

STATE OF MICHIGAN
COURT OF APPEALS

GLORIA RUSSELL, as Conservator of
JEREMIAH RUSSELL, a Minor,

UNPUBLISHED
January 22, 2013

Plaintiff-Appellant,

v

No. 307352
Oakland Circuit court
LC No. 2011-117358-NO

CARRIE WEINGARTZ,

Defendant-Appellee,

and

SOUTHFIELD PUBLIC SCHOOLS,

Defendant.

Before: HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ.

PER CURIAM.

Plaintiff Gloria Russell, as conservator of Jeremiah Russell,¹ appeals as of right the trial court's order granting summary disposition under MCR 2.116(C)(7) to defendant Carrie Weingartz.² The trial court concluded that there was no genuine issue of material fact that Weingartz's conduct in this case did not constitute gross negligence and, therefore, that she was entitled to governmental immunity as a matter of law. We affirm.

I. FACTS

This case stems from a high school chemistry demonstration gone wrong. On the day of the incident, December 7, 2009, Jeremiah was attending Weingartz's chemistry class at

¹ Jeremiah was a minor at the time this lawsuit was filed. Based on his date of birth as stated in his deposition, we believe Jeremiah has reached the age of majority; however, plaintiff has not sought to substitute parties.

² The trial court also granted summary disposition in favor of defendant Southfield Public Schools in a separate order, which plaintiff does not appeal.

defendant Southfield Public School's Lathrup High School. Although Weingartz had been teaching at Southfield schools since 2003, 2009 was her first year teaching general chemistry.³ Weingartz learned of a chemistry demonstration from another chemistry teacher, Jeff Finnan, who had worked as a chemist for 30 years before beginning to teach chemistry at Lathrup a few years before the incident. The demonstration consisted of a wooden board that was about 12 to 15 inches long with four Petri dishes affixed to the board. Each dish contained a different metal—copper, lithium, strontium, or sodium—and each was combined with ethyl alcohol and then lit on fire to produce a flame.⁴ One week before the incident, Weingartz observed Finnan perform the demonstration, which Finnan explained to Weingartz how to conduct. Finnan gave Weingartz the board he had made and used to show her the demonstration, and assured her there was enough metal in each Petri dish to run the demonstration with a full day's worth of classes. A few days before the incident, Weingartz performed the demonstration by herself to make sure that it worked correctly, which it did. Weingartz believed that the demonstration was a low-risk demonstration commonly performed in chemistry classes and she felt safe performing it because of her discussion with Finnan. Weingartz did not do any independent research regarding potential safety hazards.

On the day of the incident, Weingartz taught three chemistry classes before teaching Jeremiah's seventh-hour class. During the earlier classes, Weingartz performed the demonstration twice for each class without incident.⁵ Weingartz conducted the demonstration at a desk that was about two feet wide and about three to four feet away from the first row of students. Before beginning the demonstration, Weingartz told the students that they needed to keep a safe distance. The students, including Jeremiah, did not wear goggles during the demonstration, although they had for other in-class activities. Weingartz performed the demonstration once for Jeremiah's class without incident. At the class's request, Weingartz performed the demonstration a second time. As she had done earlier, Weingartz squeezed a small amount of alcohol from a squeeze bottle into each dish before lighting it aflame. After igniting one or two of the Petri dishes, Weingartz lit the dish containing copper chloride, and a large flame "flared outward" in Jeremiah's direction, lighting his shirt on fire and causing burns to his face. Weingartz does not know what caused the flame to flare at Jeremiah; she performed all of the demonstrations for her students in the same manner.

³ Weingartz testified that she taught general science and biology for her first seven years of teaching, and she'd also taught a section of "chemistry in the community," a more remedial chemistry class, for two years.

⁴ The purpose of the experiment was to demonstrate the different color flames that can be produced by different types of metals, which is one form of illustrating their differing properties.

⁵ Weingartz testified at deposition that the flames were very low, maybe five or six inches high or less, and burned out quickly. She ran the experiment twice in each class because not all of the students could see the flames the first time around. Jeremiah estimated that the height of the flames was around ten inches high.

II. ANALYSIS

Plaintiff argues that the trial court erred by concluding that there was no genuine issue of material fact regarding whether Weingartz acted with gross negligence. We disagree.

A trial court may grant summary disposition under MCR 2.116(C)(7) when a claim is barred by governmental immunity. See *Moraccini v Sterling Heights*, 296 Mich App 387, 391; 822 NW2d 799 (2012). We review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7). *Davis v Detroit*, 269 Mich App 376, 378; 711 NW2d 462 (2006). "When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them." *Petipren v Jaskowski*, 294 Mich App 419, 424; 812 NW2d 17 (2011), quoting *Dextrom v Wexford Co*, 287 Mich App 406, 428, 789 NW2d 211 (2010). "If any documentary evidence is submitted, we must view it in the light most favorable to the nonmoving party to determine whether there is a genuine issue of material fact." *Id.* (citation omitted). "If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred is an issue of law for the court." *Id.*, quoting *Dextrom*, 287 Mich App at 431. "Conversely, if a factual dispute exists regarding whether immunity applies, summary disposition is not appropriate." *Id.* (citation omitted).

MCL 691.1407(2) provides, in relevant part, as follows:

Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each 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 or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency 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 does not amount to gross negligence that is the proximate cause of the injury or damage.* [Emphasis added.]

For the purpose of governmental immunity, gross negligence by an employee involves "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). Gross negligence suggests "almost a willful disregard of precautions or measures to attend to safety." *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004); see also *Costa v Community Emergency Med Servs, Inc*, 475 Mich 403, 411; 716 NW2d 236 (2006) (gross negligence means conduct "substantially more than negligent"). "It is as though, if an objective observer watched the actor, he could conclude, reasonably, that the actor simply did

not care about the safety or welfare of those in his charge.” *Tarlea*, 263 Mich App at 90. Importantly, the inquiry must “focus on the actions of the governmental employee, not the result of those actions.” *Maiden v Rozwood*, 461 Mich 109, 127 n 10; 597 NW2d 817 (1999).

We conclude that governmental immunity bars plaintiff’s claims against Weingartz because Weingartz’s conduct did not rise to the level of gross negligence given the factual record. Reasonable minds could not disagree regarding whether Weingartz’s conduct constituted gross negligence. See *Petipren*, 294 Mich App at 424. Weingartz learned of the demonstration from Finnan, a fellow chemistry teacher who had decades of experience in chemistry. She watched Finnan perform the demonstration “very closely” and received verbal instruction on how to perform it. Before performing the demonstration in front of her students, she conducted the demonstration by herself to make sure that it worked properly, which it did. She also told her students to keep a safe distance during the demonstration. Furthermore, before performing the demonstration for the second time in Jeremiah’s class, she performed it without incident six times for other classes and once for Jeremiah’s class. Given these facts, an objective observer could not reasonably conclude that Weingartz “simply did not care about the safety or welfare of those in [her] charge.” *Tarlea*, 263 Mich App at 90.

Plaintiff emphasizes that Weingartz did not research the potential harmful results of the demonstration; however, “[s]imply alleging that an actor could have done more is insufficient under Michigan law, because, with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result.” *Id.* Plaintiff’s argument falls squarely within this description, suggesting that Weingartz’s failure to do research on the potential harmful outcome of the demonstration renders her grossly negligent.

Plaintiff also contends that Weingartz’s failure to measure the amount of chemicals used with a measuring device raises her conduct to gross negligence. Weingartz, however, followed the lead of her colleague, Finnan, who had experienced no ill effects when using a squeeze bottle, rather than a tablespoon or some other device, to add ethyl alcohol to the Petri dishes. She also did the demonstration at least eight times without incident using the same methodology that was used when the flame flared up and injured Jeremiah. Even if Weingartz’s actions could be seen as ordinary negligence, “evidence of ordinary negligence does not create a material question of fact concerning gross negligence.” *Maiden*, 461 Mich at 122-123.

Accordingly, the trial court did not err by granting Weingartz’s motion for summary disposition.⁶

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering

⁶ Given our resolution of this issue, we need not address plaintiff’s argument regarding proximate cause.