

STATE OF MICHIGAN
COURT OF APPEALS

FELICIA KROL,

Plaintiff-Appellant,

v

KATRINA CALIANNO, DANIEL GUERRERO,
and DRYDEN COMMUNITY SCHOOLS,

Defendants-Appellees.

UNPUBLISHED

June 21, 2011

No. 297355

Lapeer Circuit Court

LC No. 08-040813-NO

Before: METER, P.J., and CAVANAGH and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendants. We affirm.

Plaintiff allegedly sustained back injuries after a group pushup exercise directed by defendant Daniel Guerrero, who was assisting defendant Katrina Calianno in her job as a girls' volleyball coach at Dryden High School. After plaintiff filed suit, alleging negligence and gross negligence, defendants moved for summary disposition based on governmental immunity, and the trial court granted the motion.

We review de novo a trial court's grant of summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The trial court based its decision in this case on MCR 2.116(C)(7) and (10). As stated in *Maiden, id.* at 120:

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.

Also,

[a] party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is

submitted, it must be considered. MCR 2.116(G)(5). Moreover, the substance or content of the supporting proofs must be admissible in evidence Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. [*Maiden*, 461 Mich at 119.]

We hold that the trial court correctly concluded that there was no genuine issue of material fact regarding whether Calianno and Guerrero were entitled to governmental immunity. MCL 691.1407 states, in part:

(2) 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.

Calianno and Guerrero were coaching volleyball for a public school and therefore were clearly engaged in the exercise of a governmental function. Moreover, they were not grossly negligent. MCL 691.1407(7)(a) defines "gross negligence" as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." In *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004), the Court, after discussing the ordinary-negligence standard, stated: "The much less demanding standard of care—gross negligence—suggests . . . almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks. 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."

In *Vermilya v Dunham*, 195 Mich App 79, 80-81; 489 NW2d 496 (1991), an eleven-year-old boy was injured when "a steel soccer goal was pushed over on top of him at school." This Court stated:

After reviewing the record, we agree with the trial court that the undisputed facts in this case preclude a finding that defendant's conduct

amounted to gross negligence. Defendant became aware that the goals could be tipped over approximately one to two weeks before plaintiff's son was injured. He then asked his maintenance supervisor to determine how the goals could be anchored, checked with the maintenance supervisor on his progress, made announcements in school instructing the children to stay off the goals, and disciplined students for climbing the goals. The trial court properly granted defendant's motion for summary disposition. [*Id.* at 83.]

The Court found no gross negligence even though, evidently, the defendant allowed the goals to remain in use despite their condition.

Here, plaintiff testified that the tryouts for the volleyball team involved "between a week and two weeks" of "running, conditioning, and hitting, . . . volleying, to try to figure out, you know, just different aspects of volleyball." Plaintiff testified that calisthenics like pushups were familiar to her and that she had never had any particular problems with "calisthenics or exercise, or the like." Guerrero testified that he had employed group pushups during prior coaching experiences and that nobody had ever been injured by them. He indicated that there is no extra weight on one's back during a group pushup because each person supports his or her own weight during the exercise.

Given that the girls on the volleyball team had been undergoing athletic conditioning beforehand, given the nature of the group pushup itself, and given plaintiff's admitted familiarity with calisthenics like pushups, we cannot find that employing the group pushups amounted to gross negligence. There was no indication, from the evidence, that Calianno and Guerrero "simply did not care about the safety or welfare of those in [their] charge." *Tarlea*, 263 Mich App at 90.

Plaintiff contends that there were questions of fact concerning whether Calianno and Guerrero were "acting or reasonably believe[d] [they were] acting within the scope of [their] authority." MCL 691.1407(2)(a). Plaintiff focuses on the alleged fact that the incident took place before Guerrero had been formally approved as a volunteer assistant coach. However, it is not disputed that Calianno had broad discretion to run the volleyball program. As such, it was not outside the scope of her authority have someone assist her at practices. Moreover, Guerrero, having been asked by Calianno to assist with the coaching, clearly reasonably believed that he was acting within the scope of his authority in conducting the group pushups. We find no basis for reversal.

In addition, the trial court correctly dismissed the case against defendant Dryden Community Schools. This Court has held that governmental agencies themselves are not subject to the gross-negligence exception to governmental immunity. *Gracey v Wayne Co Clerk*, 213 Mich App 412, 420; 540 NW2d 710 (1995), overruled in part on other grounds by *American Transmissions, Inc v Attorney Gen*, 454 Mich 135; 560 NW2d 50 (1997). The *Gracey* Court also stated that "a governmental agency can be held vicariously liable only when its officer, employee, or agent, acting during the course of employment and within the scope of authority, commits a tort while engaged in an activity that is nongovernmental or proprietary or that falls within a statutory exception." *Id.* at 421. Plaintiff contends that Calianno and Guerrero's alleged gross negligence should be considered a "statutory exception," *id.*, allowing for a finding that

defendant school is liable. However, there was no gross negligence here. Reversal is unwarranted.¹

Affirmed.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto

¹ Plaintiff contends that an affidavit filed below by defendants should be stricken from the record because the affiant was not listed on defendants' witness list or in answers to interrogatories. We need not decide this issue because we have not relied on the affidavit in resolving this appeal.