

STATE OF MICHIGAN
COURT OF APPEALS

KYLE OOSTDYK, a Minor, by his Conservator,
DAWN BUDD,

UNPUBLISHED
February 13, 2014

Plaintiff-Appellant,

v

CALEDONIA COMMUNITY SCHOOLS, KEN
HOMRICH, JUDY TRUER, AND RAY
VENEKLASE,

No. 312607
Kent Circuit Court
LC No. 11-010411-NI

Defendants-Appellees.

Before: HOEKSTRA, P.J., and MARKEY and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this negligence case, plaintiff appeals as of right the trial court's order granting summary disposition in favor of all defendants.¹ Because we conclude that defendants are entitled to governmental immunity and no factual basis could provide a basis for recovery by plaintiff, we affirm.

This case arises as a result of injuries sustained by plaintiff Kyle Oostdyk while riding a school bus owned and operated by defendant Caledonia Community Schools (CCS). At the time of the incident, Kyle was a 17-year-old special needs student, diagnosed as emotionally impaired with a history of seizures and asthma. Kyle split each school day between the Caledonia High School and the Kent Transition Center (KTC). Kyle's injuries occurred after he suffered a seizure while riding the school bus from Caledonia High School to KTC. Kyle's seizure began at 7:55 a.m. The seizure caused Kyle's body to turn and his head and torso to extend into the bus aisle between the seats. Defendant Ken Homrich, who was employed by CCS, was driving the CCS school bus the day of Kyle's seizure. After being alerted by a student that something was

¹ We note that defendants moved for summary disposition under MCR 2.116(C)(7), (8), and (10), and while the trial court did not specify which subsection it was relying on to grant summary disposition, it is plain from its analysis and from the facts of this case that summary disposition was granted under MCR 2.116(C)(7) on the basis of defendants' entitlement to governmental immunity.

going on with Kyle, Homrich stopped the bus and observed Kyle. Homrich determined that Kyle was breathing, despite being otherwise nonresponsive. Homrich decided to continue to KTC because the school bus was already on KTC's campus. It took one minute and seven seconds for Homrich to arrive. Homrich did not move Kyle from the position he was in after his seizure before continuing the trip, and during the drive to KTC Kyle's body shifted into a position that blocked his airway and prevented him from breathing, known as positional asphyxia.

Once the school bus arrived at KTC, Homrich sent one of the other children on the bus to get help. Defendant Ray Veneklese, who is the principal at KTC, entered the bus less than a minute after its arrival. Both Veneklese and Homrich did not move Kyle from his position. Veneklese squatted down next to Kyle to see if he could get a response from him. Veneklese shook his shoulder and called his name. Kyle did not respond and Veneklese told another KTC employee on the bus to call 911. Veneklese testified that he heard Kyle gasp for air when he was checking Kyle's airway, but that Kyle's lips and face were blue. Eventually, the KTC nurse entered the bus and indicated that Kyle could not breathe in that position and had to be moved. Emergency responders arrived on the scene at 8:09 a.m., and Kyle was transported to the hospital. As a result of approximately seven minutes without oxygen, Kyle suffered anoxic brain damage and is now a spastic quadriplegic who is completely dependent on others for all his needs.

Kyle, by his conservator Dawn Budd, filed this negligence action against defendants CCS, Homrich, Veneklese, and Judy Truer, who is the Director of Transportation for CCS. Defendants moved for summary disposition, primarily arguing that Kyle's claims were barred by governmental immunity. Plaintiff argued that CCS was liable under the motor vehicle exception to governmental immunity and that Homrich, Veneklese, and Truer were liable because their actions constituted gross negligence. Following a hearing on the motions, the trial court granted summary disposition in favor of all defendants. Plaintiff now appeals as of right.

We review de novo a trial court's decision to grant summary disposition, viewing the evidence in the light most favorable to the nonmoving party. *Coblentz v City of Novi*, 475 Mich 558, 567-568; 719 NW2d 73 (2006). Pursuant to MCR 2.116(C)(7), summary disposition is appropriate if a claim is barred because of immunity granted by law. A motion pursuant to MCR 2.116(C)(7) may be supported by affidavits, depositions, admissions, or other documentary evidence so long as the evidence would be admissible at trial. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). "[T]he trial court must accept the nonmoving party's well-pleaded allegations as true and construe the allegations in the nonmovant's favor to determine whether any factual development could provide a basis for recovery." *Hoffman v Boonsiri*, 290 Mich App 34, 39; 801 NW2d 385 (2010).

