STATE OF MICHIGAN

COURT OF APPEALS

DENESSA SMITH, Personal Representative of the Estate of TEMPEST SMITH, Deceased,

Plaintiff-Appellee,

v

LINCOLN PARK PUBLIC SCHOOL, RANDALL KITE, ROBERT REDDEN, KATHLEEN EVANS, DARCY MIDDLEMISS, DIANE DELGADO, ROBIN CORNELL, JAMES DONOVAN, and MICHAEL SUCHY,

Defendants-Appellants,

and

KATHLEEN MUMAW,

Defendant.

UNPUBLISHED
May 20, 2004

No. 245204
Wayne Circuit Court
LC No. 02-226685-NO

Before: Saad, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

Defendants-appellants (hereafter "defendants") appeal as of right, challenging the trial court's November 15, 2002, order insofar that it denies their joint motion for summary disposition with respect to plaintiff's gross negligence claim. We conclude that plaintiff's gross negligence claim is barred by governmental immunity and, therefore, reverse the trial court's order in this regard.

This case arises out of the tragic death of plaintiff's daughter, Tempest Smith. At the time of her death, Tempest was a seventh grade student at Lincoln Park Middle School (LP Middle School) in the Lincoln Park Public School (LPPS) school district. Tempest committed suicide at her home in February 2001, while preparing to go to school.

The instant action is the second of two actions filed by plaintiff to recover damages from LPPS and various individual defendants employed by LPPS for the emotional distress suffered by Tempest that allegedly caused her to commit suicide. Plaintiff's first action, which was filed in federal court, alleged violations of Tempest's federal constitutional rights and two state

claims. The federal court granted summary judgment in favor of defendants with regard to the federal claim and dismissed the state claims for lack of jurisdiction.

Plaintiff subsequently filed the instant action in state court, alleging violations of Tempest's state constitutional rights (count I), violations of the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq.* (count II), and ordinary or gross negligence (count III). The negligence count alleged that Tempest endured unlawful discrimination, teasing, bullying, physical and psychological intimidation, and other abusive conduct by other students in the LPPS, beginning when she was in elementary school and continuing after she entered the LP Middle School for the 2000-2001 school year. The students' abusive conduct toward Tempest at the LP Middle School was allegedly directed at Tempest's sex and Wiccan religious affiliation.[1] Plaintiff sought damages from the LPPS, the LPPS superintendent Randall Kite, and various individual defendants employed at the LP Middle School, relative to Tempest's emotional distress, which allegedly culminated in her suicide, based on defendants' alleged failure to take appropriate corrective or remedial measures to protect Tempest.

Defendants jointly moved for summary disposition under MCR 2.116(C)(7), (8), and (10), with regard to all three counts. The trial court granted the motion with regard to plaintiff's constitutional claim and claim for ordinary negligence, but denied the motion with regard to plaintiff's CRA claim and gross negligence claim. The only issue before us on appeal is whether defendants were entitled to summary disposition with regard to the gross negligence claim based on governmental immunity. Having reviewed the trial court's decision de novo, *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999), we conclude that each defendant is entitled to summary disposition with regard to plaintiff's claim for gross negligence on the basis of governmental immunity.

LPPS argues that it is entitled to immunity with regard to plaintiff's gross negligence claim pursuant to MCL 691.1407(1), because it was engaged in a governmental function and there is no applicable statutory exception to immunity. We agree.

Initially, contrary to what plaintiff argues on appeal, LPPS did not waive this issue. If anything, plaintiff waived the right to argue that LPPS was not entitled to immunity by asserting in her brief below that "LPPS, as a governmental agency, is immune from liability for the negligence or gross negligence of its employees and agents as alleged in Count III." A party may not acquiesce in a matter before the trial court, and then argue on appeal that it constituted error. See *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). Indeed, we note

