STATE OF MICHIGAN

COURT OF APPEALS

TRISTAN PARENT, by his next friend CHERYL MERCIER,

Plaintiff-Appellee,

v

LAPEER COMMUNITY SCHOOLS, ANNE PRILL, KIM LENCH and TODD HARRIS,

Defendants,

and

MICHELLE BRADFORD and RYAN CARLSON,

Defendants-Appellants.

UNPUBLISHED
June 28, 2011

No. 297656
Lapeer Circuit Court
LC No. 09-041274-NO

Before: BORRELLO, P.J., and JANSEN and SAAD, JJ.

PER CURIAM.

Defendants Michelle Bradford and Ryan Carlson appeal the trial court's order that denied their motion for summary disposition. For the reasons set forth below, we reverse and remand for further proceedings.

I. FACTS AND PROCEEDINGS

In 2008, Tristan Parent was a sixth grade student at C.K. Schickler Elementary School. Tristan suffers from osteogenesis imperfecta, also known as brittle bone disease, and thus uses a motorized wheelchair that is operated by a joystick controller to minimize risk of injury. Because of his physical disability, the school district completed an Individualized Education Program (IEP) for Tristan in September 2007. The IEP provided a list of "physical functional needs" for which Tristan would need paraprofessional support, including assistance getting on and off the bus, carrying his school materials, using his locker, transitions between classes, toileting, stretching as needed, supervision during physical education class and outdoor recess, monitoring his use of a walker, stander or other equipment, and help with winter dressing. In the Supplementary Services Considerations section, the IEP states that Tristan would receive paraprofessional support for four to six hours per school day. Tristan's mother, Cheryl Mercier,

testified that, although it is not explicitly stated in the IEP, she believed an aide would be assigned to Tristan throughout each school day, which was approximately seven hours per day. According to Mercier, the school principal, defendant Bradford, told her the reference to four to six hours in the IEP was merely necessary to allow for breaks and lunch for the aide. In fact, Tristan's aide, Todd Harris, left the school each day at 2:00 p.m. and another paraprofessional or special education teacher would help Tristan at his locker and get him on the bus when school let out after 3:00 p.m.

At around 2:50 p.m. on March 27, 2008, Tristan and his friend, "Student A,"[1] were in defendant Ryan Carlson's homeroom class. Carlson was a long-term substitute teacher at the school who filled in while Tristan's regular teacher was on maternity leave. The boys asked Carlson if they could go to the computer lab to finish typing an assignment. Tristan testified that he had been to the computer lab without an aide "a few times" before. Carlson and Student A both testified that Carlson told the boys they could go to the computer lab if an adult was there for supervision and that they would have to return to the classroom if no adult was in the room. The boys went to the computer lab, which was approximately 30 or 40 feet away from Carlson's classroom. A class was using the lab, but there are usually a few open computer stations for other students to use. When the class ended and the other students and teacher were leaving the lab, Student A told Tristan that they should return to Carlson's classroom. Tristan told student A he was "right behind" him, but he instead stayed in the lab alone to keep working. When Student A returned to the classroom alone, Carlson sent him back to get Tristan. Student A again went to the computer lab and Tristan apologized and said he was still typing and asked Student A to wait for him. Thereafter, Tristan asked Student A to move the arm of his wheelchair down and, in the process, Student A's sweatshirt sleeve became caught on the joystick of Tristan's motorized wheelchair. The wheelchair thrust forward into the metal computer table and Tristan sustained injuries when the table fell on him.

Tristan's mother filed this lawsuit against the school district, the principal, and various school employees on March 10, 2010. Specifically, the complaint alleged that defendants are liable for Tristan's injuries because they failed to follow the IEP, which resulted in Tristan being unsupervised in the computer lab. Defendants filed a motion for summary disposition and argued, among other things, that plaintiff failed to plead her claim against the school district in avoidance of governmental immunity under MCL 691.1407(1) and that plaintiff cannot establish that the individual defendants were grossly negligent pursuant to MCL 691.1407(2). The trial court granted summary disposition on plaintiff's claims against the school district and to three school employees who were not in the building when Tristan was injured. However, the court denied the motion for summary disposition on plaintiff's claims against Bradford and Carlson. Specifically, the trial court ruled that a reasonable jury could conclude that Bradford's failure to instruct Carlson on Tristan's IEP and her failure to enforce compliance with the IEP amounted to gross negligence and that Carlson's failure to read and follow the IEP amounted to gross negligence. The court observed that "a reasonable jury could find that the actions of Defendants

[1] The parties concealed the name of this student to protect his privacy rights under the Family Educational Rights and Privacy Act, 20 USC 1232g.

Bradford and Carlson, could be construed by the trier of fact as significantly lacking in concern for Plaintiff's safety or that defendants failed to exercise basic care to enforce its IEP." The court also ruled that a "jury could find that the failure to follow the IEP was the proximate cause of Tristan's accident and injuries." Because the trial court's rulings are incorrect, we reverse.

