STATE OF MICHIGAN

COURT OF APPEALS

JOEL CAMERON and KRISTI CAMERON, on behalf of ASHLEY CAMERON, a Minor, and KRISTI CAMERON, Plaintiffs-Appellants,	UNPUBLISHED January 15, 2015
v	No. 318887 Wayne Circuit Court
HURON CLINTON METROPOLITAN AUTHORITY, JEFFREY W. SCHUMAN, and RICHARD E. SOBECKI, Defendants-Appellees.	LC No. 12-007767-NO

Before: FORT HOOD, P.J., AND HOEKSTRA AND O'CONNELL, JJ.

PER CURIAM.

In this personal injury action, plaintiffs appeal as of right an order of the trial court granting defendants' motion for summary disposition. Because defendants, as a governmental agency and individual governmental employees, were entitled to immunity in this case, we affirm.

On July 5, 2010, Ashley Cameron and her mother Kristi Cameron visited the Lower Huron Metropark (LHM) with other family members. The LHM is one of a number of parks operated by defendant Huron Clinton Metropolitan Authority (HCMA). Ashley and Kristi had lunch in the Ellwoods picnic area, located near the LHM's Turtle Cove Water Park (Turtle Cove). After finishing her lunch, Ashley played near a tree where she stepped on hot barbecue coals, which had been dumped at the base of the tree by an unknown patron. Ashley suffered severe burns as a result.

After Ashley was injured, plaintiffs filed suit against the HCMA, Jeffrey Schuman (the LHM's operations manager), and Richard Sobecki (the LHM's park superintendent). Plaintiffs alleged claims of intentional nuisance, gross negligence, and negligent infliction of emotional

distress.[1] Defendants filed a motion for summary disposition, which the trial court granted. The trial court subsequently denied plaintiffs' motion for reconsideration. Plaintiffs now appeal as of right.

This Court reviews de novo a trial court's grant of summary disposition. *McLean v Dearborn*, 302 Mich App 68, 72; 836 NW2d 916 (2013). Although the trial court did not specify under what subsection summary disposition was appropriate, it granted summary disposition based on the application of immunity provided by the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq*, and consequently we will review the matter under MCR 2.116(C)(7). See *Smith v Kowalski*, 223 Mich App 610, 612 n 2; 567 NW2d 463 (1997). A trial court properly grants summary disposition under MCR 2.116(C)(7) when a claim is barred because of immunity granted by law. *Plunkett v Dep't of Transp*, 286 Mich App 168, 180; 779 NW2d 263 (2009).

> Under MCR 2.116(C)(7), the trial court must accept as true the contents of the complaint, unless they are contradicted by documentary evidence submitted by the moving party. A trial court may also consider the parties' pleadings, affidavits, depositions, admissions, and other documentary evidence filed to determine whether the defendant is entitled to immunity. [*Roby v Mount Clemens*, 274 Mich App 26, 28-29; 731 NW2d 494 (2006) (quotation marks and citations omitted).]

"If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide." *Moraccini v Sterling Heights*, 296 Mich App 387, 391; 822 NW2d 799 (2012).

I. PROPRIETARY FUNCTION EXCEPTION

Plaintiffs first argue that the trial court erred when it determined that the HCMA was entitled to the protections of governmental immunity pursuant to MCL 691.1407(1). In particular, plaintiffs contend that Turtle Cove was primarily operated for profit, meaning that, according to plaintiffs, the proprietary function exception to governmental immunity under MCL 691.1413 applies and the HCMA is therefore not immune from tort liability in this case.

"Except as otherwise provided, the governmental tort liability act (GTLA), MCL 691.1401 *et seq.,* broadly shields and grants to governmental agencies immunity from tort liability when an agency is engaged in the exercise or discharge of a governmental function." *Moraccini*, 296 Mich App at 391, citing MCL 691.1407(1). There are six statutory exceptions to governmental tort immunity, including, relevant to the present dispute, the proprietary function

[1] Plaintiffs' complaint actually titled this claim as one for intentional infliction of emotional distress, and alleged elements of both intentional and negligent infliction of emotional distress. However, in their response to defendants' motion for summary disposition, as well as in their brief on appeal, plaintiffs refer to and argue the claim as one for negligent infliction of emotional distress. Thus, we treat it as such.

exception found in MCL 691.1413. See *McLean*, 302 Mich App at 73. Pursuant to MCL 691.1413:

> The immunity of the governmental agency shall not apply to actions to recover for bodily injury or property damage arising out of the performance of a proprietary function as defined in this section. Proprietary function shall mean any activity which is conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding, however, any activity normally supported by taxes or fees. No action shall be brought against the governmental agency for injury or property damage arising out of the operation of proprietary function, except for injury or loss suffered on or after July 1, 1965.

