STATE OF MICHIGAN

COURT OF APPEALS

DEONTE RIDLEY, a minor, by his Next Friend EDWIN ALEXANDER, Plaintiff-Appellee, v KURT BRITNELL, MICKEY REDMOND, ERNIE SMITH, and KEVIN BIGA, Defendants-Appellants.	UNPUBLISHED June 14, 2016 No. 326517 Wayne Circuit Court LC No. 13-014705-NO

Before: TALBOT, C.J., and MURRAY and SERVITTO, JJ.

PER CURIAM.

In this tort action involving the governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, defendants appeal as of right the trial court's order denying their motion for summary disposition that was premised upon defendants' assertion of governmental immunity. We affirm.

I. FACTS AND PROCEEDINGS

Deonte Ridley was a high school sophomore participating in a summer preconditioning camp for students interested in preparing for sports, including football. Defendants were coaching the camp. Deonte attended the first couple of weeks without incident. On June 26, 2013, however, Deonte suffered heat stroke. According to Deonte,[1] he experienced no difficulties or sickness prior to June 26.

Deonte testified that when he was at a session, he was not permitted to stop and rest or take a drink unless one of the coaches[2] told him he could. At approximately 9:00 a.m. on June 26, when the camp day was starting, atmospheric reports show that it was 73º with low humidity.

[1] Most of the material facts come from Deonte's deposition testimony, since we must view the evidence in a light most favorable to plaintiff.

[2] There is no dispute that Biga, Smith, and Redmond were present on June 26, and that Britnell was not.

Deonte and the other camp[3] participants first jogged around a school parking lot, and then returned to the air-conditioned building to drink some water. After 10-15 minutes, the campers were required to jog from the school building to "the hill," located on school grounds. When Deonte arrived he was already winded and was given a 30-second break to drink water. The training involved running up and down the hill 30 times in 30 minutes. After 15 laps, according to Deonte's testimony, he felt physically unable to continue, but one or more of coaches would not allow him to stop. He asked at least twice to stop for a drink and to catch his breath, but was not allowed to.[4]

When Deonte felt he could not continue on his own, one of the coaches enlisted another attendee to physically push Deonte up the hill. Once Deonte finally finished, a coach ordered Deonte to do five extra laps because he had taken so long. The other attendee continued to physically push Deonte up the hill. Eventually, when Deonte got to the top of the hill, his legs gave out and he fell down while trying to descend the hill. A coach informed Deonte that he had to get down the hill somehow, so the coach told Deonte to roll down the hill. When Deonte reached the bottom he attempted to get back up and continue. However, Deonte's body entirely gave out and he collapsed.

The coaches testified that they were aware of the signs of heat stroke. The coaches also agreed that simply observing someone is not always enough to recognize that someone is suffering from heat stroke. Rather, at times further investigation is required, and the coaches recognized that they would have to question the person to see if the person was incoherent, clumsy, or dizzy. Despite that admitted knowledge, according to Deonte's testimony, the coaches ordered him to continue running without a break or a drink of water even though he was visibly struggling and complained of feeling ill, and the coaches made that decision without asking Deonte any questions about his health or feelings.

Deonte's father, Edwin Alexander, filed the instant litigation on Deonte's behalf. Defendants eventually moved the trial court for summary disposition, arguing that the coaches were entitled to governmental immunity pursuant to MCL 691.1407(2), as their action/inaction did not amount to gross negligence that was the proximate cause of Deonte's injuries. Plaintiff argued that the evidence conflicted and so whether defendants were grossly negligent in their treatment of Deonte, and whether that treatment was the proximate cause of Deonte's injuries, was for a jury to decide. The trial court determined that there was an issue of fact regarding both questions, and denied defendants' motion. This appeal followed.

II. ANALYSIS

[3] Although Deonte acknowledged that the camp sessions were voluntary, he believed his presence was required in order to make the football team in the fall.

[4] Deonte could not identify by name which coach communicated to him at any given time during this training session.

