

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UNPUBLISHED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.

BORRELLO, J. (*dissenting*).

An employee of a governmental agency acting within the scope of his or her authority is immune from tort liability unless the employee's conduct amounts to gross negligence that is the proximate cause of the injury. MCL 691.1407(2). Gross negligence is "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c). Relevant to the disposition of this action, "[s]ummary disposition is precluded where reasonable jurors honestly could have reached different conclusions with respect to whether a defendant's conduct amounted to gross negligence." *Stanton v Battle Creek*, 237 Mich. App. 366, 375; 603 NW2d 285 (1999), *aff'd* 466 Mich 611; 647 NW2d 508 (2002); *Kendricks v Rehfield*, 270 Mich App 679, 682; 716 NW2d 623 (2006).

Here, we have a minor child who, against his express wishes, was hoisted onto the shoulders of an adult and thrown into the air. As the majority correctly asserts, for the adult to assume that the child would land on his feet, is speculative. Deciding the central issue of this case by relying on speculation, runs afoul of this Court's obligation to examine the record in the light most favorable to the plaintiff to ascertain whether reasonable jurors could have reached a different conclusion than that of my colleagues and the trial court.

Hoisting a minor child against his express wishes onto the shoulders of an adult and throwing him into the air (hoping) that he would land on his feet, goes beyond the normal course of "playing," and comes close to an assault. Further, the majority's assertion of a lack of animus between the two is irrelevant to the issue of whether the actions of the adult constituted gross negligence. More troublesome is the majority's assertion that "a child's protests reveal nothing of the actor's intent, other than the lack of intent to act in accord with those protests." At a minimum, such protestations exhibited fear on the part of the child, rendering any subsequent actions and continuing protestations highly relevant as to the actor's state of mind. The fact that

the actor continued with his plan to hoist the child onto his shoulder and then fling him into the air, after he was specifically told not to, is evidence of a state of mind that was more consumed with completing the act, rather than exhibiting any consideration of the possible dire consequences such action could bring to the child. At the very least, such actions create a question of fact as to whether the actions of the adult constituted gross negligence as defined in MCL 691.1407(2)(c). For these reasons, I would reverse the granting of summary disposition and remand this matter to the trial court for further proceedings.

/s/ Stephen L. Borrello