

STATE OF MICHIGAN
COURT OF APPEALS

KAREN THOMAS, Next Friend and Conservator
of K.C., a Minor,

UNPUBLISHED
March 24, 2011

Plaintiff-Appellee,

v

No. 293054
Wayne Circuit Court
LC No. 08-106190-NO

LINDA PORTER-KING and TANYA BLAKE,

Defendants-Appellants.

Before: WILDER, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Plaintiff Karen Thomas's claims arise from the alleged sexual assault of her daughter, K. C.,¹ by two of her classmates while she was a special education student at an elementary school in Detroit. Plaintiff seeks to hold defendants Linda Porter-King, the principal, and Tanya Blake, a teacher, liable for their actions during the discovery and investigation of the incident, as well as their instigation of a code of conduct hearing that led to K.C.'s suspension. Defendants appeal as of right from the trial court's denial of summary disposition on the grounds of governmental immunity. Because we conclude that plaintiff has not created a question of fact as to whether the defendants' conduct amounted to gross negligence, we reverse.

I. FACTS

At the time of the incident, K.C. was an 11-year-old special education student. According to her deposition testimony, on April 24, 2007, she arrived at her homeroom class between 8:15 a.m. and 8:20 a.m. Her teacher was not present, although two male students, X.P. and K.M., were. Both were also special education students. K.C. testified that, as she ate breakfast at her desk, the boys at first occupied themselves with investigating items in the room, but then started to accost her. According to K.C.'s testimony, X.P. came over to her desk, grabbed her hands and pulled her out of her seat. Although she struggled, he was successful in pulling her into a back

¹ Because Thomas's daughter and the young male students involved are all minors, they are referred to by their initials.

area by a bookcase. At first, she alleges, the boys attempted to make her perform a “lap dance” for them, but she refused. X.P. then allegedly swung K.C. to the floor on her back and asked K.M. if he wanted to assault K.C. He responded that he did not. X.P., who was sitting in front K.C.’s feet and holding her down by keeping his hands on her feet, told K.M. to grab K.C.’s arms, which he did. X.P. then pulled down K.C.’s pants and underwear to her ankles, while K.M. held K.C.’s arms over her head. According to K.C., while X.P. was still at K.C.’s feet, he opened K.C.’s legs and her vagina with his hands and attempted to penetrate her with his penis by getting on top of her. She was unsure how long this assault lasted, but remembered that he only did it once and that it hurt. K.C. testified that X.P. and K.M. were not saying anything as this occurred and that she said nothing other than “ouch.” X.P. and K.M. then flipped K.C. over onto her stomach. X.P. pulled open K.C.’s buttocks and attempted to penetrate her, but was unable to do so.

A portion of this alleged assault was witnessed by Blake, although her deposition testimony concerning it differed from K.C.’s. Blake testified that she arrived at the school and, after finding that repairs were being performed in her classroom, went to find another room to use. She went to the room where K.C. and the others were. According to Blake, she found the lights off, but saw three breakfasts on desks and heard whispering coming from the back of the classroom. Blake took about five steps into the room, where she saw a female student, K.C., on her knees with her face down toward the floor and her pants and underwear down; X.P. on his knees with his pants unbuttoned at a side angle to K.C.; and K.M. fully clothed, on his knees moving back and forth and whispering. Blake testified that saw no sex or penetration and stated that she believed the students were trying to experiment with sexual conduct but did not know what they were doing. She could not tell if X.P.’s underwear was pulled down, but she did not see his “back side.” According to Blake, although there was conversation going on, no one was crying out for assistance or help. The students never saw Blake, who remained in the room only a few seconds before walking out “to get help and a witness” because she “wanted to get a witness to cover the story to protect all the children in this case”, and she did not think the students were going to engage in sexual intercourse when she left the room. She immediately went to the room of another teacher, yelled to her to come, and returned to the room with the other teacher all of which, according to Blake, took less than thirty seconds. Upon reentering the room, the students had not changed positions and were still not having sex. Blake did not believe it would have been possible for penetration to have occurred during the time she was absent from the room because X.P. “wasn’t even holding her, touching her from the back, so I don’t see how he could penetrate.” The other teacher and Blake yelled at the students and X.P. moved away from K.C. and pulled his pants up. K.M. jumped up and ran from the classroom claiming to have nothing to do with the incident; X.P. yelled that he was not doing anything, and K.C. remained quiet.

