

STATE OF MICHIGAN
COURT OF APPEALS

K.S., as Next Friend for J.G.,

Plaintiff-Appellee,

v

WALLED LAKE SCHOOL DISTRICT,
JANELLE MCGUIRE, DON LAERMONT, and
JAMES GEISLER,

Defendants,

and

WILLIAM KASE and DENNIS WISINSKI,

Defendants-Appellants.

UNPUBLISHED

June 8, 2004

No. 244605

Oakland Circuit Court

LC No. 00-027502-NO

Before: Schuette, P.J., and Bandstra and Cooper, JJ.

PER CURIAM.

Defendants William Kase and Dennis Wisinski appeal as of right from the trial court's order denying their motion for summary disposition as to plaintiff's claims against them. We reverse.

Plaintiff brought this negligence action for injuries arising out of the alleged sexual abuse of her son, J.G., by a fellow student, J.M., at Walled Lake Western High School. J.G. has Aperts Syndrome, which is characterized by certain physical abnormalities and by mental retardation, and was classified as an EMI (Educable Mentally Impaired) special education student. Defendant Kase was the special education teaching consultant at the high school and J.G.'s special education teacher. Defendant Wisinski is the director of special education for Walled Lake School District.

When J.G. was in fifth grade at elementary school, he allegedly was sexually abused by J.M., who was classified as severely emotionally impaired. As a result, J.M. was moved to another school and J.G. received adult supervision throughout the school day. J.G. subsequently transferred to Walled Lake Western High School, where J.M. was also a student, and an Individualized Educational Plan (IEP) was developed for J.G. Although the IEP refers to the necessity of heightened adult supervision, particularly at lunch and school assemblies, it did not contain any direct reference to J.M. Nonetheless, because of J.G.'s history with J.M., defendant

Kase agreed to make sure that J.G. and J.M. did not have classes together and did not have lunch at the same time. Additionally, defendant Kase agreed to walk J.G. to his next class whenever he left Kase's classroom, and arranged for hall monitors to "monitor" J.G. from his mainstream classes and to the lunch room. In May 2000, J.G. informed defendant Kase that J.M. had been molesting him at school. Defendant Kase immediately contacted the sheriff's department, which began an investigation.

Plaintiff subsequently filed this action, alleging that J.G. was sexually assaulted as a result of defendants' gross negligence in failing to adequately supervise J.G. Defendants moved for summary disposition, arguing that their conduct did not amount to gross negligence and was not the proximate cause of J.G.'s injuries, thereby entitling them to governmental immunity under MCL 691.1407. The trial court denied defendants' motion under MCR 2.116(C)(10), concluding that there were genuine issues of material fact as to whether their conduct constituted gross negligence or could be considered the proximate cause of J.G.'s injuries. Defendant also argued that plaintiff failed to exhaust her administrative remedies under the Individuals with Disabilities Education Act (IDEA), 20 USC 1400 *et seq.*, before filing this action, and the trial court concluded that her action was not barred by the IDEA because she was not arguing that the IEP developed for J.G. was inadequate, but rather that defendants "failed to comply with the plan of supervision that they were supposed to put in place."¹

We review a trial court's grant or denial of summary disposition *de novo*. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support of a claim, and we must consider the pleadings, together with any affidavits, depositions, admissions or other documentary evidence submitted by the parties in a light most favorable to the nonmoving party to determine whether a genuine issue of fact exists. MCR 2.116(G)(2); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). The motion should be granted if the evidence demonstrates that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

As employees of the Walled Lake School District, a governmental agency, defendants are entitled to governmental immunity if they were acting within the scope of their authority, were "engaged in the exercise or discharge of a governmental function," and their conduct did not "amount to gross negligence that is the proximate cause of the injury or damage." MCL 691.1407(2). The parties do not dispute the applicability of the first two elements, but disagree on whether defendants' conduct amounted to gross negligence or could be considered the proximate cause of J.G.'s injuries. Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c). If reasonable minds could not differ as to whether a defendant's conduct amounted to gross

¹ We find it unnecessary to reach this issue because of our conclusion, *infra*, that the trial court erred in denying defendants' motion for summary disposition on the issues of gross negligence and proximate cause, and reverse on that basis. That is, even if plaintiff did exhaust her administrative remedies under the IDEA, she would be unable to maintain the action in any event.

negligence, summary disposition should be granted. *Vermilya v Dunham*, 195 Mich App 79, 83; 489 NW2d 496 (1992).

Here, there is evidence that J.G.'s IEP addressed the need for adult supervision during lunch and assemblies. Nonetheless, the evidence does not support a finding that defendants' conduct amounted to gross negligence. The evidence shows that defendant Kase, under the general authority of defendant Wisinski, listened to plaintiff's concerns about J.G.'s safety, entered into an IEP agreement that plaintiff was satisfied with and which she signed, and took steps to see that J.G. was monitored as he moved from class to class. The evidence does not support a finding that defendants engaged in "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c). In a factually similar case, *Soper v Hoben*, 195 F3d 845 (CA 6, 1999), a female special education student was sexually assaulted by a male student after a teacher inadvertently locked both students in a classroom. The female student's mother had previously expressed her concern to the school about the male student and the teacher allegedly assured the mother that the female student would be well supervised. Applying Michigan law, the Court of Appeals for the Sixth Circuit concluded that, even assuming the teacher's "knowledge and conduct," "reasonable minds could not find that the failure to have a policy in effect to protect at-risk students and/or the failure to place a para-professional in [the teacher's] classroom constitutes gross negligence." *Id.* at 852. We believe that a similar conclusion is required here, especially considering that defendants did not do anything to directly place J.G. in danger, as occurred in *Soper*. See also *Lindberg v Livonia Schools*, 219 Mich App 364, 368; 556 NW2d 509 (1996) (defendant was not grossly negligent when the wheelchair-bound plaintiff, who was retraining to be a welder, set his legs on fire after the defendant provided safety equipment that was acceptable to the plaintiff and promised to periodically monitor him).

Furthermore, apart from the question of gross negligence, defendants may not be held liable for J.G.'s injuries unless their conduct was "*the* proximate cause of the injury or damage." MCL 691.1407(2)(c) (emphasis added). Although plaintiff urges a general causation analysis, the governmental immunity statute was amended by 1986 PA 175 to require that a governmental employee's conduct be "the" proximate cause of an injury. MCL 691.1407(2)(c). Our Supreme Court concluded in *Robinson v Detroit*, 462 Mich 439, 462-463 n 19; 613 NW2d 307 (2000), that the amended statute, as applied to governmental employees, "contemplates *one* cause," which it described as "the immediate efficient, direct cause preceding the injury." Here, the immediate, direct cause preceding J.G.'s injuries was the alleged sexual molestation by J.M. The trial court erred in concluding that there was a question of fact regarding whether defendants' conduct was the proximate cause of J.G.'s injuries.

The evidence fails to show a genuine issue of material fact. Accordingly, defendants were not grossly negligent and their conduct was not the proximate cause of J.G.'s injuries. In light of that conclusion, we need not address defendants' other claims of error. Defendants are entitled to judgment as a matter of law, and the trial court's denial of their motion for summary disposition was error.

We reverse.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Jessica R. Cooper