STATE OF MICHIGAN

COURT OF APPEALS

JESSICA GIFFORD,

Plaintiff-Appellant,

v

RALPH GRIMES, D.E. GOODALL, MICHAEL MCINTOSH, MARCIA PETERSON, JOHN RHODIN, ROBERT MOFFETT,

Defendants-Appellees,

and

YPSILANTI SCHOOL DISTRICT

Defendant.

UNPUBLISHED
December 3, 2002

No. 233667
Washtenaw Circuit Court
LC No. 99-005422-NO

Before: Whitbeck, C.J., and Hood and Kelly, JJ.

PER CURIAM.

Plaintiff Jessica Gifford appeals as of right the trial court's order granting summary disposition pursuant to MCR 2.116(C)(7) to defendants, employees of the Ypsilanti School District, in this personal injury action. We affirm.

I. Basic Facts And Procedural History

The facts of this case are largely undisputed; the legal conclusions to be drawn from those facts are at the heart of this case. In January 1994, twelve-year-old Gifford was a student in the seventh grade at East Middle School in the Ypsilanti School District. On January 26, Gifford attended the first volleyball team practice session. The team used a portable net for their practices. The net was affixed to two large poles, approximately eight feet tall, and each pole was inserted in a heavy round base that had two wheels attached. Each pole/base assembly weighed somewhere between eighty and one hundred pounds, and, evidently, most of that weight was in the base. To move the poles on the respective bases, a person would tip the pole and roll it on the attached wheels.

On this day, the girls' volleyball team was slated to practice in the cafeteria. Volunteer coach Dori Boroner told Gifford and her friend, Aliki Bovoaletis, to move the poles from the

gymnasium to the cafeteria. Boroner did not inspect the poles and bases. Nor did she instruct the girls on how to move the equipment or supervise the girls' efforts. Previously, Gifford had seen girls in the eighth grade set-up the poles and net during team tryouts. Bovoaletis had also been involved in volleyball for some time. Gifford and Bovoaletis grabbed the poles and started dragging them toward the gymnasium doors. As Bovoaletis attempted to open the gymnasium doors, the pole she was holding detached from the base and the base landed on Gifford's left foot.

The injury the base inflicted on Gifford was serious, painful, and debilitating, The base crushed Gifford's largest toe on her left foot, immediately turning it black in color. The base crushed the bones in the adjacent toe on her left foot. Her foot was swollen and bloody. Gifford, in a state of shock, hopped to the coach's office in the girl's locker room screaming "bloody murder." Boroner and principal D.E. Goodall attended to Gifford and called her father. Gifford's father took her to a doctor's office, but the doctor immediately sent her to the hospital, where she stayed overnight. She missed two to three weeks of school following the accident because of the pain, swelling, and additional medical treatment she needed. She was forced to use crutches to move around her home and a wheelchair in public. Though physicians initially placed a cast on her left leg, they had to amputate her largest toe in March 1994. Her other toe never fully healed. As she described it, "If you start from my foot and work up on that second toe, it's fine up to the first joint, and once it comes to that joint the bone is pretty much crumbled and not there. It's deformed and floppy and there's no toenail on it." Though Gifford had additional surgery in 1995, she continues to have pain, walk with a limp, and use a shoe insert to protect her remaining toes.

Following the accident, the Ypsilanti School District did not undertake a formal investigation. Rather, in December 1994, apparently in response to inquiries from the Gifford family, defendant Michael McIntosh, the athletic director, produced a single page report referring to the "Volleyball Accident," which stated:

> An inquiry was made by the staff at East Middle School as to the manufacturer, brand name, or any reference about the volleyball standard[1] that was involved in the accident of January 26, 1994. The result [sic] produced no information. Subsequently, I went over to East Middle School to validate these earlier findings. I too discovered no markings on the volleyball polls or bases to indicate a manufacturer.
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> I talked to a physical education teacher, who had been there about 15 years and he told me that these poles have always looked worn and unlabeled since he has been there.
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> Subsequently, I went to the East Middle School main office to find out if there was any paperwork on physical education or athletic equipment. The answer was also a negative.

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[1] Referring to the bases and poles used to hold the volleyball net, not a set of regulations concerning volleyball.

