# STATE OF MICHIGAN

# COURT OF APPEALS

DESHUNDRA GRAY and KEITH GRAY,

Plaintiffs-Appellees,

v

LEONARD CRY,

Defendant-Appellant.

UNPUBLISHED
September 20, 2011

No. 291142
Wayne Circuit Court
LC No. 07-717218-NO

Before: MURPHY, C.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

In this action arising out of a fight in a high school between two student-athletes, defendant appeals as of right the trial court's order denying his motion for summary disposition. We reverse and remand for entry of judgment in favor of defendant.

The facts, as alleged by plaintiffs in the complaint, and as testified to by plaintiff Keith Gray (hereafter Gray), were not disputed by defendant for purposes of his motion for summary disposition, nor does he dispute those facts on appeal. Gray and his fellow football-team members were in the school's weight room, working out while listening to music. Defendant was the football coach and a teacher at the school. Gray and another student, Derrick Benson, quarreled about the music being played on a CD player in the weight room. They began pushing one another, but other students separated Gray and Benson. Gray then started to walk away and leave the room. However, before Gray could exit the room, defendant entered the weight room and said something to the effect of asking the two students if they wanted to settle it. Benson, who was then "hyped-up" according to Gray, responded, "yeah, I want to fight . . . ." Defendant then instructed the other students not to restrain Benson anymore, and defendant, in Gray's words, "backed off and let us fight." Another student, not involved in the fracas, essentially corroborated Gray's version of events. Gray indicated that a fight then erupted, with Benson violently attacking Gray, causing injuries.

Plaintiffs sued, alleging gross negligence. Defendant filed a motion for summary disposition, asserting governmental immunity and arguing that Benson's conduct, not defendant's conduct, was "the" proximate cause of Gray's injuries. Plaintiffs opposed the motion for summary disposition, maintaining that the evidence gave rise to a question of fact regarding proximate cause. The trial court, in denying the motion, concluded that there was a genuine issue of material fact regarding gross negligence. With respect to causation, the court

ruled that a reasonable juror could conclude that defendant's conduct and words allowed Benson to fight Gray and were thus the cause of Gray's injuries.

Defendant argues that the trial court erred as a matter of law in denying summary disposition, given that defendant's words and actions were not the proximate cause of Gray's injuries. We agree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, __ Mich __; __ NW2d __, issued June 6, 2011 (Docket No. 141168), slip op at 2; *In re Egbert R Smith Trust*, 480 Mich 19, 23; 745 NW2d 754 (2008). Further, the determination regarding the applicability of governmental immunity and an exception to governmental immunity is a question of law that is also subject to de novo review. *Co Rd Ass'n of Mich v Governor*, 287 Mich App 95, 117-118; 782 NW2d 784 (2010); *Robinson v Lansing*, 282 Mich App 610, 613; 765 NW2d 25 (2009), rev'd on other grounds 486 Mich 1 (2010). Indeed, we review de novo questions of law in general, including matters of statutory construction. *Loweke*, __ Mich __, slip op at 2; *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006); *Byker v Mannes*, 465 Mich 637, 643; 641 NW2d 210 (2002). "Ordinarily, the determination of proximate cause is left to the trier of fact, but if reasonable minds could not differ regarding the proximate cause of the plaintiff's injury, the court should rule as a matter of law." *Babula v Robertson*, 212 Mich App 45, 54; 536 NW2d 834 (1995).

Under MCR 2.116(C)(7), an order granting a motion for summary disposition in favor of a defendant is proper when the plaintiff's claim is "barred because of . . . immunity granted by law." See *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). The moving party may submit affidavits, depositions, admissions, or other documentary evidence in support of the motion if substantively admissible. *Id.* The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. *Id.* This Court must consider the documentary evidence submitted for purposes of a motion brought under MCR 2.116(C)(7) relative to governmental immunity in a light most favorable to the nonmoving party. *Herman v Detroit*, 261 Mich App 141, 143-144; 680 NW2d 71 (2004). If there is no relevant 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. *Huron Tool & Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 377; 532 NW2d 541 (1995). If, however, a pertinent factual dispute exists, summary disposition is not appropriate. *Id.*

The immunity of individual government officers, employees, and agents is governed by MCL 691.1407(2), which provides:

> 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, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force 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 or caused by the volunteer while acting on behalf of a governmental agency 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*. [Emphasis added.]