"Therefore, to be a proprietary function, an activity: '(1) must be conducted primarily for the purpose of producing a pecuniary profit; and (2) it cannot be normally supported by taxes and fees.'" *Herman v Detroit*, 261 Mich App 141, 145; 680 NW2d 71 (2004), quoting *Coleman v Kootsillas*, 456 Mich 615, 621; 575 NW2d 527 (1998).

In this case, it is plain that HCMA is a governmental agency and that its operation of the LHM generally constituted a governmental function. See *Rohrabaugh v Huron-Clinton Metro Auth Corp*, 75 Mich App 677, 681; 256 NW2d 240 (1977) ("Michigan courts have traditionally treated the operation of recreational parks as a governmental function."). The issue raised by plaintiffs is whether HCMA's operation of Turtle Cove Water Park in particular involved a proprietary function. The trial court rejected this assertion, concluding that HCMA's operation of Turtle Cove was not a proprietary function. On appeal, we find it unnecessary to consider this issue because Turtle Cove's activities are simply irrelevant to the injuries involved in the present case.

That is, assuming for the sake of argument that the operation of Turtle Cove was a proprietary function, it is nonetheless clear that Ashley's injuries did not "arise[] out of" the performance of this function. MCL 691.1413. Instead, Ashley was injured in Ellswood picnic area, an area outside of Turtle Cove where she and Kristi had stopped to eat lunch before entering the water park. Her injury was not caused by the operation of Turtle Cove; it was caused by coals left on the ground by an unknown patron in the Ellwoods picnic area. While plaintiffs assert, without citation to authority, that the HCMA is liable under the proprietary function exception for its negligence in "the pathway leading up to" Turtle Cove, Ashley was not injured on any such pathway. Rather, the only link plaintiffs had to Turtle Cove was the fact that they intended to enter Turtle Cove after they finished eating lunch. Plaintiffs' injuries did not arise out of the operation of Turtle Cove, and accordingly, the HCMA's operation of Turtle Cove offers no basis for avoiding the general grant of immunity to the HCMA. MCL 691.1407(1); MCL 691.1413. Thus, the HCMA was entitled to the protections of governmental immunity,

and the trial court properly granted summary disposition in the HCMA's favor pursuant to MCR 2.116(C)(7).[2]

II. NEGLIGENCE BASED TORTS

Plaintiffs next argue that the trial court erred when it concluded that defendants Schuman and Sobecki were entitled to summary disposition in relation to plaintiffs' claim of gross negligence and negligent infliction of emotional distress based on their immunity from tort liability under MCL 691.1407(2) as individual governmental actors. In particular, plaintiffs maintain that Schuman and Sobecki were grossly negligent and that their gross negligence was the proximate cause of Ashley's injuries. Plaintiffs also allege that Schuman and Sobecki are liable for Kristi's claim of negligent infliction of emotional distress.

In addition to the broad grant of immunity provided to governmental agencies, the GTLA also confers qualified immunity from tort liability to individual governmental actors. *Odom v Wayne Co*, 482 Mich 459, 468; 760 NW2d 217 (2008). Specifically, as this Court explained in *Radu v Herndon and Herndon Investigations, Inc*, 302 Mich App 363, 382; 838 NW2d 720 (2013):

> MCL 691.1407(2) generally provides that a governmental agency's employee is immune from tort liability for an injury caused by the employee while in the course of employment if (a) the employee was acting within the scope of his or her authority, (b) the governmental agency was engaged in the exercise of a governmental function, and (c) the employee's conduct did not amount to gross negligence that was the proximate cause of the injury.

For purposes of MCL 691.1407(2), "gross negligence" is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a). "Therefore, a plaintiff cannot survive a motion for summary disposition premised on immunity granted by MCL 691.1407(2) merely by presenting evidence that the employee's conduct amounted to ordinary negligence." *Radu*, 302 Mich App at 382-383. "Rather, the plaintiff must present evidence that the 'contested conduct was substantially more than negligent.'" *Id*. at 383, quoting *Costa v Community Emergency Med Servs, Inc*, 475 Mich 403, 411; 716 NW2d 236 (2006). "[I]f no reasonable jury could find that the employee's conduct amounted to gross negligence, the plaintiff's claim must be dismissed." *Id*. Moreover, even if grossly negligent, to be subject to tort liability, a governmental employee's actions must be "the proximate cause" of the plaintiff's injuries. *Robinson v Detroit*, 462 Mich 439, 445; 613 NW2d 307 (2000). For an employee's conduct to be "the proximate cause," it must amount to "the one most immediate, efficient, and direct cause of the injury or damage." *Id.* at 459, 462. In other words, "it is not enough that the gross negligence be 'a' proximate cause, it must be the

[2] Although our reasoning differs from that of the trial court, summary disposition was nonetheless properly granted and this Court will not reverse the court's order when the right result was reached. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

'direct cause preceding the injury.'" *Kruger v White Lake Twp*, 250 Mich App 622, 627; 648 NW2d 660 (2002), quoting *Robinson*, 462 Mich at 462.

