STATE OF MICHIGAN

COURT OF APPEALS

NICHOLAS A. WHITE, by his Next Friend, BERTHA WHITE,

Plaintiff-Appellee,

v

ROSEVILLE PUBLIC SCHOOLS,

Defendant,

and

MATTHEW KOMAROWSKI,

Defendant-Appellant.

UNPUBLISHED
February 21, 2013

No. 307719
Macomb Circuit Court
LC No. 2011-000569-NZ

Before: MURRAY, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Defendant Matthew Komarowski, a teacher with defendant Roseville Public Schools,[1] appeals as of right from a circuit court order denying his motion for summary disposition pursuant to MCR 2.116(C)(7) (governmental immunity), (C)(8) (failure to state a claim), and (C)(10) (no genuine issue of material fact). The circuit court concluded that defendant was not entitled to governmental immunity, and there were genuine issues of material fact whether defendant was grossly negligent and whether his conduct was the proximate cause of the minor plaintiff's injuries. We affirm.

Plaintiff was injured while operating a Powermatic table saw in the woodworking shop at his high school. The injury occurred while plaintiff was attempting to rip-cut[2] a one-inch wide

[1] The trial court granted summary disposition in favor of defendant Roseville Public Schools and that decision is not at issue in this appeal. Therefore, because Roseville Public Schools is no longer a party to this action, this opinion will refer to Matthew Komarowski as defendant.

[2] A rip cut is performed by cutting with the grain of the wood.

segment from a board that was less than four inches wide and two to three feet in length. As plaintiff was beginning to make the cut in the wood, he had his left hand on top of the wood and his right hand at the back of it, and he pushed the wood forward until he could see enough of the table to use a push stick.[3] Plaintiff stated, "When I reached for the push stick, it caught a knot in the wood and pulled my hand on the wood forward across the blade." Three fingers on his left hand were cut by the blade, but were not completely severed. The blade guard that would have shielded plaintiff's hand from the blade had been displaced (i.e., pivoted upward) before plaintiff began cutting. According to plaintiff, he did not move the guard and he did not know to use or adjust the guard. Plaintiff stated that he had used the table saw on prior occasions without the blade guard in position. Defendant admitted that before the incident occurred he had performed rip cuts without the blade guard in position. Defendant claimed that he had specified to the students that his method was not safe and that they should not do it that way. Plaintiff's classmate maintained that plaintiff had used the table saw with defendant's assistance or supervision while the guard was displaced. Plaintiff and defendant disagreed whether defendant gave plaintiff permission to use the saw without assistance or supervision on the day of the accident.

Plaintiff filed this action alleging that defendant was grossly negligent. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10), arguing that plaintiff's action was barred by governmental immunity because there was no genuine issue of material fact that his alleged conduct amounted to gross negligence or that his conduct could be considered the proximate cause of plaintiff's injury. However, the trial court denied defendant's motion, finding that there were genuine issues of material fact whether defendant showed a substantial lack of concern for plaintiff's safety and whether this conduct was the proximate cause of plaintiff's injury. On appeal, defendant asserts that the trial court erred in determining that there were genuine issues of material fact that he was grossly negligent and his conduct was the proximate cause of plaintiff's injuries. We disagree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "Similarly, the applicability of governmental immunity is a question of law that this Court reviews de novo." *McLean v McElhaney*, 289 Mich App 592, 596; 798 NW2d 29 (2010). Summary disposition may be granted pursuant to MCR 2.116(C)(7) where a claim is barred because of "immunity granted by law . . . ." If a motion is based on governmental immunity, the parties may provide supporting evidence, including affidavits, depositions, and admissions. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). If the parties submit documentary evidence, this Court must review it to determine whether the nonmoving party proved that there is an exception to governmental immunity. *Id.* "[T]he plaintiff's well-pleaded factual allegations, affidavits, or other admissible documentary evidence must be accepted as true and construed in the plaintiff's favor, unless the movant contradicts such evidence with documentation." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 278; 769 NW2d 234 (2009).

[3] A push stick is a device to help keep the hand above the wood so if the hand slips it will not hit the blade.

"A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone." *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). A motion under MCR 2.116(C)(8) may be granted only where "the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery." *Id.* "All factual allegations supporting the claim, and any reasonable inference or conclusions that can be drawn from the facts, are accepted as true." *Id.*

"A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *BC Tile & Marble Co, Inc v Multi Building Co, Inc*, 288 Mich App 576, 582-583; 794 NW2d 76 (2010). All documentary evidence supporting a motion under (C)(10) must be viewed in a light most favorable to the nonmoving party. *Marilyn Froling Revocable Living Trust*, 283 Mich App at 278. When reviewing a motion pursuant to MCR 2.116(C)(10), summary disposition may be granted if the evidence establishes that "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." MCR 2.116(C)(10). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in a light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

MCL 691.1407(2) provides that an employee of a governmental agency will be immune from tort liability for an injury caused by the employee while in the course of employment if:

> (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.

