

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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LANAH HARRIS, Next Friend of MARIAH  
BOGARD-DIETZ, WILLIAM WESLEY DIETZ,  
and DONALD HARRIS, JR., Minors,

UNPUBLISHED  
July 22, 2004

Plaintiff-Appellee,

v

No. 247253  
Wayne Circuit Court  
LC No. 01-116038-NO

PAUL RAHMAN; WALTER SAKOWSKI,  
Personal Representative of the Estate of  
RICHARD E. RAHMAN, Deceased; COUNTY  
OF WAYNE; BAKER DENTAL DIVISION;  
ENGLEHARD INDUSTRIES, INC.; TROY  
CHEMICAL COMPANY,

Defendants,

and

HENRY MACIEJEWSKI,

Defendant-Appellant.

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Before: Jansen, P.J., and Meter and Cooper, JJ.

PER CURIAM.

Defendant Henry Maciejewski<sup>1</sup> appeals as of right from a trial court order denying his motion for summary disposition. Plaintiff filed a claim against defendant, an employee of the Environmental Health Division of the Wayne County Public Health Department, alleging injuries resulting from negligence in connection with the cleanup of an elemental mercury spill that occurred in plaintiff's home. On appeal, defendant argues that the trial court erred in denying his motion for summary disposition because (1) he is entitled to governmental immunity

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<sup>1</sup> Throughout this opinion Maciejewski will be referred to singularly as defendant as the other named defendants are not parties to this appeal and will be referred to by name.

and (2) he was not the proximate cause of the injuries sustained by plaintiff's children. We affirm.

Plaintiff's children suffered injuries after handling mercury found in a jar in a home plaintiff had recently rented. Defendant is the employee, of the Environmental Health Division of the Wayne County Public Health Department, who was contacted by the Harris family to assist in determining the hazard posed by the mercury.

Defendant's argument on appeal is that the trial court erred in denying his motion for summary disposition because no genuine issue of material fact exists as to whether defendant was grossly negligent in connection with the injuries sustained by plaintiff's children and because defendant met his burden in establishing that no genuine issue of material fact existed as to whether defendant's alleged gross negligence was the proximate cause of plaintiff's children's injuries. Therefore, defendant claims he is entitled to governmental immunity. We disagree.

On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition brought pursuant to "MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties." *Glancy v Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998). All well-pleaded allegations are construed in favor of the nonmoving party. *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997). 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. *Id.* If the pleadings demonstrate that a party is entitled to judgment as a matter of law, or if the affidavits or other documentary evidence show that there is no genuine issue of material fact, judgment must be rendered without delay. *Harris v Allen Park*, 193 Mich App 103, 106; 483 NW2d 434 (1992). The applicability of governmental immunity is a question of law that is also reviewed de novo on appeal. *Baker v Waste Mgt of Michigan, Inc.*, 208 Mich App 602, 605; 528 NW2d 835 (1995). A claim subject to governmental immunity is properly dismissed by summary disposition on the basis that the claim is barred. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994).

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201(1998). Such a motion, under MCR 2.116(C)(10), may be granted when:

[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. [MCR 2.116(C)(10).]

A motion for summary disposition based on the lack of a material factual dispute must be supported by documentary evidence. MCR 2.116(G)(3)(b); *Meyer v City of Center Line*, 242 Mich App 560, 574; 619 NW2d 182 (2000). The moving party must specifically identify the matters which have no disputed factual issues, MCR 2.116(G)(4); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999), and has the initial burden of supporting his position by affidavits, depositions, admissions, or other documentary evidence, *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists, *Smith, supra*, and

that the disputed factual issue is material to the dispositive legal claims, *State Farm v Johnson*, 187 Mich App 264, 267; 466 NW2d 287 (1990).

MCL 691.1407(2), which concerns governmental immunity for purposes of tort liability, provides the following:

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 . . . 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 . . . if all of the following are met:

(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.

(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.