On appeal, plaintiff first argues that summary disposition in favor of CCS was not appropriate because he alleged sufficient facts to demonstrate that further factual development could provide a basis for recovery by demonstrating that the motor vehicle exception to governmental immunity was applicable.

The governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, provides broad immunity to governmental agencies when engaged in the discharge of a governmental function.

MCL 691.1407(1); *Robinson v Detroit*, 462 Mich 439, 455; 613 NW2d 307 (2000). However, the GTLA provides several exceptions to its broad grant of immunity. The motor vehicle exception to governmental immunity is set forth by MCL 691.1405, which provides that governmental agencies “shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner”

To establish a prima facie case of negligence, a plaintiff must prove: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011). Moreover, our Supreme Court has made clear that the grant of immunity under MCL 691.1407(1) is broad, and the statutory exceptions to governmental immunity must be narrowly construed. *Robinson*, 462 Mich at 455. “The motor vehicle exception requires that a plaintiff’s injuries result from the operation of a government vehicle.” *Id.* at 456. More specifically, our Supreme Court in *Chandler v Muskegon Co*, 467 Mich 315, 320; 652 NW2d 224 (2002), held that “the language ‘operation of a motor vehicle’ means that the motor vehicle is being operated *as* a motor vehicle.” (Emphasis in original). The Court further held that “‘operation of a motor vehicle’ encompasses activities that are directly associated with the driving of a motor vehicle.” *Id.* at 321.

On appeal, plaintiff does not argue, and there is no evidence to suggest, that Homrich’s driving could be construed as negligent. In particular, plaintiff does not allege that Homrich took any action, such as accelerating too quickly, abruptly stopping, swerving, jerking the bus, or speeding, that could constitute negligent driving. Rather, plaintiff argues that the fact that Homrich made the decision to drive the bus at all when Kyle was not properly positioned in his seat was negligent. However, our Supreme Court has held that “the decision to pursue a fleeing motorist, which is separate from the operation of the vehicle itself, is not encompassed within a narrow construction of the phrase ‘operation of a motor vehicle.’” *Robinson*, 462 Mich at 457. Thus, plaintiff’s claim that Homrich’s choice to drive the bus despite Kyle’s position must fail because the decision to drive a vehicle is separate from that vehicle’s operation. *Id.* Accordingly, Kyle’s injury did not result from Homrich’s negligent operation of the bus because there is no evidence that Homrich negligently operated the bus. Thus, we conclude that summary disposition in favor of defendant was appropriate because plaintiff failed to demonstrate that further factual development could establish that Kyle’s bodily injury “result[ed] from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner” as required by MCL 691.1405. Therefore, CCS is entitled to governmental immunity.

Next, plaintiff argues that the trial court erred by granting summary disposition in favor of Homrich, Truer, and Veneklase because the evidence was sufficient to demonstrate that factual development could prove that all three defendants were grossly negligent.

Governmental employees are immune from tort liability when acting within the scope of their authority unless their actions constitute gross negligence that is the proximate cause of an injury. MCL 691.1407(2); *Tarlea v Crabtree*, 263 Mich App 80, 89; 687 NW2d 333 (2004). 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.” Moreover, grossly negligent

misconduct is the proximate cause of an injury only when it is “the one most immediate, efficient, and direct cause.” *Id.*, quoting *Robinson*, 462 Mich at 459.

Summary disposition on the issue of whether conduct constitutes gross negligence is not appropriate if “reasonable jurors could honestly reach different conclusions . . . [h]owever, if reasonable minds could not differ, the issue may be determined by a motion for summary disposition.” *Oliver v Smith*, 290 Mich App 678, 685; 810 NW2d 57 (2010). Gross negligence “has been characterized as a willful disregard of safety measures and a singular disregard for substantial risks.” *Id.* Similarly, in *Tarlea*, 263 Mich App at 90, this Court explained that an actor is grossly negligent when an objective observer could conclude that “the actor simply did not care about the safety or welfare of those in his charge.” Further, our Supreme Court has specifically held that “evidence of ordinary negligence does not create a material question of fact concerning gross negligence.” *Maiden*, 461 Mich at 122-123. Rather, to establish gross negligence the evidence must demonstrate that “the contested conduct was substantially more than negligent.” *Costa v Community Emergency Med Servs, Inc*, 475 Mich 403, 411; 716 NW2d 236 (2006).

Moreover, applicable precedent has established that evidence of an actor’s failure to follow proper procedures or comply with general standards or policies does not create a question of fact regarding gross negligence. For example, in *Rakowski v Sarb*, 269 Mich App 619, 635-636; 713 NW2d 787 (2006), this Court held that evidence showing that a ramp was constructed in violation of construction standards and a national building code constituted evidence of ordinary negligence only; accordingly, this Court upheld the trial court’s grant of summary disposition in favor of the defendant on the plaintiff’s gross negligence claim. Similarly, in *Xu v Gay*, 257 Mich App 263, 271; 668 NW2d 166 (2003), this Court held that the defendant’s failure to know about industry standards and failure to implement the standards regarding placement of a treadmill was not evidence of gross negligence, but rather, only suggested ordinary negligence. Further, our Supreme Court held that evidence demonstrating a failure to follow proper techniques does not constitute gross negligence. *Maiden*, 461 Mich at 125-128. In *Maiden*, the defendant’s employees failed to use approved restraint techniques when physically restraining the plaintiff. *Id.* at 125-126. As a result, the plaintiff died of compressional asphyxia. *Id.* at 127. The Court noted that while the defendants “might have used other means to restrain” the plaintiff, the failure to follow approved techniques did not evidence gross negligence under the circumstances where the plaintiff’s “volatile behavior required that the staff exercise split-second judgment in deciding how and when to use physical intervention.” *Id.* at 126-127. The Court held that the summary disposition in favor of the defendant was appropriate because the plaintiff failed to raise a material question regarding whether the defendant’s employees’ conduct was grossly negligent. *Id.* at 128.

In this case, plaintiff argues that there was sufficient evidence to create a genuine issue of material fact regarding whether the individual defendants were grossly negligent because they willfully disregarded Kyle’s safety. Plaintiff raises specific arguments regarding each individual defendant. Regarding Homrich, plaintiff maintains that a jury should determine whether Homrich should have moved Kyle before proceeding, whether he should have called 911 or dispatch, and whether he should have kept the bus stopped until emergency services arrived. Plaintiff further notes that there is evidence that the applicable emergency procedures specifically require bus drivers to contact dispatch and provide an exact location and report

injuries when an accident occurs and also that they require the bus driver to provide first aid if able. Thus, plaintiff argues Homrich's failure to follow any of these procedures created a question of fact regarding whether he was grossly negligent. Regarding Veneklese, plaintiff notes that there is evidence that Veneklese observed that Kyle's face was blue, that he was having a hard time breathing, and that he had no pulse, but nonetheless did not move Kyle or perform CPR. Plaintiff also argues that Veneklese's failure to confirm that 911 was actually immediately called after instructing another KISD employee to call and his failure to ensure that Kyle's condition was specifically conveyed to the 911 operator was evidence of gross negligence. Finally, regarding Truer, plaintiff specifically argues that her failure to properly train Homrich to respond to a situation like the one that occurred in this case demonstrates gross negligence.

We conclude that plaintiff has failed to prove that further factual development could demonstrate the applicability of the gross negligence exception to governmental immunity. Even assuming the facts are as plaintiff alleges,² the fact that Veneklese and Homrich declined to move Kyle from the awkward position he was in did not amount to "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). It is clear from the evidence that both Veneklese and Homrich were concerned about a possible injury because both men examined Kyle to see if he was breathing. Homrich averred that he stopped the bus and examined Kyle as soon as he was alerted to the situation. He further stated that he did not think Kyle was in a dangerous position, that Kyle appeared to be breathing, and that Kyle was not choking and there was no vomit. Homrich then decided to continue driving the bus to KTC where he believed help would be available to Kyle. Homrich was unable to send radio signals from the bus from his location on KTC's campus.

When the bus arrived at KTC Veneklese boarded the bus and examined Kyle. Veneklese similarly demonstrated concern for Kyle's wellbeing. Veneklese reported that he could not find a pulse, but that Kyle was making nonverbal noises and gasped for air. Veneklese instructed other employees to get the school nurse and to call 911. Moreover, the video recording of the incident depicts that both Veneklese and Homrich expressed concern about moving Kyle, ostensibly because they were concerned that moving Kyle could exacerbate any injury he might have sustained.

In light of these undisputed facts, we conclude that while the matter of minutes that passed while this was taking place ended up being critical to the deterioration of Kyle's condition, Homrich and Veneklese did not delay in trying to help Kyle and the time it took to render aid does not rise to the level of demonstrating a substantial lack of concern for whether an injury results. Rather, the evidence demonstrates that both men were deeply concerned for Kyle's condition and were doing the best that they could under difficult circumstances. The fact

² We note that Veneklese argues on appeal that plaintiff exaggerated and misrepresented his actions, specifically, he disputes the time that he noticed Kyle's face was blue and the amount of time that passed while he was on the bus before he called 911 and before medical assistance arrived.

that it is clear in hindsight that Kyle should have been moved to a different position does not establish gross negligence on the part of either Homrich or Veneklas.

Further, any failure by Homrich or Veneklas to follow their training or a school policy or procedure under the circumstances is not evidence of gross negligence. Rather, failure to abide by best practices is evidence of ordinary negligence, and evidence of ordinary negligence is not sufficient to create a jury question regarding gross negligence. See, e.g., *Rakowski*, 269 Mich App at 635-636; *Xu*, 257 Mich App at 271; *Maiden*, 461 Mich at 125-128. For the same reason, any evidence that Truer failed to properly train Homrich or properly implement safety procedures demonstrates only ordinary negligence and does not create a question of fact regarding gross negligence. *Id.* Accordingly, summary disposition in favor of all defendants was appropriate because plaintiff failed to demonstrate a question of fact regarding gross negligence.³

Finally, plaintiff argues that summary disposition was premature because discovery was not complete at the time the trial court granted defendants' motions.

This Court has recognized that summary disposition can be premature when granted before discovery is complete. See, e.g., *CD Barnes Assoc, Inc v Star Heaven, LLC*, 300 Mich App 389, 422; 834 NW2d 878 (2013); *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009). "However, the mere fact that the discovery period remains open does not automatically mean that the trial court's decision to grant summary disposition was untimely or otherwise inappropriate." *Marilyn Froling Revocable Living Trust*, 283 Mich App at 292. Rather, "[t]he question is whether further discovery stands a fair chance of uncovering factual support for the opposing party's position." *Id.* A party claiming summary disposition is premature must identify a disputed issue and support that issue with independent evidence. *Id.* Further, the party opposing summary disposition must comply with MCR 2.116(H),⁴ which requires affidavits setting forth the probable testimony in support of the party's contentions. *Id.* at 292-293. Mere speculation that

³ In light of our conclusion regarding plaintiff's failure to demonstrate that further factual development could establish gross negligence, we need not address the parties' proximate cause arguments.

⁴ MCR 2.116(H)(1) provides:

A party may show by affidavit that the facts necessary to support the party's position cannot be presented because the facts are known only to persons whose affidavits the party cannot procure. The affidavit must

(a) name these persons and state why their testimony cannot be procured, and

(b) state the nature of the probable testimony of these persons and the reason for the party's belief that these persons would testify to those facts.

additional discovery might produce evidentiary support is not sufficient. *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 540-541; 687 NW2d 143 (2004).

In this case, plaintiff first complains that summary disposition was premature because he was unable to depose defendants regarding his gross negligence claims. However, our Supreme Court held that MCR 2.116(H) controls under these circumstances, and that failure to comply with MCR 2.116(H) precludes a plaintiff from complaining that discovery was prematurely ended. *Coblentz*, 475 Mich at 570-571. Moreover, plaintiff has failed to demonstrate how additional discovery has a fair chance of uncovering factual support for his gross negligence claims. In regard to Homrich, plaintiff claims additional discovery was necessary to uncover information regarding his licensing and training requirements as well as what training he actually received. Regarding Truer, plaintiff argues that additional discovery would uncover whether Truer had knowledge of safety requirements and procedures that were or should have been in place. Finally, regarding Veneklase, plaintiff claims that further discovery would disclose what his responsibilities were in regard to care for special needs students and the extent of his training regarding emergency response. Plaintiff also claims discovery would reveal whether CCS and KTC had a contractual relationship regarding student transportation. However, information about these undiscovered matters would not demonstrate gross negligence because even assuming additional discovery revealed that defendants failed to follow procedures and/or were not adequately trained, such facts would be evidence of ordinary negligence, not gross negligence. See, e.g., *Rakowski*, 269 Mich App at 635-636 (holding that evidence showing that a ramp was constructed in violation of construction standards and a national building code constituted evidence of ordinary negligence only and rejecting the plaintiff's claim that the trial court erroneously granted summary disposition regarding the gross negligence claim).

Moreover, plaintiff failed to specifically identify a disputed issue in connection to his claims regarding what additional discovery could uncover, and he has also failed to support his claims with independent evidence as required by *Marilyn Froling Revocable Living Trust*, 283 Mich App at 292. Therefore, plaintiff has failed to demonstrate that summary disposition was premature.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Amy Ronayne Krause