

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

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TAMMIE HOLZ,

Plaintiff-Appellant,

v

CITY OF ST. IGNACE, TOWNSHIP OF  
MORAN, and JAKE TAMLYN,

Defendants-Appellees.

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UNPUBLISHED  
October 18, 2012

No. 302647  
Mackinac Circuit Court  
LC No. 2009-006688-NO

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NANCY NOWISKI,

Plaintiff-Appellant,

v

CITY OF ST. IGNACE, TOWNSHIP OF  
MORAN, and JAKE TAMLYN,

Defendants-Appellees.

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No. 302659  
Mackinac Circuit Court  
LC No. 2009-006697-NO

Before: RONAYNE KRAUSE, P.J., and BORRELLO and RIORDAN, JJ.

PER CURIAM.

In these consolidated appeals, plaintiffs appeal as of right the trial court's order granting summary disposition for Jake Tamlyn (defendant). We affirm.

In December 2008, plaintiffs and a group of family and friends traveled to Silver Mountain, a skiing and snow-tubing hill in northern Michigan, for winter recreation. While at Silver Mountain, plaintiffs engaged in snow tubing—riding a large, inflated inner tube down a snow hill for recreation. During a tubing run Holz's tube inexplicably stopped midway down the hill, where it was subsequently struck by another tuber in the middle of the hill. Nowiski then also collided with Holz a few seconds later. Plaintiffs suffered extensive injuries from the collisions.

Plaintiffs sued the City of St. Ignace and Moran Township, the two municipalities that owned and operated Silver Mountain, and Tamlyn, the manager of Silver Mountain, claiming that defendants operated a dangerous facility without regard for the safety of patrons.<sup>1</sup> Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10), claiming that he was entitled to absolute immunity under MCL 691.1407(5), and that he was entitled to immunity under MCL 691.1407(2) because he was not grossly negligent, and was not the proximate cause of plaintiffs' injuries. The trial court concluded that defendant was entitled to absolute immunity under MCL 691.1407(5).

We review de novo a trial court's decision on a motion for summary disposition. *Young v Sellers*, 254 Mich App 447, 449; 657 NW2d 555 (2002). Under MCR 2.116(C)(7), summary disposition is appropriate when an action is barred by governmental immunity. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). "With regard to a motion for summary disposition pursuant to MCR 2.116(C)(7), this Court reviews the affidavits, pleadings, and other documentary evidence presented by the parties and 'accept[s] the plaintiff's well-pleaded allegations, except those contradicted by documentary evidence, as true.'" *Young*, 254 Mich App at 450, quoting *Novak v Nationwide Mut Ins, Co*, 235 Mich App 675, 681; 599 NW2d 546 (1999) (alteration in original). We also review de novo a trial court's application of governmental immunity. *McLean v McElhaney*, 289 Mich App 592, 596; 798 NW2d 29 (2010).

Plaintiffs argue that the trial court erred by determining that defendant was absolutely immune. Plaintiffs further argue that while defendant was the "highest executive official" at Silver Mountain, he was not the "highest executive official" at a level of government. We agree.

The governmental tort liability act shields a governmental employee from tort liability in certain circumstances. MCL 691.1407. One such circumstance is provided in MCL 691.1407(5), which reads:

A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority.

To determine whether a governmental employee is entitled to absolute immunity under MCL 691.1407(5) as the "highest executive official," it is necessary to determine the relevant "level of government" involved. *Grahovac v Munising Twp*, 263 Mich App 589, 593; 689 NW2d 498 (2004).<sup>2</sup>

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<sup>1</sup> The parties agreed that St. Ignace and Moran Township were entitled to governmental immunity under MCL 691.1407(1), which leaves Tamlyn as the only remaining defendant.

<sup>2</sup> It is also necessary to determine whether the governmental employee was acting in the scope of his or her authority, *Bennett v Detroit Police Chief*, 274 Mich App 307, 311-312; 732 NW2d 164 (2006), but no party has contended that defendant was acting outside the scope of his authority in this case.

Courts determine the level of government by examining “whether the entity shares aspects of governance with other political subdivisions, such as the power to levy taxes, the power to make decisions having a wide effect on members of the community, or the power of eminent domain.” *Grahovac*, 263 Mich App at 593. Courts also consider the extent to which the governmental employee exercises “broad-based jurisdiction or extensive authority similar to that of a judge or legislator.” *Id.*, quoting *Chivas v Koehler*, 182 Mich App 467, 471; 453 NW2d 264 (1990). When the governmental entity is at the “complete disposal” of municipal officials, the level of government is the municipality itself, not the governmental entity. See *id.* at 594.

We find that Silver Mountain is not a level of government. Silver Mountain does not have the authority to levy taxes or exercise eminent domain. Any policy decisions of Silver Mountain are limited in effect to its patrons. Moreover, defendant did not exercise the broad type of authority naturally exercised by judges and legislators. His authority was restricted to overseeing the functioning of the ski hill, and neither defendant nor Silver Mountain had the authority to exercise any type of police power. Thus, the relevant level of government here is one or both municipalities, see *Grahovac*, 263 Mich App at 594, and therefore defendant was not entitled to absolute immunity under MCL 691.1407(5).

However, the trial court correctly determined that defendant was entitled to immunity. If a governmental employee is not entitled to absolute immunity under MCL 691.1407(5), he or she may still be entitled to immunity under MCL 691.1407(2). *Odom*, 482 Mich at 479-480. MCL 691.1407(2) provides:

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.