K.C. testified that she did not see Blake enter the room or know Blake was there before she heard Blake tell X.P. to get off of her. K.C. pulled up her underwear and pants before they all left the classroom and went to Porter-King’s office. K.C. testified that she was not crying or upset at this time, just quiet. Blake did not recall if she said anything to K.C. while they were

walking to Porter-King's office, but she knew she did not have a conversation with X.P. Upon arriving at Porter-King's office, Blake and the other teacher told Porter-King what they had observed and then returned to their rooms. Blake then prepared an incident memo. Blake did not use the term consensual² sex when speaking with Porter-King, but she did not think K.C.'s participation was non-voluntary because she wasn't screaming, crying, moving, shaking, or saying "stop."

Porter-King testified in her deposition that, when initially informed of the incident, she was told that K.C. and X.P. had their pants down, but was not told that they were engaging in sexual activity and no one ever mentioned penetration. She asked K.C. and X.P. what had occurred; K.C. would not tell her anything, while X.P. specifically denied penetrating K.C.

Porter-King contacted the students' parents as well as the Department of Public Safety (DPS). At that time, she believed that both X.P. and K.C. had possibly violated the student's code of conduct, but did not believe that K.C. had been assaulted because the teachers had reported that K.C. was not crying, and when she asked K.C. what had occurred, she did not say anything, was calm, and was not crying. Nor did anyone state that K.M. was holding K.C. down and she understood his role to be only that of an observer. Nothing that she saw or heard led her to think that any forcible conduct was occurring.

According to K.C., prior to the arrival of her aunt, she told Porter-King "that I didn't want it", and when further questioned whether she told Porter-King, "that he did it and you didn't want it?" she replied "Yes." She further maintained that she was crying before her aunt arrived. When asked about what then occurred, K.C. first testified that she did not tell Porter-King anything after her aunt arrived. However, she later testified that she had to tell her story about what happened once her aunt arrived, that she told it to "everybody" and that she believed that X.P., Porter-King, and her aunt were all present.³ Porter-King testified that she had only a brief conversation with K.C.'s aunt, that K.C. never revealed that she had been assaulted and instead remained closed-mouth the entire time she was in the office. Porter-King maintained that she suggested to K.C.'s aunt that she take K.C. to the hospital.

Subsequently, K.C. was taken to the hospital and the police were informed of what had occurred. In addition, K.C. and X. P. received a five-day suspension, and returned for a code of conduct hearing, which occurred on May 1, 2007. At that time, K.C. did not testify, Porter-King advised K.C.'s family that K.C. was engaged in sexual misconduct and had violated the code of conduct. Subsequently, an individualized evaluation plan (IEP) hearing was held, and Porter-King recommended that neither X.P. nor K.C. be expelled, but that they attend separate schools. Following this hearing, a readmission hearing was conducted. During this hearing, on the advice of DPS officers, neither student provided an account of the incident. Both students' parents

² Recognizing that minors cannot legally consent to sexual encounters, this term is used throughout the report to mean volitional participation.

³ She did not think Blake or X.P.'s parents were present.

informed Porter-King that their children would not be returning to the school, and the meeting was closed.

Plaintiff filed her complaint against defendants, alleging that they were liable for the sexual assault due to a failure to supervise and also that they acted with gross negligence in their investigation of the incident as disciplinary proceedings. Defendants moved to dismiss, arguing that defendants could not be liable for the sexual assault because the two students were independent actors who committed the alleged assault, that they were entitled to governmental immunity because they were not the proximate cause of plaintiff's alleged injuries, and that they were not grossly negligent in following the school district's code of conduct in participating in the code of conduct hearing. The trial court subsequently granted summary disposition as to the gross negligence claim concerning the failure to prevent the alleged sexual assault. However, the court further held that defendants' actions could be viewed as the proximate cause of the alleged damages that occurred as the result of the investigation and subsequent hearing. Defendants now appeal this latter ruling.⁴

II. SUMMARY DISPOSITION

Defendants maintain that they were entitled to summary disposition on the basis of governmental immunity. We review de novo a motion brought under MCR 2.116(C)(7), which alleges that a claim is barred because of immunity by law. *Bennett v Detroit Police Chief*, 274 Mich App 307, 310; 732 NW2d 164 (2006). "When deciding a motion for summary disposition under MCR 2.116(C)(7) or (10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party." *Herman v Detroit*, 261 Mich App 141, 143-144; 680 NW2d 71 (2004). If there is no factual dispute, whether a plaintiff's claim is barred by governmental immunity is a question of law for the court to decide. See *Huron Tool & Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 377; 532 NW2d 541 (1995). If a factual dispute exists, however, summary disposition is not appropriate. *Id.*

MCL 691.1407(2) provides, in part:

[E]ach officer and employee of a governmental agency . . . is immune from tort liability for an injury to a person or damage to property caused by the officer . . . in the course of employment or service . . . while acting on behalf of a governmental agency if . . . :

* * *

(c) The officer's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

⁴ Plaintiff has not filed a cross-appeal from the trial court's partial grant of summary disposition.

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.” Evidence of merely ordinary negligent conduct is not enough to establish that a government employee was grossly negligent. *Maiden v Rozwood*, 461 Mich 109, 122; 597 NW2d 817 (1999).

Simply 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. However, saying that a defendant could have taken additional precautions is insufficient to find ordinary negligence, much less recklessness. Even the most exacting standard of conduct, the negligence standard, does not require one to exhaust every conceivable precaution to be considered not negligent.

The much less demanding standard of care--gross negligence--suggests, instead, 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. [*Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004).]

In addition, the employee’s conduct must be the proximate, i.e., direct, cause of the plaintiff’s injury. *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000).

Here, defendants first argue that the investigation and code of conduct hearing were the direct result of the alleged sexual misconduct of X.P. and K.M., as was any trauma that occurred after the assault such that X.P. and K.M., not defendants, were the proximate cause of any alleged injuries.⁵ However, plaintiff asserts that defendants did not comfort K.C., required her to provide her version of events in front of her alleged attacker, improperly suspended her as a wrongdoer, and instigated a code of conduct hearing. These are separate alleged actions by defendants that neither X.P. nor K.M. had any control over. Consequently, we agree with the trial court that, to the extent plaintiff’s complaint pertaining to defendants’ alleged actions related to the investigation of the incident and the conduct hearing, any such allegations are separate

⁵ We note that several of the injuries alleged in plaintiff’s complaint are not supported by the record. First, K.C. was not expelled. She was suspended and, at the conduct hearing, her mother represented that she would not be coming back to that school. Second, although plaintiff has provided her mother’s deposition testimony on appeal as evidence that K.C. was made to speak publicly about the event, there is no indication that this evidence was submitted to, or considered by the trial court and we thus will not consider it on appeal. *Barnard Mfg Co v Gates Performance Engineering, Inc*, 285 Mich App 362, 380; 775 NW2d 618 (2009). Accordingly, the allegations of expulsion and publicly speaking at the code of conduct hearing cannot support the trial court’s decision.

from the alleged sexual assault and can survive summary disposition so long as they rise to the level of gross negligence.

After viewing the evidence presented by the parties in the light most favorable to plaintiff, we find that plaintiff has failed to show that defendants' conduct either in investigating the incident or during the code of conduct hearing and other proceedings could be found to amount to gross negligence by a reasonable trier of fact.

As to the defendants' conduct concerning the code of conduct hearing, no evidence supports an allegation of impropriety. As previously noted, plaintiff presented nothing to the trial court to suggest that K.C. was required to make a public statement regarding the incident at the hearing. Porter-King's memo indicates that Blake and the other teacher read their previous written accounts regarding what they had observed. Two Detroit Public Safety Officers entered the meeting, one of whom advised that the students not provide an account of what took place "since the students/parents were considering this a rape." According to the memo, the parents agreed not to discuss it further. Porter-King advised those present that the only issue was whether to permit readmission, at which time Thomas indicated that K.C. would not be returning to the school, so Porter-King closed the meeting. Her memo further indicates that she "would not recommend expulsion." Consistent with Porter-King's memo is the "Code of Conduct School's Hearing Decision Report" that indicates that no evidence was presented, that "[s]tudents did not make a statement as parents asked them to remain silent," and that the decision of the hearing officer was to charge the students with "other illegal conduct" and suspend them pending expulsion review, which is listed as "required in all Class 3 Offenses." Accordingly, we find no evidence that anything that occurred at the conduct hearing amounted to gross negligence on the part of defendants. Thus, the only issue that remains is whether defendants' conduct during their investigation immediately after the incident, including the instigation of the conduct hearing, constituted gross negligence.

With respect to plaintiff's allegations against Blake, plaintiff asserted that "moments before, or during the actual sexual penetration, Defendant Tanya Blake came into the classroom, witnessed the sexual assault in its early stages, and left the classroom without coming to the assistance of [K.C.] or otherwise termination [sic] the sexual assault." The complaint then asserts that several minutes elapsed before Blake returned to the classroom with another teacher "to exhibit to [the other teacher that K.C. was] being raped and sexually assaulted by another 12 year old classmate, as though a form of entertainment or spectacle."

However, the record indicates that: 1) when Blake originally went into the room, she saw no penetration and there was nothing in K.C.'s behavior to suggest that the encounter was anything other than consensual, 2) Blake was only gone from the room for thirty seconds, 3) Blake went to get another teacher in order to have a witness "to cover the story to protect all the children in this case" and because she expected that the children would deny what occurred. In short, there is nothing in the record to support that Blake witnessed a sexual assault involving penetration, that she left the children alone for several minutes or that she brought the other teacher to the room to witness the incident as a form of entertainment. While K.C.'s testimony supports a factual question concerning whether X.P. and K.M. assaulted K.C., nothing in her testimony contradicts the statements made by Blake or the other teacher concerning what either witnessed, including the testimony of the two that K.C. was calm. K.C. testified that when the

teachers made their presence known, she was not moving at all to try and get X.P. off of her, that she was not saying anything, and that as they went to the principal's office, she was quiet. She also indicated that she thought she was going to get into trouble. There is also nothing in the record that contradicts Blake and the other teacher's assertions that they saw no evidence that penetration had occurred or was occurring. Blake testified that she never used the term consensual to describe the incident, and none of her written reports make such a claim. Blake also played no part in the decision to file an incident report against K.C. alleging sexual misconduct; that decision was made solely by Porter-King. None of Blake's actions during the incident indicate that Blake was a person who "simply did not care about the safety or welfare of those in [her] charge." *Tarlea*, 263 Mich App at 90. Thus, there is no evidence in the record that Blake's actions rise to a level that could be construed as gross negligence, and the trial court should have granted her request for summary disposition.

As to the actions of Porter-King, scant evidence has been shown that Porter-King was aware of the possibility that K.C. was sexually assaulted when she filed an incident report instigating the code of conduct proceedings. The only evidence plaintiff has presented suggesting that she had an idea that K.C.'s participation was non-consensual comes from K.C.'s deposition testimony. She unquestionably testified that she "didn't want it." We note that, assuming that K.C. did, in fact, tell Porter-King that she "didn't want it," that statement is a far cry from an assertion that X.P. threw her to the ground, held her down with K.M.'s help, and forcibly raped her.

Many key portions of K.C.'s testimony are inconsistent. For example, K.C. testified that she was crying before her aunt arrived at the school, but also testified that she was not crying or upset when she and X.P. were confronted by a teacher and when she went to Porter-King's office. K.C. also testified that she did not recall telling Porter-King anything after her aunt arrived, yet at another point testified that she told Porter-King and her aunt what had happened.

Porter-King testified, consistent with one version of K.C.'s testimony, that she was not crying or screaming at any time, and refused to answer any questions asked. When asked what had happened, she simply remained silent. Porter-King further testified that both teachers who saw the children told her they were unsure whether penetration had occurred, but that both students had their pants down, and that they did not witness any screaming, crying, or call by K.C. to stop. Porter-King then called both children's parents and the DPS, and advised K.C.'s aunt to take her to the hospital. Porter-King, then, spoke to all parties involved, all witnesses, Public Safety, and the children's parents. Given the steps she took and the information made available to her, we cannot see how Porter-King was grossly negligent in her investigation of the matter.

With respect to initiating the code of conduct proceedings, Porter-King testified that whenever sexual misconduct is alleged, she has to automatically send a report to the Student Code of Conduct Office in Detroit to initiate a hearing. Plaintiff has presented nothing to dispute this assertion. Porter-King filled out the incident report, wherein she listed the offense as consensual sexual misconduct. According to plaintiff, Porter-King's labeling the incident as consensual amounted to gross negligence. Again, Porter-King testified that K.C. did not tell her what had happened. And the teachers testified that K.C. did not tell them that the incident was non-consensual, nor did K.C. appear to be upset or in any distress. Viewing the evidence in a

light most favorable to K.C. (i.e. accepting as true that K.C. did tell Porter-King that she had been assaulted), Porter-King was left with only three options: do nothing; report the incident as both children having been involved; or report the incident as a sexual assault by X.P. It would have been egregious to accuse X.P. of sexual assault on the scant, third-party information Porter-King had. To accuse X.P. of this serious crime, Porter-King would have had to conclude, based on K.C.'s alleged statement alone, that X.P. had forced himself on K.C.; i.e. taking K.C.'s verbal statement at face value and ignoring all other information, including X.P.'s denial that anything had happened, and the teachers' view of the incident and K.C.'s demeanor. To label the incident as consensual, under the circumstances, does not rise to the level of gross negligence. Nothing in Porter-King's actions could be construed as a willful disregard of whether K.C. would be injured by the designation of the incident as consensual or by the initiation of the code of conduct proceedings. Consequently, we find that the trial court erred when it refused to grant summary disposition to Porter-King.

Reversed and remanded for entry of summary disposition for defendants. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro