STATE OF MICHIGAN

COURT OF APPEALS

EC, a Minor, by Next Friend KAYLI LESLI,

Plaintiff-Appellee,

v

CITY OF LINCOLN PARK and JOHN DOE,

Defendants,

and

DOREEN CHRISTIAN and JOHN KOZUH,

Defendants-Appellants.

UNPUBLISHED
December 14, 2023

No. 363411
Wayne Circuit Court
LC No. 21-008550-NO

Before: LETICA, P.J., and O'BRIEN and CAMERON, JJ.

PER CURIAM.

Defendants Doreen Christian and John Kozuh appeal as of right the trial court's order denying their motion for summary disposition under MCR 2.116(C)(7) and (10). We reverse.

I. BACKGROUND

On July 14, 2020, EC was playing on playground equipment at Memorial Park, which is located in the city of Lincoln Park. EC was being supervised by her mother. Unbeknownst to EC or her mother, the slide at Memorial Park had a large hole near the bottom of the slide caused by rust. EC, who was wearing flip flops, went down one time without incident. But when EC went down the slide a second time, one of her toes got caught in the hole and was nearly severed off.

Plaintiff brought this lawsuit seeking to hold Lincoln Park and its employees (Christian and Kozuh) liable for EC's injury. At the time of EC's injury, Christian was serving as the director of the Lincoln Park Department of Parks and Recreation, and Kozuh was the director of the Lincoln Park Department of Public Services. As relevant to this appeal, plaintiff alleged that Christian and

Kozuh were grossly negligent, which is an exception to the immunity granted to governmental employees by the governmental tort liability act (GTLA), MCL 691.1401 *et seq*.[1]

Following discovery, Christian and Kozuh moved for summary disposition under MCR 2.116(C)(7) and (10), arguing they were entitled to governmental immunity because plaintiff could not establish that either Christian or Kozuh was grossly negligence. Christian and Kozuh emphasized that there was no evidence suggesting that, before EC was injured, they were aware of (1) anyone having been injured by the slide that injured EC, (2) any defects with the slide that injured EC, or (3) any similar defects with other slides at other parks. Christian and Kozuh maintained that, in light of these facts, plaintiff was unable to establish that either Christian or Kozuh engaged in conduct amounting to gross negligence.

In response, plaintiff argued that Christian and Kozuh were responsible for maintaining Lincoln Park's playground equipment, and had shown such indifference to that responsibility so as to meet the gross-negligence exception to governmental immunity. Plaintiff contended that this indifference was shown by (1) Christian and Kozuh's failure to maintain the slide that injured EC and allowing it to fall into a state of disrepair, (2) Christian and Kozuh's failure to implement a procedure for tracking complaints about Lincoln Park's playground equipment, and (3) Christian and Kozuh's failure to inspect or require the inspection of Lincoln Park's playground equipment.

After a hearing, the trial court denied Christian and Kozuh's motion. The trial court reasoned that they had "no inspection records, no inspection protocol, [and] no record system for complaint[s]," which created a question of fact whether their conduct or indifference amounted to gross negligence.

This appeal followed.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). Christian and Kozuh moved for summary disposition under MCR 2.116(C)(7) and (C)(10). "MCR 2.116(C)(7) provides that a motion for summary disposition may be raised on the ground that a claim is barred because of immunity granted by law." *Dextrom v Wexford Co*, 287 Mich App 406, 428; 789 NW2d 211 (2010). As explained by this Court:

> 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. If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact. If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court.

[1] The trial court dismissed Lincoln Park as a party after concluding that it was immune from liability under the GTLA. That ruling is not at issue in this appeal.

> However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is appropriate. [*Id*. at 428-429 (footnotes omitted).]

Summary disposition under MCR 2.116(C)(10) is proper when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Zaher v Miotke*, 300 Mich App 132, 139-140; 832 NW2d 266 (2013).

This Court reviews de novo questions of statutory interpretation and the applicability of governmental immunity. *Wood v City of Detroit*, 323 Mich App 416, 419; 917 NW2d 709 (2018).

III. ANALYSIS

The GTLA generally grants governmental agencies and their employees immunity from tort liability when they are engaged in the exercise or discharge of a governmental function, absent an exception. *Ray v Swager*, 501 Mich 52, 62; 903 NW2d 366 (2017). To assert a viable claim against a governmental employee, the "plaintiff must plead facts establishing that an exception to governmental immunity applies to his or her claim." *Wood*, 323 Mich App at 420.

As relevant to this appeal, MCL 691.1407(2) provides that governmental employees like Christian and Kozuh are immune from tort liability if, among other requirements, their "conduct does not amount to gross negligence that is the proximate cause of the injury or damage." "Gross negligence," in turn, is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a).

Grossly negligent conduct is "substantially more than negligent." *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). As explained by this Court:

> 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).]

On the record before us, a reasonable juror could only conclude that Christian and Kozuh were not grossly negligent. Plaintiff has never alleged that Christian and Kozuh *did* anything that amounted to gross negligence; rather, plaintiff has always maintained that Christian and Kozuh's

failure to take certain actions amounted to gross negligence. Specifically, plaintiff contends that the following three omissions by Christian and Kozuh amounted to gross negligence: (1) failing to inspect the slide that injured EC despite being responsible for Lincoln Park's playground equipment; (2) failing to maintain the slide that injured EC despite being responsible for maintaining Lincoln Park's playground equipment; and (3) failing to implement a system for handling complaints related to Lincoln Park's playground equipment.

Under the facts of this case, these failures simply do not amount to "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a). Plaintiff has not put forth any evidence suggesting that anyone other than EC was injured by any improperly maintained playground equipment in the city of Lincoln Park. It obviously follows that there is no evidence tending to establish that Christian and Kozuh knew or should have known that others were injured by improperly maintained playground equipment in Lincoln Park before EC was injured. Relatedly, plaintiff has not submitted any evidence to suggest that Christian or Kozuh knew or should have known that any of the playground equipment in the city of Lincoln Park—let alone the slide that injured EC—posed a risk of serious injury due to being improperly maintained. To summarize, there is no evidence to suggest that Christian and Kozuh knew or should have known that (1) some of the playground equipment in Lincoln Park posed a risk of serious injury due to being improperly maintained or (2) others had been injured by improperly maintained playground equipment in Lincoln Park. As will be explained, given these undisputed facts, no reasonable juror could conclude that Christian and Kozuh were grossly negligent for any of the "failures" identified by plaintiff.

First, plaintiff contends that Christian and Kozuh demonstrated gross negligence by failing to inspect Lincoln Park's playground equipment. Under the facts of this case, however, that omission is hardly negligent, let alone grossly negligent. Again, nothing in the record suggests that Christian and Kozuh were aware that others had been injured by improperly maintained playground equipment, or even that any of Lincoln Park's playground equipment was improperly maintained. Without such knowledge, no reasonable juror could conclude that Christian and Kozuh's failure to inspect Lincoln Park's playground equipment showed an "almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks." *Tarlea*, 263 Mich App at 90. Accord *Wood*, 323 Mich App at 425 (concluding that the driver of a van that had a tire fall off due to the lack of a lug nut was not grossly negligent as a matter of law for driving the van because there was "no evidence whatsoever that, before driving the vehicle, [the driver] was actually aware that there were no lug nuts" on the tire that fell off).

Second, plaintiff contends that Christian and Kozuh demonstrated gross negligence by failing to maintain the slide that injured EC in a reasonably safe condition. Assuming that Christian and Kozuh had a duty to maintain Lincoln Park's playground equipment and that they breached this duty, that would only amount to negligence, and grossly negligent conduct is "substantially more than negligent" conduct. *Maiden*, 461 Mich at 121. Plaintiff contends that Christian and Kozuh's failure to maintain the slide that injured EC constituted gross negligence because they knew that metal playground equipment like the slide was prone to rust. But knowledge that metal playground equipment could potentially rust does not transform the failure to maintain that equipment from negligence into "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a).

Third, plaintiff contends that Christian and Kozuh's failure to implement a procedure or system for tracking complaints about Lincoln Park's playground equipment creates a question of fact whether they were grossly negligent. For this argument, plaintiff does not argue that there was no way to register complaints about Lincoln Park's playground equipment; plaintiff admits that when a complaint was received, it was written down or forwarded to the appropriate person. In effect, then, "plaintiff's contention is no more than a simple allegation that [Christian and Kozuh] could have done more," which "is insufficient to defeat governmental immunity." *Dougherty v City of Detroit*, 340 Mich App 339, 351; 986 NW2d 467 (2021). Moreover, plaintiff has not provided any evidence tending to suggest that Christian and Kozuh were aware that their current system for handling complaints was ineffective such that their failure to implement a different system could be tantamount to an "almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks." *Tarlea*, 263 Mich App at 90.

For these reasons, we conclude that plaintiff provided no evidence that Christian and Kozuh's conduct rose to the level of gross negligence. Stated differently, on this record, a reasonable juror could only conclude that Christian and Kozuh were not grossly negligent.

Reversed and remanded for entry of an order pursuant to MCR 2.116(C)(7). We do not retain jurisdiction.

/s/ Anica Letica
/s/ Colleen A. O'Brien
/s/ Thomas C. Cameron