For purposes of MCL 691.1407, "gross negligence" means "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). Mere evidence of ordinary negligence is inadequate to create a question of fact concerning gross negligence. *Maiden*, 461 Mich at 122-123. Gross negligence "has been characterized as a willful disregard of safety measures and a singular disregard for substantial risks." *Oliver v Smith*, 290 Mich App 678, 685; 810 NW2d 57 (2010). The determination of whether a governmental employee's conduct is gross negligence under MCL 691.1407 is generally a question of fact for the factfinder and not the trial court. *Jackson v Saginaw Co*, 458 Mich 141, 146; 580 NW2d 870 (1998). However, a trial court may grant summary disposition based on governmental immunity if, based on the evidence, reasonable minds could not differ. *Id.*

We agree with the trial court's determination that reasonable minds could differ concerning whether the evidence, viewed in the light most favorable to plaintiff, showed that defendant's conduct amounted to gross negligence. The hazards of high school students using a table saw are self-evident and undisputed. Defendant acknowledged that because of the danger, any use should be supervised and that some cuts were too dangerous for students to attempt even with supervision. Plaintiff presented evidence that he used the table saw with defendant's

permission, but without his supervision, on the date of the accident and on prior occasions. Further, there was evidence that defendant allowed or did not take measures to prevent the unsupervised use of the admittedly hazardous piece of equipment. Scrap wood was available in the room for the students to use, and the table saw was not locked to prevent it from operating without adult supervision. In addition, the noise in the room from other tools was loud enough that defendant could not hear the table saw being operated.

Moreover, the evidence in this case went beyond a claim that defendant "could have done more" to prevent plaintiff's improper use of the table saw. *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). The evidence indicated that in the presence of students, including plaintiff, defendant had demonstrated the operation of the table saw without the blade guard in place. Defendant performed admittedly dangerous rip cuts on the table saw with the blade guard displaced, rather than using a push stick with the guard down. He did not claim that the method he used was safer. When asked why he did not use a push stick with the guard down, he answered, "Because I feel that with my experience of making those types of rip cuts, I choose to use my hand, or I've used push sticks to do it also." Defendant claimed to have told the students not to attempt to copy his method because it was dangerous. However, plaintiff presented evidence that defendant knew that plaintiff was using the saw without the guard. According to plaintiff's classmate, on prior occasions, plaintiff used the saw with defendant's assistance or supervision while the guard was in the up position. Plaintiff and his classmate both stated that they thought it was acceptable to use the table saw without the guard in place.

Reasonable jurors could conclude that defendant's demonstration of hazardous conduct, his assistance while plaintiff used the saw without the guard, and the absence of measures to prevent plaintiff from attempting the same without assistance, showed "a willful disregard of safety measures and a singular disregard for substantial risks," *Oliver*, 290 Mich App at 685, thereby amounting to "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). Thus, the trial court properly determined that defendant was not entitled to summary disposition on the issue of gross negligence.

We also agree with the trial court's determination that defendant was not entitled to summary disposition on the issue of proximate cause. A governmental employee may be liable for gross negligence only if the employee's conduct was *the* proximate cause of an injury. MCL 691.1407(2)(c). "Proximate cause in the context of MCL 691.1407(2) refers to the cause that is 'the one most immediate, efficient, and direct cause preceding an injury.'" *Oliver*, 290 Mich App at 686-687, quoting *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000). It must be defendant's acts alone that were "the one most immediate, efficient, and direct cause preceding [plaintiff's] injury." *Id.* (quotation marks and citation omitted). There cannot be other more direct causes of plaintiff's injuries. *Kruger v White Lake Twp*, 250 Mich App 622, 626-627; 648 NW2d 660 (2002).

In this case, defendant characterizes plaintiff's claim as one of negligent supervision. According to defendant's position, negligent supervision can never be the proximate cause of an injury, because the act that allegedly could have been prevented with proper supervision will always be more immediate, efficient, and direct than the negligent supervision. The evidence in this case, however, was not limited to negligent supervision. The evidence showed that defendant not only failed to adequately monitor those in his charge, he modeled the hazardous

activity that led to plaintiff's injury, and assisted or supervised plaintiff as he copied the hazardous behavior on other occasions. Although defendant contends that the proximate cause was plaintiff's decision to use the saw to perform a dangerous rip cut without the blade guard down, defendant admittedly had demonstrated that same procedure to plaintiff. The fact that the injury occurred while plaintiff was attempting to copy defendant's method supports plaintiff's contention that defendant's conduct was the proximate cause of the injury, and there were no other more direct causes. We believe that where defendant had demonstrated hazardous use of the table saw, failed to take measures to limit unsupervised use of the saw, and plaintiff was injured while attempting to copy defendant's methods, a reasonable jury could determine that defendant's conduct was the proximate cause of plaintiff's injury. Thus, the trial court properly denied summary disposition on the issue of proximate cause.

Affirmed.

/s/ Christopher M. Murray
/s/ Kurtis T. Wilder
/s/ Donald S. Owens