Proximate cause has two components: (1) cause-in-fact and (2) legal cause. *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). In other words, proximate cause is a term of art that encompasses both factual and legal causation. *Ykimoff v Foote Mem Hosp*, 285 Mich App 80, 87; 776 NW2d 114 (2009). Cause-in-fact requires a "but-for" analysis. *Craig*, 471 Mich at 86-87. Legal cause, on the other hand, normally entails examining the foreseeability of consequences, as well as considering whether a defendant should be held responsible, under the circumstances, for the injuries that occurred. *Id.* at 87.

In *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000), the plaintiffs were innocent bystanders who were struck and injured by a person fleeing from police in a stolen vehicle. The plaintiffs sued the individual officers, among other defendants, arguing that the officers' gross negligence was the proximate cause of the injuries. The Supreme Court rejected that argument and, focusing on the word "the" before the term "proximate cause" in MCL 691.1402(2)(c), ruled as follows:

[R]ecognizing that "the" is a definite article, and "cause" is a singular noun, it is clear that the phrase "the proximate cause" contemplates *one* cause. Yet, meaning must also be given to the adjective "proximate" when juxtaposed between "the" and "cause" as it is here. We are helped by the fact that this Court long ago defined "the proximate cause" as "the immediate efficient, direct cause preceding the injury." The Legislature has nowhere abrogated this, and thus we conclude that in MCL 691.1407(2)(c) the Legislature provided tort immunity for employees of governmental agencies unless the employee's conduct amounts to gross negligence that is the one most immediate, efficient, and direct cause of the injury or damage, i.e., the proximate cause.

Applying this construction to the present cases, we hold that the officers in question are immune from suit in tort because their pursuit of the fleeing vehicles was not, as a matter of law, "the proximate cause" of the injuries sustained by the plaintiffs. The one most immediate, efficient, and direct cause of the plaintiffs' injuries was the reckless conduct of the drivers of the fleeing vehicles.

Accordingly, summary disposition for the defendant officers was proper because reasonable jurors could not find that the officers were "the proximate cause" of the injuries. [*Robinson*, 462 Mich at 462-463 (citations omitted).]

In the case at bar, the evidence establishes as a matter of law that the one most immediate, efficient, and direct cause of Gray's injuries was Benson's assault. Accordingly,

Benson's actions, not defendant's, were "the proximate cause" of Gray's alleged injuries for purposes of MCL 691.1407(2)(c).

We find further support for our holding in *Miller v Lord*, 262 Mich App 640; 686 NW2d 800 (2004), wherein this Court faced an analogous situation. The issue in *Miller* was whether the alleged gross negligence of a high school principal and two teachers constituted the proximate cause of injuries suffered in a sexual assault committed by Lord, a student, on Miller, another student. One teacher sent Miller into the hallway for misbehavior. The other teacher observed Lord talking with Miller in the hallway and asked why they were not in class. Lord explained that Miller was upset for being reprimanded and that he was trying to convince Miller to return to class. The second teacher left, and later, Lord and Miller went into a bathroom, where Lord allegedly sexually assaulted Miller. *Id*. at 642. The *Miller* panel held:

> The governmental immunity statute was amended by 1986 P.A. 175 to require that a governmental employee's conduct be "the" proximate cause of an injury. MCL 691.1407(2)(c). Our Supreme Court concluded in *Robinson* . . . that the amended statute, as applied to governmental employees, "contemplates *one* cause," which it described as "the immediate efficient, direct cause preceding the injury." Here, the immediate, direct cause preceding Tierra's injuries was the alleged sexual assault by Lord. Therefore, the trial court erred in denying defendants' motion for summary disposition on the basis that there was a question of fact regarding whether defendants' conduct was the proximate cause of Tierra Miller's injuries. [*Miller*, 262 Mich App at 644.]

Here, once again, Benson's physical assault of Gray, and not an act by defendant, was the one most immediate, efficient, and direct cause preceding Gray's injuries. While there may have been an issue of fact concerning whether defendant's conduct amounted to gross negligence, and although we certainly do not condone defendant's actions, *Robinson* and *Miller* dictate that proximate cause cannot be established in this case as a matter of law.

Reversed and remanded for entry of an order granting summary disposition in defendant's favor. Having fully prevailed on appeal, taxable costs are awarded to defendant under MCR 7.219. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot