

STATE OF MICHIGAN
COURT OF APPEALS

DENISE GLARNER, as Personal Representative
for the Estate of SEAN MICHAEL GLARNER,

UNPUBLISHED
December 20, 2012

Plaintiff-Appellee,

v

No. 308839
Ingham Circuit Court
LC No. 10-000712-NO

OKEMOS PUBLIC SCHOOLS, CAROL
THORSEN, and PAT HATCHER d/b/a OKEMOS
SPECIAL NEEDS DAY CAMP,

Defendants-Appellants,

and

BRIANA SEAKS, BRIAN SMITH, SARA
KRIBS, ELLY RICKLE, AIMEE HOLBROOK,
MARY VLIEK, CHRISTIAN GILCHRIST,
ELIZABETH LONGSHORE, and SHARON
CRONK,

Defendants.

Before: TALBOT, P.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

In this wrongful death action, Okemos Public Schools, Carol Thorsen, and Pat Hatcher d/b/a Okemos Special Needs Day Camp appeal as of right the trial court's order denying their motion for summary disposition based on governmental immunity.¹ We reverse and remand for proceedings consistent with this opinion.

Thorsen is the director and Hatcher is the assistant director of the Okemos Special Needs Day Camp, which is a summer camp for special needs individuals that is offered by the Okemos Community Education Department, which is part of the Okemos Public Schools. Okemos Special Needs Day Camp has both an educational and a recreational component. Campers

¹ MCR 2.116(C)(7).

participate in classroom activities, field trips, and recreational swimming. On June 17, 2008, 22-year old decedent Sean Michael Glarner was participating in a swim session as part of the camp's activities. At some point, the lifeguard on duty noticed that Sean was underwater and alerted a nearby camper to see if he was okay. Mary Smith, a one-on-one aide for another camper, quickly determined that Sean was not okay and called for help as she removed Sean from the water. When he was pulled from the pool, Sean was blue in color, had no pulse and was not breathing. Attempts by camp staff and fire rescue officers to resuscitate Sean were unsuccessful. An autopsy revealed that Sean died as a result of medical complications from near drowning and that epilepsy was a contributing factor.

We review de novo a trial court's decision on a motion for summary disposition.² Summary disposition of a claim is proper if "[t]he claim is barred because of . . . immunity granted by law"³ "When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them."⁴ Although the moving or nonmoving party may submit documentary evidence in support of their position, such evidence is not required.⁵ If documentary evidence is received, however, it must be considered by the trial court "to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion."⁶ "If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court."⁷ "[I]f a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate."⁸

Okemos Public Schools argues that because the Okemos Special Needs Day Camp does not fall within the proprietary function exception to governmental immunity, the trial court erred when it denied its motion for summary disposition. We agree.

Generally, "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function."⁹ A governmental function is "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law."¹⁰ "Governmental immunity is not an

² *Haaksma v Grand Rapids*, 247 Mich App 44, 51; 634 NW2d 390 (2001).

³ MCR 2.116(C)(7).

⁴ *Dextrom v Wexford Co*, 287 Mich App 406, 428; 789 NW2d 211 (2010).

⁵ MCR 2.116(G)(2).

⁶ MCR 2.116(G)(6).

⁷ *Dextrom*, 287 Mich App at 429.

⁸ *Id.*

⁹ MCL 691.1407(1).

¹⁰ MCL 691.1401(b).

affirmative defense proffered by governmental defendants, but rather is a characteristic of government; therefore ‘a party suing a unit of government must plead in avoidance of governmental immunity.’”¹¹ Thus, “such pleading must state a claim that fits within a statutory exception to immunity or include facts that indicate the action at issue was outside the exercise of a governmental function.”¹²

Okemos Public Schools successfully asserts that the Okemos Special Needs Day Camp was authorized by statute and thus was the exercise of a governmental function.¹³ The relevant statute provides:

(3) A general powers school district has all of the rights, powers, and duties expressly stated in this act; may exercise a power implied or incident to a power expressly stated in this act; and, except as provided by law, may exercise a power incidental or appropriate to the performance of a function related to operation of the school district in the interests of public elementary and secondary education in the school district, including, but not limited to, all of the following:

(a) Educating pupils. In addition to educating pupils in grades K-12, this function may include operation of preschool, lifelong education, adult education, community education, training, enrichment, and recreation programs for other persons.¹⁴

Here, the Okemos Special Needs Day Camp is a summer camp for special needs individuals with both an educational and a recreational component that is offered by Okemos Public Schools through its Community Education Department. Thus, under the plain language of the statute, the operation of the camp constitutes an exercise of a governmental function.¹⁵

Glerner argues that because the idea for the camp came from private individuals employed by the school district, the day camp is not a government function. This argument is unpersuasive because so long as the activity meets the definitional requirements of the relevant statutes,¹⁶ any activity—regardless of where the idea originated—is properly deemed a governmental function. Next, Glerner asserts that because the camp’s brochure clearly states that it is “a self-supporting program using the facilities of Okemos Public Schools” it is not a

¹¹ *Kendricks v Rehfield*, 270 Mich App 679, 681; 716 NW2d 623 (2006) (citation omitted).

¹² *Id.*

¹³ MCL 380.11a(3)(a).

¹⁴ *Id.*

¹⁵ See *Mich Ed Ass’n v Secretary of State (On Rehearing)*, 489 Mich 194, 217; 801 NW2d 35 (2011); *Joseph v Auto Club Ins Ass’n*, 491 Mich 200, 205-206; 815 NW2d 412 (2012); *Velez v Tuma*, 492 Mich 1, 16-17; 821 NW2d 432 (2012).

¹⁶ MCL 691.1401(b); MCL 380.11a(3)(a).

governmental function. Whether or not the activity is self-supporting is unrelated to the statutorily defined activities that are deemed governmental functions.¹⁷

Glarner also contends that an activity is not a governmental function merely because it occurred on school grounds. That argument, however, lacks merit as it is not Okemos Public Schools' contention. Finally, Glarner argues that since the services are being provided to adults with special needs who allegedly have no direct relationship with the services of the Okemos Public Schools, they do not constitute a governmental function. Glarner's assertion must fail as operation of "lifelong education, adult education, community education, training, enrichment, and recreation programs for other persons" is specifically authorized and the statute does not necessitate that the programs be restricted to those with a "direct relationship" to the school district.¹⁸ As such, Glarner has failed to successfully assert that the camp "was outside of the exercise of a governmental function" to avoid summary disposition.¹⁹

Glarner may also avoid summary disposition if she "state[s] a claim that fits within a statutory exception to immunity."²⁰ The proprietary function exception to governmental immunity, which Glarner claims applies to the instant matter, provides:

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, 1965.²¹

Thus, to constitute a proprietary function, "the '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.'"²² "[W]hether an activity actually generates a profit is not dispositive, but the existence of profit is relevant to the governmental agency's intent."²³ Additionally, "[a]n agency may

¹⁷ *Id.*; MCL 691.1401(b).

¹⁸ MCL 308.11a(3)(a).

¹⁹ *Kendricks*, 270 Mich App at 681.

²⁰ *Id.*

²¹ MCL 691.1413.

²² *Transou v Pontiac*, 283 Mich App 71, 73; 769 NW2d 281 (2009) (citation omitted).

