STATE OF MICHIGAN

COURT OF APPEALS

KISHON DAVIS, as Next Friend of DISHON DAVIS,

Plaintiff-Appellant,

v

FLINT COMMUNITY SCHOOLS and MICHELLE VANTOL,

Defendants-Appellees.

UNPUBLISHED
October 29, 2020

No. 350265
Genesee Circuit Court
LC No. 18-111460-NO

Before: STEPHENS, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

Plaintiff, as next friend of her minor son, Dishon Davis, appeals by right the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(7) (dismissal of action is appropriate because of governmental immunity). We affirm.

I. FACTS AND PROCEDURAL HISTORY

Dishon was a six-year-old child with autism who was injured at school when his hand was caught in a bench lid that Dishon had been holding open. Defendant teacher had told the students not to open the bench, and she did not open the bench in front of the students. When the teacher saw Dishon open the bench, she told him to close it. Dishon then dropped the bench lid on his hand. Dishon's thumb was bleeding, and he was taken by his mother to the hospital. After the accident, the school had the bench lid sealed.

II. STANDARD OF REVIEW

This Court reviews the trial court's decision to grant or deny a summary disposition motion de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(7) may be supported by affidavits, depositions, and other documentary evidence. *Id*. at 119. The substance of these proofs must be admissible. *Id*. Neither party is required to provide additional evidence, and the allegations in the complaint are to be taken as true unless contradicted by evidence submitted by the movant. *Id*.

III. ANALYSIS AND APPLICATION

Defendants were entitled to summary disposition under MCR 2.116(C)(7) because the public-building exception did not apply, and because a reasonable juror could not conclude that defendant teacher was grossly negligent.

A. PUBLIC-BUILDING EXCEPTION

Governmental agencies are generally immune from tort liability when they are discharging a governmental function, unless there is an exception to governmental immunity that applies to the situation. *Tellin v Forsyth Twp*, 291 Mich App 692, 699; 806 NW2d 359 (2011). The operation of a public school is a governmental function. *Stringwell v Ann Arbor Pub Sch Dist*, 262 Mich App 709, 712; 686 NW2d 825 (2004). "Courts are required to broadly construe the term 'governmental function,' while strictly construing exceptions to governmental immunity." *Tellin*, 291 Mich App at 699. The public-building exception is one of the exceptions that applies to governmental immunity. *Id*. MCL 691.1406 provides:

> Governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition. Knowledge of the dangerous and defective condition of the public building and time to repair the same shall be conclusively presumed when such defect existed so as to be readily apparent to an ordinary observant person for a period of 90 days or longer before the injury took place. As a condition to any recovery for injuries sustained by reason of any dangerous or defective public building, the injured person, within 120 days from the time the injury occurred, shall serve a notice on the responsible governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

The plaintiff must prove the following five elements to avoid governmental immunity under the public-building exception: "(1) a governmental agency is involved, (2) the public building in question is open for use by members of the public, (3) a dangerous or defective condition of the public building itself exists, (4) the governmental agency had actual or constructive knowledge of the alleged defect, and (5) the governmental agency failed to remedy the alleged defective condition after a reasonable amount of time." *Renny v Dep't of Transp*, 478 Mich 490, 495-496; 734 NW2d 518 (2007).

The issue in this case focuses on the third prong, whether "a dangerous or defective condition of the public building itself exists." *Id.* The public-building exception may only be invoked when the injury is caused by the physical condition of the building. *Reardon v Dep't of Mental Health*, 430 Mich 398, 411-413; 424 NW2d 248 (1988). The public-building exception only requires that public buildings be maintained and repaired; it does not cover design defects. *Renny*, 478 Mich at 502-505. "Central to the definitions of 'repair' and 'maintain' is the notion of

restoring or returning something, in this case a public building, to a prior state or condition." *Id*. at 500. In contrast, " '[d]esign' refers to the initial conception of the building, rather than its restoration." *Id*. at 501. This Court has held that a design defect relates to the design itself, such as the function, purpose, or characteristics of the building. *Tellin*, 291 Mich App at 705. The failure to maintain or repair relates to deterioration of a public building or an error in the installation or construction process. *Id*. at 705-706.

Plaintiff's argument that the trial court erred by determining that plaintiff's injury related to a design defect is unavailing because plaintiff's argument is premised on the bench lid's lack of a safety device or spring, which relates to a characteristic of the bench and not restoring it to a prior state. In *Renny*, our Supreme Court remanded the case to this Court to determine if the plaintiff's suit could proceed under a failure to repair claim because there were some indications from the record that the building had once had the features that were missing at the time of the accident. *Renny*, 478 Mich at 506-507. In *Tellin*, this Court determined that the steel pole that injured the plaintiff was a repair issue rather than a design defect because the steel pole was part of the repair work done to the structure, and because once the steel pole was installed, the defendant had a duty to maintain the steel pole. *Tellin*, 291 Mich App at 706-707. This Court noted that a design defect relates to the purpose and characteristics of the building, while a failure to repair or maintain relates either to a mistake during construction or the deterioration of the building. *Id*. at 705-706. In this case, plaintiff alleges only that the bench lacked a safety device, not that one had existed and then deteriorated. Neither defendant teacher's deposition nor the maintenance worker's deposition contains any testimony that the bench lid used to have a safety device that was then allowed to deteriorate. The plaintiff is required to prove that the exception to governmental immunity applies. See *Renny*, 478 Mich at 495-496. Plaintiff now argues that there is no indication whether the bench used to have a different safety device, but plaintiff cannot rely on the lack of indication of a safety device because plaintiff must prove that the public-building exception applies.

Plaintiff argues that the bench lid was poorly maintained in relation to the room's purpose as a special education classroom, citing *Bush v Oscoda Area Schs*, 405 Mich 716; 275 NW2d 268 (1979). In *Bush*, the Court determined that there was a question of fact as to whether the school room was safe for the purpose of being a science classroom. *Busch*, 405 Mich at 732. However, the Supreme Court in *Renny* overruled the dicta from *Bush*, or any other case, that suggested that a design defect fell under the public-building exception. *Renny*, 478 Mich at 505. Because plaintiff did not provide any evidence to suggest that the bench lid used to have a safety device that had fallen into disrepair, the lack of a safety device is a design defect. Therefore, the trial court did not err by granting defendant school summary disposition on this issue.[1]

B. GROSS NEGLIGENCE

Generally, government employees are immune from tort liability when acting within the scope of their authority, so long as they are not grossly negligent. *Maiden*, 461 Mich at 121-122.

[1] Because we have determined that defendants were entitled to summary disposition on this issue, we need not address plaintiff's argument that a question for the jury was presented as to the failure to repair the bench.

This immunity is codified in MCL 691.1407(1). MCL 691.1407(8)(a) defines gross negligence as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."

Alleging that the defendant could have done more to prevent the injury is, on its own, insufficient to show negligence or gross negligence. *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). Because gross negligence is a higher standard than negligence, it "suggests, instead, almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks." *Id*. Gross negligence occurs when an objective observer could watch the incident and then could reasonably conclude that the defendant did not care about the safety of the plaintiff. *Id*. Summary disposition is inappropriate when reasonable jurors could disagree about whether the defendant was grossly negligent, but it is appropriate when reasonable jurors could not disagree about gross negligence. *Vermilya v Dunham*, 195 Mich App 79, 83; 489 NW2d 496 (1992).

Plaintiff's argument that there was a material question of fact as to gross negligence is unavailing because reasonable minds could not determine that defendant teacher acted with willful disregard of precautions or safety. Plaintiff asserts that if there is some evidence of gross negligence, then a question for the trier of fact exists. Summary disposition is appropriate when reasonable jurors could not disagree about whether gross negligence exists or not. *Vermilya*, 195 Mich App at 83. Defendant teacher testified in her deposition that she had told the students not to open the bench lid, and she avoided opening the bench lid in front of the students. Defendant teacher had never seen Dishon open the bench lid before the incident. Defendant teacher told Dishon to close the bench lid when she saw that he had opened it. Dishon was then injured when he dropped the bench lid while his thumb was under it. The allegation that defendant teacher could have done more to prevent harm, on its own, does not prove negligence or gross negligence. *Tarlea*, 263 Mich App at 90. In *Tarlea*, this Court noted that the numerous safety precautions that the defendants took meant that a reasonable jury could not conclude that the defendants were grossly negligent. *Id*. at 90-91. And in *Vermilya*, this Court determined that the record supported summary disposition on a claim of gross negligence when a coach reported to maintenance the danger the soccer goals presented, instructed the students not to climb on the goals, and disciplined them for climbing on the goals. *Vermilya*, 195 Mich App at 83. In this case, defendant teacher took precautions by instructing the students not to open the bench lids and by not opening the bench lids in front of the students. Although defendant teacher could have closed the lid herself, her decision to instruct Dishon to close the lid did not indicate an almost reckless disregard of safety, because her instruction to not enter the bench and to close the bench lid demonstrated her concern for his safety as she attempted to make him stop playing with the bench and the bench lid. The mere fact that defendant teacher could have done more by walking over to the bench lid and closing it herself does not prove gross negligence. Therefore, summary disposition on this issue was appropriate.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Jane M. Beckering