Plaintiff has not challenged defendant's contention that defendant was an officer or an employee of a governmental agency acting in the course of his employment and within the scope of his authority, or his contention that Wayne County, defendant's employer, is a governmental agency engaged in the exercise or discharge of a governmental function. Accordingly, pursuant to MCL 691.1407, defendant is immune from tort liability if his conduct did not amount to gross negligence that was the proximate cause of plaintiff's children's injuries. Thus, to survive defendant's summary disposition motion, plaintiff is required to demonstrate that genuine issues of material fact exist with regard to whether defendant was grossly negligent, and as to whether this gross negligence was the proximate cause of the injuries sustained by plaintiff's children.

Defendant, meeting the initial burden of showing that no genuine issue of material fact exists as to the element of gross negligence, presented evidence that: (1) he did not initially know how much mercury was involved; (2) he immediately informed Lanah Harris that she should call an environmental consulting firm, since he did not have the equipment necessary to conduct the testing, and provided Harris with the name of such a firm; (3) at the time he tested the Harris home he was informed by plaintiff that some professional cleanup had already been completed; and (4) he had advised Harris that additional cleanup should be done to get rid of certain furniture saturated with mercury, as well as to keep the household pets out of the most highly contaminated areas. Defendant further presented evidence that even at the time he contacted the Environmental Protection Agency to get it involved in the case he still did not believe that it was necessary for the Harris family to evacuate their home, because he did not believe that the readings he obtained during his testing were accurate.

Plaintiff presented evidence that: (1) defendant knew at the time of the spill at the Harris home that the amount of mercury involved in a spill was an important factor because the greater

the spill the greater the danger of vaporization and, therefore, poisoning; (2) before the time of the spill at the Harris home, defendant believed that when one pound of elemental mercury was involved in a spill immediate evacuation of the contaminated area was necessary; (3) defendant was informed during his first conversation with Lanah Harris that one pound of mercury was involved and that the Poison Control Center had advised the family to evacuate the home; (4) although defendant's testing had revealed levels of mercury contamination within the legal limits for industrial sites, this legal limit was higher than was safe in a residential area because it was based on time of exposure; (5) and that defendant had recommended that the Harris' keep their family pets away from the most heavily contaminated areas for the safety of the pets. Plaintiff further presented evidence that, despite all of the above, not only did defendant not advise the Harris family to evacuate the home, but he directly contradicted the advice given the family by the Poison Control Center in telling them that it was mere speculation that the levels of mercury in the home were dangerous.

Upon review de novo, we find that the trial court correctly determined that a genuine issue of material fact exists as to whether defendant was grossly negligent in connection with the injuries suffered by plaintiff's children and, thus, the claim is not statutorily barred by governmental immunity. See *Harris, supra* at 106.

Similarly, we find that the trial court also correctly determined that defendant had failed to meet his burden in demonstrating that no genuine issue of material fact exists as to the element of proximate cause. With regard to what constitutes proximate cause, the Michigan Supreme Court has stated that "the phrase 'the proximate cause' is best understood as meaning the most immediate, efficient and direct cause preceding an injury." *Robinson v Detroit*, 462 Mich 439, 459 613 NW2d 307 (2000). Defendant argues that his conduct, regardless whether it constituted gross negligence, was not the proximate cause of plaintiff's children's injuries, as the term "proximate cause" is defined in *Robinson, supra*. Specifically, defendant asserts that he could not be the proximate cause of the injuries sustained by plaintiff's children because their injuries were complete before plaintiff even contacted defendant. However, as the trial court noted, defendant has provided no evidence to show that injuries sustained by plaintiff's children were complete upon their initial exposure to the mercury. Defendant has provided no doctor's reports, no deposition testimony, no affidavits, and no scientific treatises or any other type of documentary evidence to support this contention. Without such evidence, defendant has not shown that the children's continued exposure to the mercury in their home, the direct result of defendant's allegedly grossly negligent failure to advise the Harris family to evacuate the home, did not cause some or all of the injuries sustained by plaintiff's children. See *Smith, supra* at 455. Because defendant did not make the required showing, we find, upon review de novo, that he failed to demonstrate that no genuine issue of material fact exists as to the element of proximate cause. Therefore, the trial court did not err in denying defendant's motion for summary disposition.

Affirmed.

/s/ Kathleen Jansen  
/s/ Patrick M. Meter  
/s/ Jessica R. Cooper