

STATE OF MICHIGAN
COURT OF APPEALS

DEVEN JORDAN PHILLIPS, a minor, by his next
friend SHEILA M. PHILLIPS, and SHEILA M.
PHILLIPS, individually,

UNPUBLISHED
March 18, 2003

Plaintiff-Appellants,

v

CARLTON E. SCHOOLEY,

No. 238763
Monroe Circuit Court
LC No. 01-012168-NO

Defendant-Appellee.

Before: Markey, P.J., and White and Zahra, JJ.

PER CURIAM.

In this governmental immunity case, plaintiffs appeal as of right from the trial court's order granting defendant's motion for summary disposition. We affirm.¹

I. Facts and Procedure

Defendant was employed with Mason Consolidated School District as the Director of Transportation, Buildings and Grounds. Defendant was responsible for the safe and orderly operation of the transportation of students to and from school, including that the students maintain a safe and orderly demeanor on the buses.

On September 7, 2000, defendant was present on the District's school bus while several children were being transported home, including plaintiff, who was nine-years old. Defendant's presence was requested on the bus because there had been fights on the bus the two previous days. Consequently, the bus driver was forced to stop the bus suddenly and as a result, two students reported injuries.

According to defendant, three students, one of whom was plaintiff, were sitting together on the bus in one seat, yelling out the window at other students. Defendant repeatedly asked them to use "inside voices." Shortly thereafter, while the bus was moving, several students complained that a boy sitting with plaintiff struck another boy. A student sitting with plaintiff

¹ This suit was brought on behalf of the minor child by his mother. The minor child will be referred to in this opinion as "plaintiff."

then began standing up while the bus was moving. Defendant told the student numerous times to sit down, but the student refused to listen to defendant. Defendant then physically held the student down to restrain him to his seat. While defendant was restraining the student, plaintiff stood up while the bus was moving and defendant told plaintiff repeatedly to sit down. Plaintiff refused, so defendant was required to restrain plaintiff by placing his hand on plaintiff's shoulder and forcing plaintiff down into the seat. Plaintiff and one of the other boys began encouraging the other student passengers on the bus to stand up and defy defendant and the driver. Defendant stated that one boy started to hit the back of the seat in front of him, and then plaintiff began to mimic his conduct. Defendant restrained both boys' hands from hitting the back of the seat in front of them. Defendant stated that when plaintiff exited the bus, he shouted, "I'll get you fired for this."

Many students on the bus corroborated defendant's statement of events, that various students on the bus, including plaintiff, were misbehaving and disobeying orders. Two students told the police that defendant pushed plaintiff down so hard that his head hit the window. One nine-year old student testified that defendant restrained plaintiff with a choking motion, and that she felt that plaintiff was being choked. Plaintiff alleged that defendant grabbed him by the neck, pushed him into the seat, pushed him into his friend, and into the window.

After the incident, plaintiff and his mother met with the Superintendent of Schools. The Superintendent stated that at no time during the meeting did plaintiff assert that defendant grabbed him around the neck or that defendant had pushed him into the window of the school bus. The Superintendent asked plaintiff to take off his shirt to examine his injuries. Plaintiff had a small red mark on the side of his neck, approximately the size of a fingerprint, although there was evidence that additional marks were observed at sometime subsequent to plaintiff's meeting with the Superintendent. After the meeting plaintiff apologized to defendant for his conduct on the school bus.

II. Analysis

Plaintiffs argue on appeal that a genuine issue of material fact existed that defendant committed an assault and battery constituting gross negligence beyond the immunities provided by MCL 691.1407(2) and MCL 380.1312(5). Defendant's motion for summary disposition was granted under MCR 2.116 subsections (C)(7), (C)(8), and (C)(10). We review de novo a trial court's decision to grant a motion for summary disposition. *Mack v City of Detroit*, 467 Mich 186, 193; 649 NW2d 47 (2002).

Plaintiffs' motion for summary disposition was properly granted under MCR 2.116(C)(7). In reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(7), this Court considers all affidavits, pleadings, and other documentary evidence submitted by the parties and construes the pleadings in favor of the nonmoving party. *Rheaume v Vandenberg*, 232 Mich App 417, 420; 591 NW2d 331 (1998). A motion for summary disposition under MCR 2.116(C)(7) should be granted if the claim is barred by governmental immunity. MCR 2.116(C)(7).

Defendant was acting within the limitations of his governmental responsibilities, and therefore, is immune from tort liability under MCL 691.1407(1). A governmental agency is immune from suit unless one of five statutory exceptions applies. "[I]t is the responsibility of the

party seeking to impose liability on a governmental agency to demonstrate that its case falls within one of the exceptions.” *Mack, supra* at 201.

The source of immunity from tort liability is provided statutorily by MCL 691.1407. MCL 691.1407(1) provides that “[e]xcept as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. . . .” MCL 691.1407(2) further provides:

[E]ach 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 . . . 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 did not amount to gross negligence that is the proximate cause of the injury or damage. As used in the subdivision, “gross negligence” means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.”

Defendant must satisfy all three of the above listed requirements for summary disposition to be proper under governmental immunity. MCL 691.1407(2). Regarding the first two requirements, there is no dispute on appeal. Rather, plaintiff argues on appeal that the trial court erred in finding that defendant’s conduct was not “gross negligence.”

Generally, government employees acting within the scope of their employment are immune from tort liability absent “gross negligence.” *Maiden v Rozwood*, 461 Mich 109, 121-122; 597 NW2d 817 (1999). Gross negligence is statutorily defined as “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.” MCL 691.1407(2)(c); *Maiden, supra* at 122. “[E]vidence of ordinary negligence does not create a material question of fact concerning gross negligence.” *Id.* at 122-123.

Defendant’s conduct did not fall within the realm of “gross negligence.” Defendant’s use of reasonable force to maintain safety and security on the school bus was authorized by statute. The statute provides a person employed by a local school board or public school academy “*may use reasonable physical force* upon a pupil as necessary to maintain order and control in a school or school-related setting for the purpose of providing an environment conducive to safety and learning,” and thus, “is not liable in a civil action for damages arising from the use of that physical force.” MCL 380.1312(4), (5) (Emphasis added).

Defendant was authorized by statute to use reasonable physical force to maintain order. Defendant was placed on the bus due to complained of injuries resulting when the school bus was forced to stop due to unruly behavior by students on the bus. The evidence shows that defendant asked plaintiff and the other boys disrupting the order and safety of the school bus to

cease their inappropriate and unsafe conduct. The evidence shows that defendant had to restrain multiple students at the same time to prevent them from injuring themselves and others.

Therefore, when viewing the evidence in a light most favorable to the non-moving party, defendant's conduct does not amount to conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. MCL 691.1407(2)(c); *Maiden, supra* at 122. The evidence establishes that defendant forcibly used his hands around the neck and shoulders of plaintiff and pushed plaintiff down in his seat. Testimony exists that suggested that plaintiff may have been forced down such that he hit his head on the window. However, this conduct amounts to negligence, at most, and does not amount to gross negligence.

The conduct of pushing plaintiff down in his seat by his neck does not suggest that defendant was in fact choked or that plaintiff sustained a physical injury. Plaintiff did not need or seek medical attention after the incident, and immediately afterwards when plaintiff met with the Superintendent, plaintiff never accused defendant of choking him. Further, in plaintiff's own complaint he alleges that he was "grabbed by the neck" and pushed into the seat and window. It is not alleged that plaintiff was gratuitously choked. Defendant's behavior, although arguably negligent, did not amount to the statutory definition of gross negligence. Thus, this claim is barred by governmental immunity. Accordingly, because summary disposition was properly granted under (C)(7), whether summary disposition was granted under (C)(8) and (C)(10), need not be addressed.

Further, we find that because no gross negligence occurred and thus, defendant's claim was barred by governmental immunity, it is not necessary to address plaintiffs' second argument that liability upon defendant should not be precluded regarding the minor plaintiff's post-traumatic stress disorder and the other damages because the injuries were neither remote, nor unforeseeable.

III. Conclusion

In sum, the trial court properly granted defendant's motion for summary disposition under MCR 2.116(C)(7) because the claim was barred by governmental immunity.

Affirmed.

/s/ Jane E. Markey
/s/ Helene N. White
/s/ Brian K. Zahra