The issues on appeal are the same as they were in the trial court, i.e., whether defendants are as a matter of law entitled to governmental immunity because they were neither grossly negligent nor the proximate cause of Deonte's injuries.[5]

"This Court reviews decisions on motions for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law." *Alcona Co v Wolverine Environmental Prod, Inc*, 233 Mich App 238, 245; 590 NW2d 586 (1998). "When reviewing a motion brought under MCR 2.116(C)(7), we consider all affidavits, pleadings, and other documentary evidence filed or submitted by the parties." *McFadden v Imus*, 192 Mich App 629, 632; 481 NW2d 812 (1992). "All well-pleaded allegations are accepted as true and are construed most favorably to the nonmoving party." *Id.* "Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by immunity granted by law." *State Farm Fire & Cas Co v Corby Energy Servs, Inc*, 271 Mich App 480, 482; 722 NW2d 906 (2006). The applicability of governmental immunity and its statutory exceptions are also reviewed de novo. *Moraccini v Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012). Summary disposition is proper where no relevant factual dispute exists regarding whether a claim is barred pursuant to MCR 2.116(C)(7). *Id*.

The GTLA provides immunity for governmental entities' employees and volunteers. MCL 691.1407(2). There are limits to that immunity, however, proscribed within MCL 691.1407(2):

> (2) 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

[5] Both parties have submitted arguments or evidence to the trial court or this Court that have no relevance to the legal issues presented. In his response to defendants' motion for summary disposition, plaintiff speculated that there must be a question of fact because three case evaluators determined as much by awarding plaintiff $100,000. For their part, defendants present evidence to this Court outlining Deonte's post-injury treatment and apparent rehabilitation. However, the question presented to both courts is a pure *legal* question—was the evidence presented as to duty and proximate cause sufficient to allow the case to proceed to a jury. The extent of Deonte's injuries is of no moment in deciding that issue, as our forthcoming discussion on gross negligence and proximate cause reveals. The focus is on defendants' conduct leading up to the injury. And, as plaintiff's appellate counsel recognizes, the alleged thought process of three case evaluators has no bearing whatsoever on the legal question presented. In both instances it makes no difference to properly deciding the motion whether Deonte was significantly or slightly injured, or how some other, non-judicial person viewed the case. Should a court look *more* kindly towards a rather weak summary disposition motion challenging the duty element if the injuries are only slight? Of course not. Nor should a judge look *less* kindly on a motion challenging duty that *warrants* granting if that means plaintiff losing the opportunity to receive a case evaluation award. Judges cannot let sympathies play into purely legal decisions. *Trapp v King*, 374 Mich 608, 610-611; 132 NW2d 640 (1965).

> to a person or damage to property caused by the . . . employee . . . while acting on behalf of a governmental agency if all of the following are met:
>
> (a) The . . . employee . . . 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 . . . employee's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

Considering the plain and unambiguous language of the statutes, as this Court must, *Bloomfield Twp v Kane*, 302 Mich App 170, 174; 839 NW2d 505 (2013), MCL 691.1407(2) provides an exception to the immunity of a governmental employee or volunteer where that person's gross negligence proximately causes an individual's injury.

MCL 691.1407(2)(c) indicates that the gross negligence must be "the proximate cause of the injuries or damages." "The Legislature's use of the definite article 'the' clearly evinces an intent to focus on one cause." *Robinson v Detroit*, 462 Mich 439, 458-459; 613 NW2d 307 (2000). "The phrase 'the proximate cause' is best understood as meaning the one most immediate, efficient, and direct cause preceding an injury." *Id*. at 459. In other words, "it is not enough that the defendant's actions simply be 'a' proximate cause." *Tarlea v Crabtree*, 263 Mich App 80, 92; 687 NW2d 333 (2004). Summary disposition on the grounds of proximate cause is only proper where "no reasonable trier of fact could conclude that defendants' conduct was the most immediate, proximate cause of" the injuries. *Id*. at 93.

A. GROSS NEGLIGENCE

Pursuant to the GTLA, "'[g]ross negligence' means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a). In other words, gross negligence "suggests . . . almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks." *Tarlea*, 263 Mich App at 90. More specifically, "[i]t is as though, if an objective observer watched the actor, he could conclude, reasonably, that the actor simply did not care about the safety or welfare of those in his charge." *Id*. Generally, a determination of whether an individual was grossly negligent is a decision for the finder of fact. *Jackson v Saginaw Co*, 458 Mich 141, 146; 580 NW2d 870 (1998). "However, if, on the basis of the evidence presented, reasonable minds could not differ, then the motion for summary disposition should be granted." *Id*. "[E]vidence of ordinary negligence does not create a material question of fact concerning gross negligence." *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999).