²³ *Id.* at 74 (citation and quotations omitted).

conduct an activity on a self-sustaining basis without being subject to the proprietary function exemption.”²⁴

Although evidence was presented to demonstrate that the camp generated a profit, such evidence is not dispositive of a proprietary function.²⁵ Glarner did not provide any evidence that the camp’s profits were deposited into the school’s general fund, or used on unrelated events, which can indicate a pecuniary motive.²⁶ Additionally, Thorsen testified that the camp was started to provide a place for special needs children to go during the summer that was recreational and educational, and she further indicated in an affidavit that the camp’s purpose was not to generate a monetary profit. Robert Clark, the Director of Finance for Okemos Public Schools, and Marcella Robinson Caughey, the Community Services Coordinator for Okemos Public Schools, also provided affidavits indicating that none of the programs offered through the Okemos Community Education Department, including the Okemos Special Needs Day Camp, were created or operated for the purpose of generating a profit. Glarner did not provide any evidence to the contrary. Because Glarner has failed to demonstrate that profit was the camp’s primary purpose, the proprietary function exception does not apply, and the trial court erred when it denied Okemos Public Schools’ motion for summary disposition.²⁷

Next, Thorsen and Hatcher argue that the trial court erred when it denied their motion for summary disposition based on governmental immunity as there is no evidence that they were grossly negligent. We agree.

“An employee of a governmental agency acting within the scope of his or her authority is immune from tort liability unless the employee’s conduct amounts to gross negligence that is the proximate cause of the injury.”²⁸ Gross negligence is defined as “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.”²⁹ Such conduct “has been characterized as a willful disregard of safety measures and a singular disregard for substantial risks.”³⁰

Here, we find that the evidence is not sufficient to establish that Thorsen and Hatcher’s actions were grossly negligent. It is undisputed that the swimming session on the day of Sean’s death was delayed until a lifeguard was located. The lifeguard who arrived was American Red Cross and CPR certified. Although the lifeguard was not informed that Sean was epileptic and did not have specialized training in serving as a lifeguard for special needs children, she was

²⁴ *Id.* (citation and quotations omitted).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Dextrom*, 287 Mich App at 429.

²⁸ *Kendricks*, 270 Mich App at 682.

²⁹ *Id.*, quoting MCL 691.1407(7)(a).

³⁰ *Oliver v Smith*, 290 Mich App 678, 685; 810 NW2d 57 (2010).

qualified to serve as a lifeguard for 75 swimmers at a time. On the day of Sean’s death, there were approximately 36 campers at the pool. Twenty three of the campers were swimming in the shallow end of the pool, four were in the deep end, and nine were not in the pool. In addition to the lifeguard on duty, there were also nine staff members, and a one-on-one aide for another camper present in the pool area. The lifeguard testified that she was not distracted from her duties during the swim session and was constantly scanning the pool for a problem. Additionally, the staff members testified that they were not distracted from their duties and did not see any other staff members appear distracted.

Staff members reviewed the emergency cards for all of the students at the start of each camp session and Sean’s card specified that when swimming the staff should “keep [a] close eye on him” and that “water shimmers” may induce seizures. Staff members asserted that they knew that Sean had epilepsy and they had been generally instructed to watch swimmers with epilepsy more closely. While the parties dispute whether a one-on-one aide was recommended for Sean while he was swimming, the record demonstrates that such an aide would have been provided by his parents. Additionally, Glarner testified that Sean was able to swim, did not need assistance with swimming, and did not require the use of a lifejacket while in the pool.

Moreover, the evidence establishes that Sean was seen swimming underwater on the day he died, there was no evidence that he was viewed in distress before he was found underwater, and while the period of time that Sean was underwater is in dispute, witnesses testified that they saw him alive shortly before he was discovered. Immediately after being discovered underwater, Sean was removed from the pool and CPR was administered. Paramedics were called and arrived within minutes. Therefore, viewing the evidence in the light most favorable to Glarner, she has failed to establish that Thorsen and Hatcher’s conduct was “so reckless as to demonstrate a substantial lack of concern for whether an injury results.”³¹ Thus, the trial court erred when it denied summary disposition.³²

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

/s/ Michael J. Talbot
/s/ Jane E. Markey
/s/ Michael J. Riordan

³¹ *Kendricks*, 270 Mich App at 682, quoting MCL 691.1407(7)(a).

³² *Dextrom*, 287 Mich App at 429.