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[1] "Wicca is a polytheistic faith based on beliefs that prevailed in both the Old World and the New World before Christianity. See Phyllis W. Curlott, *Wicca and Nature Spirituality*, in *Sourcebook of the World's Religions* 113 (3d ed. 2000; Joel Beversluis, editor). Its practices include the use of herbal magic and benign witchcraft." *O'Bryan v Bureau of Prisons*, 349 F3d 399, 400 (CA 7, 2003). We will assume for purposes of our review of plaintiff's gross negligence count that Wicca is a religion. Because the scope of this appeal is limited to the gross negligence count, we express no opinion regarding how Wicca should be characterized for purposes of plaintiff's CRA claim.

that at the hearing on defendants' motion, the trial court agreed that LPPS was protected by governmental immunity with respect to the gross negligence count. But because a trial court speaks through its orders, and because the court's order here provides that summary disposition was denied as to LPPS with respect to the gross negligence count, we will address the issue of LPPS's liability. *Johnson v White*, 430 Mich 47, 53; 420 NW2d 87 (1988).

MCL 691.1407(1) provides that "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." Because a governmental agency's immunity is a characteristic of government, and a party suing a unit of government must plead facts in avoidance of its immunity, we review LPPS's claim under MCR 2.116(C)(8). See *Mack v Detroit*, 467 Mich 186; 649 NW2d 47 (2002). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a complaint based on the pleadings alone. *Mack*, *supra* at 193. "A plaintiff pleads in avoidance of governmental immunity by stating a claim that fits within a statutory exception or by pleading facts that demonstrate that the alleged tort occurred during the exercise or discharge of a nongovernmental or proprietary function." *Id.* at 204.

We agree that LPPS was entitled to summary disposition under MCR 2.116(C)(8) with regard to the gross negligence count, because plaintiff's complaint does not plead facts showing that the alleged gross negligence occurred during the exercise of a nongovernmental or proprietary function. In this regard, we reject plaintiff's newly raised claim that the alleged gross negligence involves a nongovernmental or proprietary function for which LPPS could be held vicariously liable. A proprietary function is an activity primarily conducted to produce a pecuniary profit excluding activity normally supported by taxes and fees. MCL 691.1413; *Coleman v Kootsillas*, 456 Mich 615, 621; 575 NW2d 527 (1998). A "governmental function" is "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f). To determine if a governmental agency was engaged in a governmental function, a court must focus on the general activity, and not the specific conduct engaged in at the time of the tort. *Tate v Grand Rapids*, 256 Mich App 656, 661; 671 NW2d 84 (2003). "A governmental 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." *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 625; 363 NW2d 641 (1984). The activity alleged in plaintiff's complaint with regard to the individual defendants' failure to provide for Tempest's safety and welfare falls within a school district's powers. See MCL 380.11a(3). Hence, as a matter of law, LPPS was entitled to governmental immunity.

Next, we conclude that defendant Randall Kite, as the superintendent of the Lincoln Park School District, was also entitled to summary disposition with respect to the gross negligence count based on absolute immunity. MCL 691.1407(5).

We reject plaintiff's claim that defendant Kite waived this issue by arguing in the trial court that he should be dismissed from this action with regard to all three counts. Regardless of whether dismissal was warranted as to all three counts, defendant Kite properly raised the claim of immunity under MCL 691.1407(5) to invoke judicial consideration of the issue. Indeed, we note that the trial court remarked at the hearing on defendants' motion that defendant Kite was claiming absolute immunity with regard to the gross negligence count as the superintendent of

the school district. Although the court did not thereafter rule on this specific question at the hearing, it nonetheless entered an order denying defendant Kite's motion for summary disposition grounded on absolute immunity "for reasons stated on the record."

A party should not be punished for a trial court's failure to rule on an issue that was properly raised in the trial court. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). Hence, we conclude that defendant Kite's claim is properly before us.

Individual immunity, as distinguished from governmental immunity, is appropriately considered under MCR 2.116(C)(7). *Canon v Thumudo*, 430 Mich 326, 344; 422 NW2d 688 (1988); see also *Mack, supra* at 198 n 15. When reviewing a motion under MCR 2.116(C)(7), the allegations in a complaint are accepted as true unless contradicted by documentary evidence submitted by the parties. *Maiden, supra* at 119. "If the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a claim is barred by immunity is a question for the court to decide as a matter of law." *Poppen v Tovey*, 256 Mich App 351, 354; 664 NW2d 269 (2003).