As mentioned, gross negligence requires a showing of "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a). As this Court has held, gross negligence is present where the actions of defendants "suggest[] . . . almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks," *Tarlea*, 263 Mich App at 90, or where "an objective observer watch[ing]

the actor . . . could conclude, reasonably, that the actor simply did not care about the safety or welfare of those in his charge." *Id*.

We hold that there was a question of material fact regarding the issue of gross negligence. Pertinent to that consideration is the fact that Deonte asked several times to stop and take a break, but the coaches declined. Further, when Deonte fell down while descending the hill, the coaches showed no concern, and simply told Deonte to roll down the hill. And finally, all of the coaches recognized that they were aware of the signs and symptoms of heat stroke, including lack of sweat, clumsiness, dizziness, and incoherence. Further, the coaches all stated that they knew simple observation was not always enough to recognize heat stroke, but that sometimes you had to ask questions. Yet, when Deonte stumbled and fell and reported feeling ill, none of the coaches approached Deonte personally to ask questions regarding the possibility of heat stroke.

The *Tarlea* Court held that evidence of gross negligence will often exhibit itself in the form of a "willful disregard of precautions or measures to attend to safety[.]" *Id*. Here, the coaches admitted that they were aware that heat stroke was always a risk, knew of the symptoms, and the path to recognizing those symptoms, including asking questions, but entirely disregarded that training when Deonte presented with the symptoms. In other words, when faced with a case like Deonte, their training indicated that they should question Deonte personally and make a determination regarding heat stroke, but according to Deonte's testimony, the coaches merely ignored him, or worse—told him to keep running and push through. That willful disregard of safety policies, under the standard espoused in *Tarlea*, certainly suggests that there was some gross negligence involved. *Id*.

This Court in *Tarlea* also provided other signs that gross negligence has occurred. First, the *Tarlea* Court noted that, when gross negligence takes place, an objective observer would be under the impression that "the actor simply did not care about the safety or welfare of those in his charge." *Id*. In the instant case, we are provided with testimony from Deonte that he fell while coming down the hill when his legs gave out on him. Despite this sign of exhaustion and clumsiness, a coach informed Deonte that he should just roll down the hill. Further, when Deonte was struggling, rather than giving Deonte a break, the coaches ordered another student to physically push Deonte up the hill. These actions do not show any concern for Deonte's safety. See *id*. Deonte was showing clear signs of illness and exhaustion, yet not only did the coaches ignore that, but they acted in a manner that would suggest they did not care at all about Deonte's safety. Telling Deonte to roll down the hill after he had collapsed exhibits "a singular disregard for substantial risks[,]" including the risk of heat stroke. *Id*.

In sum, there is evidence that the coaches disregarded safety precautions by failing to question Deonte after he showed signs of heat stroke, evidence that the coaches simply did not care about Deonte's health by refusing to help Deonte when he fell and instead telling him to roll down the hill, and finally, evidence that the coaches entirely disregarded risks by telling Deonte to keep running when he asked specifically to stop and get a drink of water. See *id*. Considering all of that evidence, a reasonable juror could determine that defendants in this case engaged in "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a). As such, there was a question of fact regarding the issue of gross

negligence, as properly determined by the trial court. See MCL 691.1407(8)(a); MCL 691.1407(2)(c); *Tarlea*, 263 Mich App at 90.

Citing the coaches' testimony that Deonte seemed to be doing well until he collapsed, that Deonte never asked for a break or a drink of water, and that Deonte was free to stop for water at any time, defendants argue that there was no evidence of gross negligence. Under the standard pursuant to which the trial court and this Court consider motions for summary disposition, a court does not choose which facts to believe when deciding motions for summary disposition. Rather, courts must consider the evidence in the light most favorable to the nonmoving party. *McFadden*, 192 Mich App at 632. Here, the nonmoving party is plaintiff, and Deonte's testimony regarding the events of the day in question is substantially different than those described by the coaches. As such, the factual differences between the coaches and Deonte on these material issues are required to be resolved by a jury. See *id*.