On the facts of this case, we agree with the trial court's conclusions that Schuman and Sobecki were not grossly negligent for failing to place a hot ash barrel in close proximity to the Ellswood picnic area or for failing to provide instructions to patrons of the park regarding proper disposal methods for coals. While the specific safety measures urged by plaintiff had not been adopted, the evidence showed that the LHM staff checked the park for safety hazards on a regular basis, there were fountains in the park where patrons could obtain water to extinguish hot coals, and hot ash barrels were distributed throughout the park. Even if additional precautions could have been taken, "saying that a defendant could have taken additional precautions is insufficient to find ordinary negligence," let alone gross negligence, which requires "almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks." *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). Even viewed in a light most favorable to plaintiffs, the record simply does not support plaintiffs' contention that Schuman and Sobecki acted with reckless disregard for the safety of those in their charge. *Id.* at 90-91.

Additionally, we conclude that Schuman and Sobecki were clearly not "the proximate cause" of Ashley's injuries. Plainly, there were more direct causes of Ashley's injuries, including, for example, the negligence of the patron who left hot coals on the ground in the park. Given this more direct cause, any negligence by Schuman and Sobecki is simply too remote and cannot be "the one most immediate, efficient, and direct cause" of Ashley's injuries. See *Robinson*, 462 Mich at 459, 462; *Kruger*, 250 Mich App at 627. Because Schuman and Sobecki were not grossly negligent and any failures on their part were not the proximate cause of Ashley's injuries, the trial court properly granted summary disposition relating to plaintiffs' claim of gross negligence.

Similarly, to the extent plaintiffs allege negligent infliction of emotional distress, because there were more direct causes for Kristi's claimed injuries, Schuman and Sobecki, who were not grossly negligent, cannot be the proximate cause of Kristi's emotional distress and summary disposition was properly granted in relation to this claim. See MCL 691.1407(2); *Odom*, 482 Mich at 479-480. Further, regarding Kristi's claim of negligent infliction of emotional distress, summary disposition was also appropriate because the complaint fails to allege that Kristi suffered actual physical harm and plaintiffs have not presented any evidence to indicate that Kristi suffered actual physical harm. See MCR 2.116(C)(8), (C)(10); *Wargelin v Sisters of Mercy Health Corp*, 149 Mich App 75, 81; 385 NW2d 732 (1986).[3]

[3] The elements of a negligent infliction of emotional distress claim are:

> (1) "the injury threatened or inflicted on the third person must be a serious one, of a nature to cause severe mental disturbance to the plaintiff"; (2) the shock must result in actual physical harm; (3) the plaintiff must be a member of the immediate family, or at least a parent, child, husband or wife; and (4) the plaintiff must actually be present at the time of the accident or at least suffer shock "fairly

III. INTENTIONAL NUISANCE

Plaintiffs also argue that the trial court erred by granting defendants' motion for summary disposition in regard to their intentional nuisance claim. However, plaintiffs' statement of the questions presented does not raise an issue regarding this claim. "Independent issues not raised in the statement of questions presented are not properly presented for appellate review." *Bouverette v Westinghouse Elec Corp*, 245 Mich App 391, 404; 628 NW2d 86 (2001). Accordingly, we need not address the issue. See *id.* We note briefly, however, that Schuman and Sobecki were entitled to summary disposition under MCR 2.116(C)(7) in relation to this intentional tort. The record demonstrates that the discretionary acts in question were undertaken during the course of their employment, within the scope of their authority, and there is no evidence of malice. See *Odom*, 482 Mich at 474-475, 480. In such circumstances, Schuman and Sobecki were immune from suit relating to plaintiffs' claim of intentional nuisance. See *id.* at 480.

Affirmed. Having prevailed in full, defendants may tax costs pursuant to MCR 7.219.

/s/ Karen M. Fort Hood
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell

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contemporaneous" with the accident. [*Wargelin*, 149 Mich App at 81 (citations omitted).]