This statute limits the liability of government employees to gross negligence. *Costa v Community Emergency Medical Services, Inc*, 475 Mich 403, 411; 716 NW2d 236 (2006). Whether a governmental employee was grossly negligent is generally a question of fact, but

summary disposition is appropriate when reasonable minds could not differ. *Briggs v Oakland Co*, 276 Mich App 369, 374; 742 NW2d 136 (2007).

“‘Gross negligence’ means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.” MCL 691.1407(7)(a). Gross negligence occurs when “the contested conduct was substantially more than negligent.” *Costa*, 475 Mich at 411. “Evidence of ordinary negligence does not create a question of fact regarding gross negligence.” *Love v Detroit*, 270 Mich App 563, 565; 716 NW2d 604 (2006). Instead, the evidence must suggest that the contested conduct was reckless. *Chelsea Investment Group, LLC v Chelsea*, 288 Mich App 239, 265; 792 NW2d 781 (2010).

Plaintiffs argue that defendant’s conduct was grossly negligent because he failed to take basic precautions against the risk of injury. We disagree. In *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004), this Court stated:

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.

Defendant did not demonstrate “a substantial lack of concern for whether an injury results.” MCL 691.1407(7)(a). To the contrary, defendant implemented several precautions to protect the safety of patrons at Silver Mountain. Defendant and the other Silver Mountain employees inspected the tubes twice daily to ensure that the tubes were in proper condition. Conspicuous signs were placed at various locations throughout Silver Mountain to warn tubers of the tubing risks. An employee was usually present at the top of the hill to regulate patrons’ spacing down the hill. These are all tangible and significant precautions against the risk of injury.

Plaintiffs argue that an employee should have been present at all times at the top of the hill to regulate spacing. However, the temporary absence of an employee does not render defendant grossly negligent. Furthermore, any reasonable person should be aware of the possibility of injury when two tubes collide and should know to maintain an appropriate distance between tubes. The warning signs reinforced this information. The fact that defendant allowed employees to briefly avoid the cold reflects the practical recognition that employees should not need to supervise adults at all times.

Plaintiffs argue that defendant was grossly negligent in failing to reasonably inspect the tubes for defects because Holz's tube unexpectedly stopped in the middle of the hill. However, Holz stated in her deposition that her tube had no noticeable defects, and we do not believe the situation is appropriate for an application of *res ipsa loquitur*. Even if Holz's tube stopped because it was defective, defendant's rate of tube inspection—twice daily—did not indicate that defendant disregarded the safety of the tubers in a “willful” way. Instead, it established that defendant actively tried to protect the safety of the tubers.

Plaintiffs argue that defendant was grossly negligent because he did not institute additional safety procedures after earlier injuries were suffered by tubers. However, the injuries to which plaintiffs refer involved children and/or occurrences at the bottom of the hill. Irrespective of whether defendant could or should have responded in any particular way to those injuries, no such response would necessarily have had any protective effect against a collision between adults in the middle of the hill.

We find that defendant's conduct was clearly not grossly negligent. Defendant did not actively disregard the risk of injury to tubers, and he implemented safety measures to appropriately balance the need for safety with the practical restrictions of operating a ski hill on a limited budget and avoiding precluding patrons from actually engaging in the recreation for which they came. Because no reasonable person could conclude that defendant was grossly negligent, the trial court should have granted summary disposition to defendant on the basis that he was not grossly negligent as a matter of law.

Further, even if we concluded that a question of fact existed with respect to the alleged gross negligence, then we would still be compelled to affirm because defendant was not the proximate cause of plaintiffs' injuries.

Under MCL 691.1407(2)(c), a governmental employee is liable for conduct that is “the proximate cause of the injury or damage.” “The phrase ‘the proximate cause’ is best understood as meaning the one most immediate, efficient, and direct cause preceding an injury.” *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000). This phrase must be distinguished from “a proximate cause,” which implies the possibility of multiple proximate causes. See *id.* at 459-462.

In the instant case, no reasonable person could conclude that defendant was *the* proximate cause of plaintiffs' injuries. Plaintiffs' injuries were attributable to plaintiffs themselves at least as much as their injuries were attributable to defendant. See *Oliver v Smith*, 290 Mich App 678, 686-687; 810 NW2d 57 (2010). Nowiski and the other tuber could have waited until Holz reached the bottom of the hill before proceeding. This would have obviously averted the collisions. Holz could have simply looked up the hill when she unexpectedly paused in the middle of the hill. Had she done so, Holz could have avoided the incoming tubers by moving a few feet in one direction. Consequently, even if defendant was grossly negligent, the conduct of plaintiffs and the other tuber family friend was the most direct cause of plaintiffs' injuries. *Robinson*, 462 Mich at 459. Defendant was entitled to immunity under MCL 691.1407(2) because he was not the proximate cause of plaintiffs' injuries.

We affirm because the trial court reached the correct result. See *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 17; 672 NW2d 351 (2003). While defendant was not entitled to summary disposition as the “highest executive official,” he was entitled to summary disposition on two alternate grounds: (1) he was not grossly negligent, and (2) he was not the proximate cause of plaintiffs’ injuries.

Affirmed.

/s/ Amy Ronayne Krause

/s/ Stephen L. Borrello

/s/ Michael J. Riordan