A superintendent of a school district is entitled to absolute immunity under MCL 691.1407(5) when acting within the scope of his or her executive authority. *Nalepa v Plymouth-Canton Community School Dist*, 207 Mich App 580, 589-590; 525 NW2d 897 (1994), aff'd as to the result only 450 Mich 934 (1995). As plaintiff appears to concede on appeal, there is no allegation in her complaint, nor evidence submitted, that defendant Kite's alleged conduct fell outside the scope of his executive authority. Hence, as a matter of law, defendant Kite is absolutely immune, MCL 691.1407(5), and is entitled to summary disposition with regard to plaintiff's gross negligence claim.

The remaining individual defendants each claim entitlement to summary disposition based on the immunity prescribed in MCL 691.1407(2). Defendants argue that there is no genuine issue of material fact that their conduct did not amount to gross negligence or was the proximate cause of Tempest's injuries.

Defendants' claim of immunity pursuant to MCL 691.1407(2) is properly considered under MCR 2.116(C)(7). *Canon, supra*; *Poppen, supra.* Pursuant to MCR 2.116(I)(1), "[i]f the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show no genuine issue of material fact, the court shall render judgment without delay." In general, the evidence must be viewed in a light most favorable to the nonmoving party. *Moll v Abbott Laboratories*, 444 Mich 1, 27-28 n 36; 506 NW2d 816 (1993).

Here, we conclude that plaintiff is unable to establish a genuine issue of material fact with regard to the proximate cause element of gross negligence, as defined in MCL 691.1407(2)(c). To survive summary disposition grounded on MCL 691.1407(2)(c), reasonable minds must be able to conclude that a governmental employee's conduct amounted to gross negligence that was "the proximate cause of the injury or damage." For purposes of this statute, "the proximate cause" is "the one most immediate, efficient, and direct cause of the injury or damage." *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000). Here, it is apparent that plaintiff cannot show that the individual defendants' alleged gross negligence was the proximate cause of Tempest's psychological harm.

Although plaintiff relies on reports prepared by two proposed experts, plaintiff did not establish the admissibility of their reports. *Maiden, supra* at 119. Unsworn averments do not establish disputed facts. *SSC Associates Ltd Partnership v General Retirement System*, 192 Mich App 360, 364; 480 NW2d 275 (1991). In any event, even if the reports are considered, and while an expert may give an opinion that embraces an ultimate issue in a case, neither report here supports a reasonable inference that any of the individual defendants' alleged gross negligence was the proximate cause of Tempest's psychological injury or suicide. MRE 704; *Downie v Kent Products, Inc*, 420 Mich 197, 204-205; 362 NW2d 605 (1984).

We note that Dr. Michael Abramsky's report was, in essence, a letter containing only his preliminary observation that the "most likely etiology of Tempest Smith's death was her being teased and ostracized by classmates and peers." But neither Dr. Abramsky's letter, nor the other evidence submitted by plaintiff, is sufficient to create a genuine issue of material fact with regard to the proximate cause element of plaintiff's gross negligence claim. The one most immediate, efficient, and direct cause of Tempest's psychological harm was student-on-student teasing and harassment, not defendants' alleged failure to intercede to stop the students. Further, Tempest's act of suicide is even further removed from defendants' alleged gross negligence. There was no evidence that any of the defendants had notice that Tempest contemplated suicide. Because the evidence does not establish a genuine issue of material fact whether defendants' alleged gross negligence could be considered "the one most immediate, efficient, and direct cause" of Tempest's psychological injuries and suicide, defendants are immune from liability under MCL 691.1407(2) and, therefore, entitled to summary disposition with regard to plaintiff's gross negligence claim.

Reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Karen M. Fort Hood