attached the affidavit of an expert who opined that neither Thompson nor Murphy properly performed as lifeguards and that their failure to do so proximately caused Roberto Anderson’s death.

From this evidence, a reasonable jury could conclude that Thompson showed a willful disregard of precautions or measures to attend to the safety of his students, including Roberto Anderson. A reasonable juror could find that Thompson’s failure to give proper safety instructions to his students, his failure to be aware of who among his class could not swim and act on that knowledge, his failure to properly test his students, and the fact that he left his students in Murphy’s care without informing Murphy about their skill levels and under circumstances that permit an inference that Murphy would not be able to safely supervise the students on his own, demonstrated a singular disregard for the substantial risks attendant to the minors under his charge.

As for Murphy, there was evidence that he did not comply with Rule 325.2198 of the Michigan Administrative Code, which states that a lifeguard must not perform “[a]ctivities that would distract from the proper supervision of persons using the swimming pool or prevent immediate attention to a person in distress.” Mich Admin Code, R 325.2198(3)(e). Similarly, the Michigan Public Pool Safety Guidelines for Schools, 2007 edition, provided that, if a swim coach or instructor is to act as a lifeguard, he or she “must be watching *all* the students at the *same* time” which means that the instructor should have “the students do the same activities throughout class or practice.”

In addition to the evidence that Murphy did not comply with the code and guidelines, Maria Anderson presented evidence that Roberto Anderson actually called out for help and stated that he was drowning. Students testified that they could hear him from the corner of the pool. And Roberto was discovered under the water directly across from where Murphy had stood watch. There was also evidence that Murphy was attending to a student who was performing a make-up swim test when he should have been concentrating on the students engaged in the free swim. This evidence supports the inference that Murphy was distracted and not properly observing the pool to safeguard the students under his sole supervision, or outright ignored Roberto’s plight. If students could hear Roberto yelling for help, then a reasonable inference is that an attentive and responsive lifeguard would have heard him as well.

Courts must consider the totality of the circumstances when analyzing whether there was sufficient evidence to establish a question of fact as to gross negligence. See, e.g., *People v McCoy*, 223 Mich App 500, 504; 566 NW2d 667 (1997). Although the individual acts and omissions that we have identified might, standing alone, be evidence of only ordinary negligence, when layered on top of each other, these acts create a progressively more reckless and dangerous situation that could amount to “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.” MCL 691.1407(7)(a). Moreover, we have long recognized that, in a close or doubtful case, proving gross negligence “calls for jury instruction and jury verdict rather than a verdict by order of the court.” *Washington v Jones*, 386 Mich 466, 471; 192 NW2d 234 (1971), quoting *Tien v Barkel*, 351 Mich 276, 283; 88 NW2d 552 (1958); see also *Coon v Williams*, 4 Mich App 325, 333; 144 NW2d 821 (1966) (observing that “[i]t was the jury’s prerogative to determine the question of gross negligence.”). Taken in the light most favorable to the plaintiff, we conclude that the trial court correctly determined that a genuine issue of material fact exists as to whether Thompson and Murphy’s actions and omissions amounted to gross negligence under the totality of the circumstances.

C. THE PROXIMATE CAUSE

Murphy and Thompson also assert that their actions were not “the proximate cause” of Roberto Anderson’s death. Rather, they argue that the evidence shows that the proximate cause of his death was his weak swimming ability and his decision to go into the deep end of the pool.

The Legislature has provided that a governmental employee is immune from tort liability unless his or her conduct amounted “to gross negligence” and that gross negligence was “the proximate cause of the injury or damage.” MCL 691.1407(2)(c) (emphasis added). Our Supreme Court has held that the Legislature’s reference to “the proximate cause”—as opposed to “a proximate cause”—means that the employee’s gross negligence must be more than just a proximate cause of the injury in order to meet the requirements of the exception to the governmental employee’s immunity. See *Robinson v Detroit*, 462 Mich 439, 461–463, 613 NW2d 307 (2000). Instead, a governmental employee is immune from tort liability unless his or her conduct amounted to gross negligence that was “the one most immediate, efficient, and direct cause of the injury or damage” *Id.* at 462. [*LaMeau*, 289 Mich App at 181.]

Roberto Anderson was found near the point where the shallow end drops off into the deep end. That point was not marked on the pool such that a swimmer would be able to tell that he or she had reached the deep end. There was also no evidence that Roberto violated any pool rules or behaved at all negligently. In contrast, Thompson and Murphy—as teachers and lifeguards—had an obligation to ensure the safety of their charges and to respond to those who might be in trouble in the pool. Under these facts, a reasonable jury could conclude that Murphy and Thompson’s acts and omissions amounted to the one most immediate, efficient, and direct cause of Roberto Anderson’s death.

The trial court did not err in denying Murphy and Thompson's motion for summary disposition on the ground that they were immune from tort liability.

Affirmed. As the prevailing party, Maria Anderson may tax her costs. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio