

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

JUDITH CHOQUETTE, Individually and as Next  
Friend of KATIE CHOQUETTE, a Minor, and  
TIMOTHY CHOQUETTE,

Plaintiffs-Appellants,

v

ONSTED COMMUNITY SCHOOLS, TERI  
HUNT and KATHERINE ROUMELL,

Defendants-Appellees.

---

UNPUBLISHED  
September 1, 2005

No. 260827  
Lenawee Circuit Court  
LC No. 02-002940-NO

Before: Saad, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendants. We affirm.

I. Basic Facts and Procedural History

This case tragically arises from the hanging death of a fourteen-year-old girl, and the unfortunate viewing of the aftermath of that event by several students of defendant Onsted Community Schools. It is not disputed that plaintiff Katie Choquette, the six-year-old daughter of plaintiffs Judith and Timothy Choquette, was among the students who witnessed the aftermath of the hanging. According to plaintiffs, however, Katie did not comprehend what she had seen until after being required to attend a group informational/counseling session held at her school the following day. Citing assurances by Katie's teacher, defendant Teri Hunt, that the circumstances of the hanging would not be discussed with Katie unless first raised by the child, as well as the failure of defendants to obtain parental consent for Katie's attendance at the session, plaintiffs filed the instant suit alleging negligence by both Hunt and the principal of Katie's school, Katherine Roumell, and violations of their civil rights by Onsted Community Schools. The trial court, however, granted summary disposition in favor of defendants. This appeal followed.

II. Analysis

Plaintiffs do not directly challenge the trial court's grant of summary disposition in favor of defendants. Rather, plaintiffs argue that the trial court should have granted summary

disposition in their favor under MCR 2.116(I)(2) because there is no genuine issue of material fact with respect to the liability of defendants under the civil rights and negligence claims asserted by plaintiffs. However, plaintiffs did not request such relief below and have, therefore, failed to preserve for our review any argument that summary disposition in their favor was appropriate under MCR 2.116(I)(2). *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Nonetheless, because we conclude that summary disposition in favor of defendants was proper, we affirm the trial court's order to that effect.

This Court reviews de novo a trial court's determination regarding a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Here, defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). Although the trial court did not expressly articulate which of these subrules it relied on in granting defendants' motion, because the court looked beyond the pleadings in deciding the motion, we review the motion as having been granted under MCR 2.116(C)(10). See *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999). "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

#### A. Civil Rights Claim Against Onsted Community Schools

Plaintiffs' civil rights claim against Onsted Community Schools is based on 42 USC 1983. "To state a cause of action under § 1983, a plaintiff must allege the deprivation of a right secured by the United States Constitution or a federal statute by a person who was acting under color of state law." *Spadafore v Gardner*, 330 F3d 849, 852 (CA 6, 2003).

With respect to such deprivation, plaintiffs allege that Onsted Community Schools is vicariously liable for the deprivation of plaintiffs' fundamental constitutional right to make decisions concerning the care, custody, and control of their child, see *Troxel v Granville*, 530 US 57, 65; 120 S Ct 2054; 147 L Ed 2d 49 (2000), because Hunt and Roumell failed to secure parental consent before allowing Katie to attend the group session. However, a respondeat superior argument, relying solely upon an employer-employee relationship with an alleged tortfeasor, is insufficient to hold a governmental unit liable under 42 USC 1983. *Monell v Dep't of Social Services*, 436 US 658, 691; 98 S Ct 2018; 56 L Ed 2d 611 (1978). Nonetheless, municipalities and other bodies of local government may be sued pursuant to 42 USC 1983 if they are "alleged to have caused a constitutional tort through 'a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.'" *City of St Louis v Praprotnik*, 485 US 112, 121; 108 S Ct 915; 99 L Ed 2d 107 (1988), quoting *Monell*, *supra* at 690). Section 1983 also authorizes suit "for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels." *Monell*, *supra* at 690-691. Moreover, although a § 1983 plaintiff might not be able to demonstrate that a written policy exists, he or she "may be able to prove the existence of a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law." *Praprotnik*, *supra* at 127 (citation and internal quotation marks omitted).

The Sixth Circuit Court of Appeals has explained that a “custom” for the purposes of liability under 42 USC 1983:

must be so permanent and well settled as to constitute a custom or usage with the force of law. In turn, the notion of “law” must include deeply embedded traditional ways of carrying out state policy. It must reflect a course of action deliberately chosen from among various alternatives. In short, a “custom” is a “legal institution” not memorialized by written law. [*Doe v Claiborne County*, 103 F3d 495, 507-508 (CA 6, 1996) (citations and internal quotation marks omitted).]

Therefore, to defeat defendants’ motion for summary disposition plaintiffs were required to show that the session and decision not to obtain parental approval was an official policy or practice of Onsted Community Schools. This, plaintiffs failed to do. In support of their claim, plaintiffs cite the deposition testimony of Roumell, that, “counseling the next day was an automatic in a crisis situation . . . .” Plaintiffs also cite Onsted Community Schools’ written policy regarding the death of a student, which does not contain a provision regarding parental consent and calls for individual or group counseling for students, “if appropriate,” when there is a student death. However, “[p]roof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional . . . policy.” *Oklahoma City v Tuttle*, 471 US 808, 823-824; 105 S Ct 2427; 85 L Ed 2d 791 (1985). Here, although the school’s written policy indicates that counseling would be afforded students following the death of a classmate “if appropriate,” there is nothing in that policy, or Roumell’s testimony that counseling was “automatic in a crisis situation,” to indicate that parental consent or approval would not, as a matter of custom or policy, ever be obtained before such counseling. *Doe, supra*. Indeed, as previously noted, the written policy is silent on the issue of parental consent or approval. Further, plaintiffs have failed to identify a single incident similar to that which formed the basis for their complaint. To the contrary, the evidence indicates that this was an extraordinary and unfortunate event that Onsted Community Schools attempted to deal with through prompt and resolute action. The record is devoid of evidence sufficient to show that it was the school’s “custom” or “policy” that group counseling sessions be held for students in such a situation or that its reaction to this event was anything more than an isolated incident. *Monell, supra; Doe, supra*. Consequently, the trial court correctly granted summary disposition in favor of defendant Onsted Community Schools under MCR 2.116(C)(10).

#### B. Negligence Claims Against Hunt and Roumell

As employees of the Onsted Community Schools, a governmental agency, Hunt and Roumell are entitled to governmental immunity from their alleged negligence if they were acting within the scope of their authority and were “engaged in the exercise or discharge of a governmental function,” and their conduct did not “amount to gross negligence that is the proximate cause of the injury or damage.” MCL 691.1407(2). The parties do not dispute the first two of these elements, but disagree whether defendants’ conduct amounted to gross negligence or could be considered the proximate cause of plaintiffs’ injuries.

Gross negligence is defined as “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.” MCL 691.1407(7)(a). If reasonable minds could not

differ regarding whether a defendant's conduct amounted to gross negligence, summary disposition should be granted as a matter of law. *Vermilya v Dunham*, 195 Mich App 79, 83; 489 NW2d 496 (1992).

Here, when viewed in light most favorable to plaintiffs, the evidence clearly shows that Hunt and Roumell did not secure parental consent before allowing Katie to attend the session. Nonetheless, the evidence simply does not support a finding that their conduct in this regard amounted to gross negligence. Rather, the evidence shows that Hunt, under the general authority of Roumell, was merely following the professional recommendations of the school psychologist and counselor regarding the appropriate action for dealing with the children who may have viewed the aftermath of the hanging. Such evidence does not support a finding that defendants engaged in "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a).<sup>1</sup> The trial court correctly granted summary disposition in favor of Hunt and Roumell with respect to plaintiffs' negligence claims against them.<sup>2</sup>

Affirmed.

/s/ Henry William Saad  
/s/ Joel P. Hoekstra  
/s/ Jane E. Markey

---

<sup>1</sup> We reject plaintiffs' cursory and undeveloped argument that the failure of Hunt and Roumell to secure parental consent was an intentional act to which governmental immunity does not apply. Although governmental immunity does not extend to intentionally tortious acts such as assault or the intentional infliction of emotional distress, see *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004), the mere fact that a governmental employee intentionally undertakes a course of action does not remove the protections afforded by MCL 691.1407(2).

<sup>2</sup> Because we find that plaintiffs have failed to show gross negligence in avoidance of governmental immunity, we need not address the issue of proximate cause.