

STATE OF MICHIGAN
COURT OF APPEALS

LASHANDA WALKER, as Next Friend of
CHRISTOPHER EVANS, a Minor,

Plaintiff-Appellant,

v

DAN GRIBBLE,

Defendant-Appellee.

UNPUBLISHED
November 4, 2010

No. 291507
Jackson Circuit Court
LC No. 08-002168-NO

Before: FORT HOOD, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

Plaintiff, as next friend to her minor son, appeals as of right from the circuit court's order granting summary disposition to defendant on grounds of governmental immunity. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This case arises from an accident that took place in August 2007 in the course of a summer recreation program operated by the City of Jackson's Department of Parks and Recreation. Plaintiff asserts that defendant, an employee of the Department, placed the minor on his shoulders, announced he was going to throw the child from him, disregarded the child's protests, then threw the child to the ground, causing the child to suffer a fractured wrist.

At deposition, the child described defendant as a group leader for the recreation program. Asked to describe the incident, the child replied, "I was on [defendant's] back, and then I was on his neck, and he said that he was going to throw me into the air, and I said don't throw me, and then he counted down, and I said no, and he threw me anyway." The child confirmed that the two were playing. According to the child, he was sitting on defendant's shoulders, with his feet in front of defendant, when defendant placed his hands on the child's ribs and threw him "up" and "forward," causing him to land on his "butt." The child opined, "He probably thought I was going to land on my feet."

Defendant sought summary disposition on grounds of governmental immunity. The trial court granted the motion, on the ground that the court was "not satisfied that there is a sufficient showing of gross negligence to warrant the case to continue"

This Court reviews a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). MCR 2.116(C)(7) authorizes motions for summary disposition premised upon "immunity granted by law" When deciding a motion under that rule, the court must consider the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. See *Amburgey v Sauder*, 238 Mich App 228, 231; 605 NW2d 84 (1999).

MCL 691.1407(2) provides that every "officer and employee of a governmental agency . . . shall be immune from tort liability for injuries to persons . . . caused by the officer [or] employee . . . while in the course of employment or service." Subsection (2)(c), however, establishes an exception where the state agent's conduct constitutes "gross negligence that is the proximate cause of the injury or damage." Subsection (7)(a) in turn defines "gross negligence" as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."

In this case, the child's own testimony was that he and defendant were playing. The child speculated that defendant likely had hoped that the child would land on his feet. There is no evidence of animus between the two nor any proofs of prior incidents where the teacher participated in horseplay that resulted in injury or observed others doing so. Plaintiff greatly emphasizes the evidence that the child protested when defendant stated his intention to throw him. However, a child's protests reveal nothing of the actor's intent, other than the lack of intent to act in accord with those protests. We accordingly conclude that the evidence, as viewed in the light most favorable to plaintiff, bespeaks an actor who was perhaps careless or negligent, but not one who was acting with a substantial disregard for the possibility that injury would result.

The trial court, therefore, correctly granted defendant's motion for summary disposition.

Affirmed.

/s/ Karen Fort Hood
/s/ Cynthia Diane Stephens