

STATE OF MICHIGAN
COURT OF APPEALS

JULIE SRDA, as Next Friend of JOHN DOE,
Plaintiff-Appellee,

UNPUBLISHED
January 19, 2012

v

MICHIGAN SCHOOL OF THE DEAF, STATE
OF MICHIGAN, STATE OF MICHIGAN
DEPARTMENT OF EDUCATION, DAVID
SANDERSON, RICHARD SUITER, LUCINDA
BAUGH and CECELIA WINKLER,

No. 301297
Genesee Circuit Court
LC No. 10-093155-CZ

Defendants-Appellants.

Before: JANSEN, P.J., and WILDER and K. F. KELLY, JJ.

PER CURIAM.

Individual defendants, David Sanderson, Richard Suiter, Lucinda Baugh and Cecelia Winkler, appeal as of right an order denying their motion for summary disposition in this action alleging gross negligence on the part of the individual defendants. We reverse.

Individual defendants argue that the trial court erred by denying their motion for summary disposition, which denied individual defendants governmental immunity from plaintiff's gross negligence claim. We agree.

Individual defendants moved for summary disposition pursuant to MCR 2.116(C)(7) and (C)(8). This Court reviews a trial court's denial of summary disposition de novo. *Herman v City of Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). Also, this Court reviews the applicability of governmental immunity, which is a question of law, de novo. *Id.* A motion for summary disposition under MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law, and mandates consideration of all documentary evidence submitted by the parties. *Miller v Lord*, 262 Mich App 640, 643; 686 NW2d 800 (2004). A motion pursuant to MCR 2.116(C)(7) may be supported by affidavits, depositions, admissions, or other documentary evidence, MCR 2.116(G)(2), and if such material is presented to the court, it must be considered, MCR 2.116(G)(5). "To survive a motion for summary disposition brought under MCR 2.116(C)(7), the plaintiff must allege facts warranting the application of an exception to governmental immunity." *Miller*, 262 Mich App at 643. "If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of those facts, then the question

whether the claim is barred by governmental immunity is an issue of law. However, if a question of fact exists to the extent that factual development could provide a basis for recovery, [then] dismissal is inappropriate.” *Dybata v Wayne County*, 287 Mich App 635, 637-638; 791 NW2d 499 (2010).

A trial court may grant summary disposition dismissing a claim on the ground that the opposing party has failed to state a claim on which relief can be granted. MCR 2.116(C)(8); *Henry v Dow Chem Co*, 473 Mich 63, 71; 701 NW2d 684 (2005). “Only the pleadings may be considered when the motion is based on [MCR 2.116](C)(8).” MCR 2.116(G)(5). “The trial court and this Court must accept all well-pleaded factual allegations as true, construing them in a light most favorable to the nonmoving party.” *Cummins v Robinson Twp*, 283 Mich App 677, 689; 770 NW2d 421 (2009). Also, this Court accepts any reasonable inferences or conclusions that can be drawn from the factual allegations supporting a claim as true. *Detroit Internat'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 670; 760 NW2d 565 (2008).

Generally, “a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function.” MCL 691.1407(1). Additionally, employees of a governmental agency are entitled to governmental immunity if: 1) they were acting or reasonably believed they were acting within the scope of their authority, 2) were “engaged in the exercise or discharge of a governmental function,” and 3) their “conduct [did] not amount to gross negligence that [was] the proximate cause of the injury or damage.” MCL 691.1407(2)(a)-(c). Individual defendants are employees of the Michigan School of the Deaf, a governmental agency, and the parties do not dispute the first two elements, including whether the operation of a school, including the operation of its residential facilities, is a governmental function. See *Stringwell v Ann Arbor Pub School Dist*, 262 Mich App 709, 712; 686 NW2d 825 (2004) (finding that the operation of a public school is a governmental function); *Rouse v State*, 109 Mich App 21, 31; 311 NW2d 144 (1981) (finding that the operation of the Michigan School of the Deaf’s student residential facilities is a governmental function). The parties disagree on whether individual defendants’ conduct constituted gross negligence that was the proximate cause of John Doe’s injuries.

Here, plaintiff’s complaint alleged that John Doe was sexually assaulted by another male student, while he was a student and resident at defendant Michigan School of the Deaf. Plaintiff argues that she needs to take discovery to determine if the assaulter was mentally impaired because he might not be capable of being legally responsible for causing John Doe’s injuries, and thus, if he is not legally responsible, then individual defendants’ indifference to the known risk of a sexual assault would be the proximate cause of John Doe’s injuries. We reject this argument.

The governmental immunity statute, MCL 691.1407(2)(c), was amended to require a governmental employee’s conduct to be “the” proximate cause of an injury or damage. *Miller*, 262 Mich App at 644. “[T]he amended statute, as applied to governmental employees, ‘contemplates *one* cause,’ which [the Supreme Court] described as ‘the immediate efficient, direct cause preceding the injury.’” *Miller*, 262 Mich App at 644, quoting *Robinson v Detroit*, 462 Mich 439, 462-463 n 19; 613 NW2d 307 (2000).

In *Miller*, this Court held that the conduct of the individual defendants, including two teachers and a principal, could not be “the proximate cause” of an alleged sexual assault of a tenth grade girl by a fellow student, which supposedly happened in the boys’ bathroom during school, after the girl was sent into the hallway by her teacher for misbehaving and seen in the hallway by another teacher while she was walking with her alleged assaulter. See *Miller*, 262 Mich App at 642-644. This Court found that “the immediate, direct cause preceding [the girl’s] injuries was the alleged sexual assault by Lord.” *Miller*, 262 Mich App at 644. This Court held that the trial court erred in denying the defendants’ motion for summary disposition pursuant to MCR 2.116(C)(7) based on governmental immunity, on the basis that there was a question of fact regarding whether the individual defendants’ conduct was the proximate cause of the girl’s injuries. *Id.*

Like in *Miller*, we hold that the immediate efficient, direct cause preceding John Doe’s injuries was the alleged sexual assault by the alleged assailant, and thus, was the proximate cause of John Doe’s injuries. We further hold that even if the alleged assailant was mentally impaired at the time of the sexual assault and not capable of being “legally” responsible for his actions, that does not change the conclusion that his actions were still the most immediate, direct, efficient cause preceding John Doe’s injury, and thus, “the” proximate cause of John Doe’s injuries. Because plaintiff failed to allege facts warranting the application of an exception to governmental immunity, we hold that the trial court erred in denying individual defendants’ motion for summary disposition based on governmental immunity.

Since the defendants’ conduct is not the proximate cause of the plaintiff’s injuries, we need not address whether a reasonable trier of fact could have concluded that the defendants’ conduct amounted to gross negligence. *Miller*, 262 Mich App at 644 n 1.

Lastly, plaintiff challenges this Court’s jurisdiction in her brief on appeal. Plaintiff argues that this Court lacks jurisdiction of this appeal because the order appealed from is not an order denying governmental immunity, rather, individual defendants’ motion for summary disposition regarding plaintiff’s gross negligence claim was denied because discovery had not been completed, and thus, it was denied because it was premature. Here, the trial court ordered that “the individual defendants’ motion for summary disposition on the basis of governmental immunity under MCR 2.116(C)(7) and (8) is denied.” Where an order facially denies a motion for summary disposition pursuant to MCR 2.116(C)(7) based on governmental immunity, the order is final and this Court has jurisdiction. *Conmy v Dep’t of Transp*, 272 Mich App 138, 140; 724 NW2d 297 (2006). Therefore, we hold that this Court has jurisdiction over this appeal.

Reversed.

/s/ Kathleen Jansen
/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly