

STATE OF MICHIGAN
COURT OF APPEALS

MAURISA DANIELS, Next Friend of JASON
DANIELS, a Minor,

UNPUBLISHED
April 29, 2003

Plaintiff-Appellant,

v

NEW ST. PAUL TABERNACLE CHURCH OF
GOD IN CHRIST,

No. 238928
Wayne Circuit Court
LC No. 00-038436-NO

Defendant-Appellee.

Before: Griffin, P.J., and Neff and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition. We reverse and remand.

I

Plaintiff's son Jason attended a Head Start program on defendant's premises. While Jason was playing on the monkey bars he fell, breaking his arm. Plaintiff filed this action for damages, alleging claims of negligent supervision and attractive nuisance.

On the day Jason was injured there were only nine or ten children in the class that usually numbered 17. There was deposition testimony that Jason wandered away from the other children to play on the monkey bars unnoticed by the teacher's assistant assigned to Jason's class. Jason's teacher testified that the playground equipment was federally approved for Head Start students.

In ruling on defendant's motion for summary disposition, the trial court held, in part, that Jason's fall and injury "did not occur as a result of any negligence of any individual." On the record before us, we conclude that there is a genuine issue of material fact regarding negligent supervision and that therefore summary disposition was improper.

II

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other

documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. Summary disposition is appropriate only if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

Generally, negligence is conduct involving an unreasonable risk of harm. *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 5; 574 NW2d 691 (1997). To prove negligence, a plaintiff must establish a breach of duty owed by the defendant that is a proximate cause of the plaintiff's injuries. *Id.* "A teacher owes a duty to exercise reasonable care over students in his or her charge." *Cook v Bennett*, 94 Mich App 93, 98; 288 NW2d 609 (1979). Reasonable or ordinary care is the care that a reasonably careful person would use under the circumstances, as they existed at the time. *Case v Consumers Power Co*, 463 Mich 1, 7; 615 NW2d 17 (2000). "Once the existence of a duty toward the plaintiff is established, the reasonableness of the defendant's conduct is a question for the jury." *Arias v Talon Dev Group, Inc*, 239 Mich App 265, 268; 608 NW2d 484 (2000).

III

The evidence presented showed that three teachers¹ were on the playground. As noted, Jason wandered away from the group unnoticed by the assistant assigned to his class, climbed on the monkey bars, fell and was injured. There was no evidence that the other teachers were supervising him. Such evidence was sufficient to create a question of fact as to the issue of negligent supervision. It is plausible that Jason would not have wandered off from the group or at least not gone on the monkey bars unsupervised had there been proper supervision.

The evidence was also sufficient to create an issue of fact regarding defendant's liability under the doctrine of respondeat superior. An employer may be vicariously liable for the acts of an employee who is acting in the course of her employment and within the scope of her authority. *Helsel v Morcom*, 219 Mich App 14, 21; 555 NW2d 852 (1996). Whether an employee was acting within the scope of her employment is generally a question of fact. *Green v Shell Oil Co*, 181 Mich App 439, 446-447; 450 NW2d 50 (1989).

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

/s/ Janet T. Neff
/s/ Hilda R. Gage

¹ The teacher assigned to Jason's class remained indoors to do paperwork, but her assistant was on the playground to supervise the children. The other two teachers were assigned to another class on the playground at the same time.