Defendants argue that *Tarlea* is factually similar and therefore binding on this Court. However, unlike in *Tarlea*, Deonte asked to stop and get some water on more than one occasion, and was told to continue running. Further, when Deonte initially collapsed after his legs gave out on him, one coach told him to roll down the hill and then get up and try again. The coaches in *Tarlea* had no notice of fatigue or illness on the part of the plaintiff. Given this drastic difference in the treatment of the decedent and Deonte, defendants' reliance on *Tarlea* is without merit. There was a genuine issue of material fact with regard to gross negligence, and the trial court did not err in so deciding. See MCL 691.1407(8)(a); MCL 691.1407(2)(c); *Tarlea*, 263 Mich App at 90.[6]

B. PROXIMATE CAUSE

Defendants argue, citing *Tarlea*, 263 Mich App 80, that because Deonte admitted that the camp was voluntary, and knew he was getting sick and needed to stop but did not, that defendants were not the proximate cause of Deonte's injuries. In *Tarlea*, the decedent attended a football camp, where the camp coaches were responsible for the nutrition and hydration of the attendees. *Id*. at 85. The evidence suggested that the coaches encouraged the participants to take water breaks whenever they wanted and reminded them that drinking water was necessary while exercising. *Id*. On one day of the camp, the participants arrived for practice at 7:00 a.m., and the temperature was 71 degrees with 93% humidity. *Id*. Throughout the day, the participants, including the decedent, completed a 200-yard run, stretching exercises, ten 60-yard dashes, and four sets of "up-downs." *Id*. at 85-86. After those exercises, the decedent stepped away from the group and took a rest. *Id*. at 86. Then the participants engaged in a 1½-mile run, which was to

[6] We do, however, conclude otherwise as to defendant Britnell. The undisputed evidence is that Britnell was not at the camp on June 26, and Deonte testified that he experienced no physical or mental problems at the camp prior to that day. As such, the evidence established that Britnell did nothing to or in regards to Deonte on the day he was injured, and defendant Britnell should have been dismissed from this case. Indeed, plaintiff stipulated at oral argument before this Court to the dismissal of defendant Britnell. An appropriate order of dismissal as to Britnell should be entered on remand.

be completed at each person's own pace and was not timed. *Id*. Some students decided not to complete the run, and the coaches told them to sit in the shade and drink some water, as the participants were free to stop running and rest at any time. *Id*. The decedent decided to complete the run, and when he crossed the finish line he collapsed. *Id*.

In addressing the issue of proximate cause, of particular importance to this Court was the fact that the decedent's participation in the 1½-mile run, and the camp in general, was voluntary. *Id*. at 92. Additionally, even during the run, the decedent was permitted to take a break, sit in the shade, and drink water. *Id*. Despite those options being available, and even some participants accepting those choices, the decedent chose to run the entire distance without a break. *Id*. This Court also considered the fact that the decedent had an unexplained infection and various other medical issues that were only diagnosed when he arrived at the hospital and could have caused the decedent's untimely death, in addition to the heat stroke. *Id*. at 93. Nevertheless, this Court took the voluntary nature of the exercise into account when determining that there was no genuine issue of material fact regarding the issue of proximate cause. *Id*.

It is true, as defendants argue, that as the plaintiff was in *Tarlea*, Deonte was free to stay home and avoid the camp session on the day in question. Additionally, when Deonte became ill and felt that his body was giving out, he was free to stop the exercise. But unlike the situation in *Tarlea*, where the coaches encouraged the attendees to rest and drink water and were never informed that the plaintiff was ill, Deonte specifically told at least one coach that he was tired and needed water, but was told to continue. Soon thereafter, Deonte fell from exhaustion, and was told he needed to get himself down the hill one way or another. Additionally, before he collapsed a coach told another participant to help Deonte up the hill for an additional five runs, providing at least circumstantial evidence that a coach realized Deonte could not make it up the hill alone.

In sum, although Deonte made a conscious choice to participate in the camp and to continue running when he was too ill to continue, he placed at least one supervisor on notice of his condition and was disregarded. He was told to continue despite his reported condition, leading to his collapse. On this record, there is a genuine issue of material fact whether defendants' actions or Deonte's decisions were "the one most immediate, efficient, and direct cause preceding [the] injury." *Robinson*, 462 Mich at 459.

Affirmed. No costs, governmental actors involved. MCR 7.219(A).

/s/ Michael J. Talbot
/s/ Christopher M. Murray
/s/ Deborah A. Servitto