II. ANALYSIS

Defendants Bradford and Carlson argue that the trial court erred by denying their motion for summary disposition because they are immune from tort liability pursuant to MCL 691.1407(2). With regard to these parties, defendants brought their motion for summary disposition under MCR 2.116(C)(7) and (C)(10). "This Court reviews de novo a trial court's decision on a motion for summary disposition." *Lameau v Royal Oak*, 289 Mich App 153, 166; 796 NW2d 106 (2010).[2] This case also involves the interpretation of the governmental immunity act. We review de novo questions of statutory interpretation. *Odom v Wayne Cty*, 482 Mich 459, 467; 760 NW2d 217 (2008).

MCL 691.1407(2) grants immunity from tort liability to individual governmental actors for injuries or damage caused by the employee. Subsection 2 provides that an individual is immune from tort liability 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.

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[2] As the Court in *Lameau* further explained at 166-167:

> A trial court properly grants summary disposition under MCR 2.116(C)(7) when a claim is barred by immunity granted by law. A party may support or defend a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). This Court reviews the evidence in the light most favorable to the nonmovant to determine whether a plaintiff's claim is barred by immunity. *Zwiers v Growney*, 286 Mich App 38, 42; 778 NW2d 81 (2009). If the submissions demonstrate that there is a factual dispute as to whether immunity applies, summary disposition is not appropriate. *Id.*
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> A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden*, 461 Mich at 120. A party may be entitled to summary disposition under MCR 2.116(C)(10) if, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact . . . ." This Court reviews a motion brought under this subsection by considering the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion to determine whether there are genuine issues of material fact. *Maiden*, 461 Mich at 120.

(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.

Here, it is undisputed that requirements (a) and (b) are satisfied. However, the trial court ruled that Bradford and Carlson are not protected by the immunity provision because their conduct amounted to gross negligence that proximately caused Tristan's injury.

"[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). Rather, MCL 691.1407(7)(a) defines gross negligence as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." Our Court has ruled that the gross negligence standard requires proof of "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). "It 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.*

As noted, plaintiff alleged, and the trial court ruled, that defendants' failure to enforce or abide by the IEP constituted gross negligence. The IEP does not require that Tristan must be with an aide at all times during the school day. Rather, the IEP states that Tristan will be assigned an aide from four to six hours out of the seven-hour school day and it anticipates that Tristan will have some independence in getting around the school. Bradford testified that Carlson received a copy of Tristan's IEP and that he was informed of Tristan's needs. Carlson denied receiving a copy of the IEP, but he testified that Tristan's regular homeroom teacher explained to him Tristan's needs and when he would need assistance. According to Carlson, he did not believe Tristan needed an aide to go to the nearby computer lab because it was not a time when classes were changing or when many students would be in the hallway. Moreover, Bradford, Carlson and Tristan's regular homeroom teacher testified that, Tristan was able to maneuver his wheelchair in the hallway without assistance. Carlson and Student A also testified that Carlson told the boys that they could be in the computer lab only if an adult was there to supervise them. Tristan remained in the lab alone instead of leaving with the teacher who was present when he arrived.

We hold that no reasonable juror could conclude that the conduct of Bradford and Carlson was grossly negligent. Consistent with other testimony, Bradford testified that Carlson was made aware of Tristan's needs and Carlson's decision to allow Tristan to go to the computer lab as long as a teacher was there to supervise did not run contrary to the IEP. It simply does not appear that either Bradford or Carlson exhibited any disregard for Tristan's safety or welfare.

Even accepting as true Mercier's assertion that Bradford assured her that the IEP called for Tristan to have an aide or paraprofessional with him at all times—an assertion that is not supported by the terms of the IEP itself—and were we to find gross negligence for failing to assign an aide to Tristan at all times, we would nonetheless hold that the conduct cited by

plaintiff was not the proximate cause of Tristan's injury. As this Court explained in *Lameau*, 289 Mich App at 181:

> The Legislature has provided that a governmental employee is immune from tort liability unless his or her conduct amounted "to gross negligence" and that gross negligence was " *the* proximate cause of the injury or damage." MCL 691.1407(2)(c) (emphasis added). Our Supreme Court has held that the Legislature's reference to "the proximate cause"—as opposed to "a proximate cause"—means that the employee's gross negligence must be more than just a proximate cause of the injury in order to meet the requirements of the exception to the governmental employee's immunity.

Accordingly, "the" proximate cause is "the one most immediate, efficient, and direct cause preceding an injury." *Robinson v City of Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000). Here, Student A's sweatshirt accidentally caught on the controller of Tristan's wheelchair, which caused the chair to lurch forward into the computer table. This was the one most immediate, efficient and direct cause of Tristan's injury, not the absence of an adult in the room with Tristan. Because defendants' conduct did not constitute gross negligence that was the proximate cause of Tristan's injury, the trial court erred when it denied Bradford and Carlson's motion for summary disposition.[3]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Henry William Saad

[3] We reject defendants' alternative claim that plaintiff failed to exhaust her administrative remedies before filing this action in circuit court. Plaintiff's claim is clearly one for personal injury, and not an action to challenge the IEP or whether Tristan received an appropriate education under the Individuals with Disabilities Education Act, 20 USC 1400, *et seq*.