> To conclude, there is no evidence on the volleyball poles as to their manufacturer. Also in regard to the comment about new volleyball standards put in place shortly after the accident, I can say that other volleyball standards used in the East Middle School gym[nasium] have been in place as early as October 1990 because a volleyball parent group put them in with the help of the Ypsilanti Public Schools maintenance department. Documentation is available which proves the dates of installation.
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> If there are other concerns, please feel free to contact me.
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> Thank you.

Additionally, Gifford heard that a bolt affixing the base to the pole for the volleyball net had detached from the base and that a screw in the base had rusted. She believed that this had caused the base to detach from the pole Bovoaletis was pulling.

In early 2000, Gifford sued defendants, including superintendent Ralph Grimes, athletic director McIntosh, principal Goodall, and physical education teachers Marcia Peterson, John Rhodin, and Robert Moffett.[2] Gifford named Boroner, a volunteer for the school district acting as a coach, as a defendant in the lawsuit, but never served her. Substantively, Gifford alleged that defendants had breached their duties to provide proper supervision; to "ensure" activities were "conducted in such a manner that the students [were] not put in danger of loss of life or limb"; to provide a safe environment; to furnish properly trained staff to supervise extra-curricular activities; to inspect equipment students used for dangerous conditions; to warn students about dangerous "conditions and activities"; and to provide "adequate emergency care and take appropriate action when students are harmed." She alleged that defendants' conduct was "intentional, willful, wanton, grossly negligent, grossly careless, and/or reckless," and directly resulted in her physical injuries, pain, suffering, medical expenses, and other damages.

On October 20, 2000, defendants moved for summary disposition pursuant to MCR 2.116(C)(7) and (10). Defendants alleged MCL 691.1407(1) granted immunity to Ypsilanti School District, providing:

> Except as otherwise provided in this act, a governmental agency is *immune from tort liability* if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.[3]

Defendants alleged that MCL 691.1407(2) granted immunity to the remaining individual defendants, providing:

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[2] The caption to the verified complaint refers to a previous action between these parties concerning the accident, but the record does not provide any additional information about that action.

[3] Emphasis added.

> Except as otherwise provided in this section, and without 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 all of the following are met:
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> (a) The officer, employee, member, or volunteer 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.
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> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to *gross negligence* that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means *conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results*.[4]

Substantively, defendants claimed that Gifford had no evidence that any defendant acted with gross negligence. In a supplemental brief, defendants also argued that Boroner was the proximate cause of Gifford's injuries because she directed Gifford to move volleyball poles. Consequently, they claimed, they could not be held responsible for causing the accident.

Gifford responded that there was ample evidence that defendants acted recklessly. For instance, not one defendant testified in a deposition that any sort of program, manual, or schedule for maintenance existed for the volleyball sets. No one disputed that Gifford and Bovoaletis moved the volleyball poles and bases without training and supervision. McIntosh, the athletic director, testified that the accident should not have occurred and that the system should be changed to protect players. Gifford also disputed defendants' argument that Boroner proximately caused the accident, asserting, "The proximate cause of this accident was the failure of the combined individual Defendants to implement policies and procedures ensuring that the poles and bases were in proper condition, and there was adequate supervision and instruction in their transportation and set up."

The trial court held a hearing on the motion for summary disposition on January 12, 2001. At the hearing, the trial court announced its legal conclusions on the record:

> . . . With respect to immunity for the school district, considering the documentation submitted and taking the pleadings and all reasonable inferences from the allegations made in those pleadings, this Court finds as follows: first, the school district is a governmental agency and that in educating and coaching the students in Ypsilanti the school district was exercising a governmental

[4] Emphasis added.

> function. East Middle School is a public building open for use by members of the public even if on a limited basis. Plaintiff has alleged in her complaint that the poor condition of the volleyball poles created a dangerous or defective condition in the building. Deposition testimony suggests that the agents of the school district were aware that the pole was old and worn and they were not labeled with instructions for moving them. Finally, no testimony has been offered to suggest that the governmental agency in any way attempted to remedy the alleged defective condition. For these reasons, this Court finds that the public building exception to the governmental immunity statutes apply. The claims against the Ypsilanti School District are not barred and summary disposition of those claims, pursuant to MCR 2.116(C)(7) is not appropriate. Defendant's motion brought on behalf of the school district is denied.
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> Considering the claims against the individual employees of the school district and likewise considering the documentation presented, the allegations made in the pleadings, and all reasonable inferences that could be drawn from those allegations, this Court finds as follows: although a reasonable inference of the pleadings and documentation suggests that the employees were acting within the scope of their employment at the time of the accident and that they were discharging a governmental function, this Court finds that even a thorough review of the allegation does not support the conclusion that any of the employees acted with gross negligence. For this reason plaintiff's claims against the individual employees are barred by the governmental immunity statutes and summary disposition of the claims against the individuals is appropriate. Therefore, defendant's motion brought on behalf of the individuals is granted. . . .

On January 24, 2001, the trial court entered an order granting the motion for summary disposition and dismissing the case with respect to the individual defendants, but denying the motion for summary disposition as it concerned the Ypsilanti School District.

The Ypsilanti School District, alone, then applied for leave to appeal to this Court. On March 16, 2001, this Court entered the following order:

> Pursuant to MCR 7.205(D)(2), in lieu of granting the application for leave to appeal the January 24, 2001 order of the Washtenaw Circuit Court is VACATED to the extent that it denied defendant school district's motion for summary disposition. This matter is REMANDED to the trial court for entry of an order granting summary disposition in favor of the school district. The volleyball equipment in question is not a fixture of the public building and, therefore, the school district is entitled to immunity. *Carmack v Macomb Co Community College*, 199 Mich App 544, 545, 547; 502 NW2d 746 (1993). We do not retain jurisdiction.

On March 20, 2001, the trial court entered an order complying with this Court's directive. Gifford now appeals as of right the trial court's order as it concerns the individual defendants, not the Ypsilanti School District. She advances the same arguments concerning gross negligence and proximate cause that she made in the trial court.

II. Standard Of Review

This Court reviews de novo a trial court's decision to grant summary disposition.[5]

III. Governmental Immunity

MCR 2.116(C)(7) permits a trial court to dispose of a claim summarily if "[t]he claim is barred because of . . . immunity granted by law . . . ." MCR 2.116(G)(2) allows, but does not require, a party moving for summary disposition under subsection (C)(7) or a party opposing such a motion to submit documentary evidence in support of the party's position.[6] However, if the grounds for the motion "do not appear on the face of the pleadings," the party moving for summary disposition must submit supporting documentary evidence, including affidavits, depositions, and admissions.[7] Once the trial court receives any documentary evidence in support of or opposing the motion, it must[8] consider the evidence "to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion."[9] "If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay."[10] Because our review is de novo, we engage in this same analysis of the evidence that the trial court conducted to determine whether the trial court erred in granting the motion for summary disposition.

Gifford does not dispute that defendants were employees of a governmental agency, acting within the scope of their respective authority, and discharging their governmental functions in their individual roles as they each relate to her injuries. Because defendants satisfy MCL 691.1407(2)(a) and (b), the outcome of this appeal revolves around MCL 691.1407(2)(c). The parties have debated who or what proximately caused Gifford's injuries, as MCL 691.1407(2)(c) requires, at some length. The key question in this case, however, is whether the evidence on the record at the time the trial court granted summary disposition with respect to the individual defendants demonstrated a dispute concerning their alleged gross negligence. MCL 691.1407(2)(c) defines gross negligence as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."

In this case, the record clearly presents a dispute regarding whether defendants acted negligently. For instance, we can assume that defendants had a duty to supervise Gifford and other children in the school building participating in a school-sponsored, albeit extra-curricular, activity to ensure the children's safety. As McIntosh's report noted, a physical education teacher who had worked for the Ypsilanti School District for fifteen years commented that the volleyball poles had always looked "worn." This suggests that defendants, some of whom were also

[5] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[6] See *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994).

[7] MCR 2.116(G)(3)(a).

[8] MCR 2.116(G)(5).

[9] MCR 2.116(G)(6).

[10] MCR 2.116(I)(1).

physical education teachers, had likely seen the equipment that harmed Gifford and observed that it looked worn. There was no evidence that defendants took any actions to protect Gifford or any student by discovering, remediating, or warning of the danger the volleyball poles and bases posed. However, even if this evidence proved simple negligence, it does not satisfy the gross negligence standard. As the Michigan Supreme Court emphasized in *Maiden v Rozwood*,[11] "[T]he Legislature limited employee liability to situations where the contested conduct was *substantially more than negligent*."

Though serious, the facts of this case are not comparable to cases in which there was sufficient evidence of gross negligence to survive summary disposition. *Maiden's* companion case, *Reno v Chung*,[12] illustrates the extreme level of negligence required to demonstrate "substantial lack of concern for whether an injury results."[13] In *Reno*, the plaintiff returned to his home in 1991 only to find that his wife and his daughter had been stabbed.[14] The plaintiff's wife was already dead, but his daughter was still alive.[15] According to the plaintiff, as she was dying, his daughter identified who had stabbed her and her mother.[16] The plaintiff told the police about this dying declaration.[17] In the ensuing investigation, however, the medical examiner handling the case concluded that the plaintiff's daughter's neck injuries would have made it impossible for her to have spoken.[18] On the basis of this conclusion, the county prosecutor charged the plaintiff with murder.[19] The plaintiff consulted other experts while preparing to defend against the murder charges.[20] The medical examiner refused to give her records and specimens to these experts until ordered by the court in the criminal case.[21] The experts then determined that the medical examiner had made an incorrect conclusion.[22] This was not merely a difference of opinion regarding the nature and extent of the injuries to the plaintiff's daughter. Rather, the experts concluded that the medical examiner had "no anatomical or physiological basis" for the opinion, and that the plaintiff's daughter would have been able to make the dying declaration the plaintiff reported to the police.[23] On appeal, the Supreme Court identified several factors that demonstrated gross negligence. First, the medical examiner's opinion was patently incompetent

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[11] *Maiden v Rozwood*, 461 Mich 109, 122; 597 NW2d 817 (1999) (emphasis added).

[12] *Id*. at 116-118, 128-136.

[13] MCL 691.1407(2)(c).

[14] *Maiden*, *supra* at 116.

[15] *Id*.

[16] *Id*.

[17] *Id*.

[18] *Id*.

[19] *Id*.

[20] *Id.* at 116-117.

[21] *Id*. at 117.

[22] *Id*.

[23] *Id*.

or false, not "a mere difference of medical opinion."[24] Second, that opinion led directly to the plaintiff's arrest.[25] Third, and perhaps most importantly, the medical examiner revealed that she knew her opinion was baseless when she attempted to conceal her activities by withholding her reports and specimens from the experts.[26] This attempt to cover-up the medical examiner's missteps at the expense of the plaintiff's liberty clearly demonstrated that the medical examiner had a "substantial lack of concern for whether an injury result[ed]" from her actions.[27]

In this case, however, the evidence fails to point to who, if anyone, had a "substantial lack of concern" for student safety as it concerned the portable volleyball set. For example, there was no evidence that the volleyball set, though looking "worn" for some time, outwardly showed any wear that was incompatible with safe use, rather than the sort of cosmetic and benign effects of use. We may infer from the record that some sort of screw or bolt failed, which allowed the pole to detach from the base. Still, there is no evidence that defendants were aware that this defect existed and posed a risk of harm, and yet allowed the use of the equipment without warning of the risk or taking some other steps, such as supervision, to prevent harm. While some defendants expressed regret that Gifford suffered this accident and indicated a willingness to act to prevent similar accidents in the future, they did not make any statements that suggest the sort of callous disregard for her safety that would qualify was as the "substantial lack of concern" the Legislature incorporated in definition of gross negligence in MCL 691.1407(2)(c). Because there was no question of material fact surrounding the gross negligence issue essential to this case, the trial court did not err when it granted defendants summary disposition on the basis of governmental immunity. [28]

Affirmed.

/s/ William C. Whitbeck
/s/ Harold Hood
/s/ Kirsten Frank Kelly

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[24] *Id*. at 129.

[25] *Id*. at 130.

[26] *Id*.

[27] MCL 691.1407(2)(c).

[28] See MCR 2.116(I)(1).