STATE OF MICHIGAN

COURT OF APPEALS

MICHELLE CARR, Personal Representative of the Estate of MICHAEL CARR,

Plaintiff-Appellee,

v

JUSTIN GREEN and AQUILA MERRIWEATHER,

Defendants-Appellants.

UNPUBLISHED
December 17, 2020

No. 350502
Wayne Circuit Court
LC No. 2018-002631-NO

Before: CAVANAGH, P.J., and JANSEN and CAMERON, JJ.

PER CURIAM.

Defendants appeal as of right an order denying their motion for summary disposition premised on governmental immunity under MCR 2.116(C)(7) for failure to establish that their conduct amounted to gross negligence that was the proximate cause of plaintiff's decedent's death. We reverse and remand for entry of an order granting defendants' motion for summary disposition and dismissing this case.

This case arises from the death of 19-year-old Michael Carr, a developmentally disabled student at the Jerry L. White Center High School in the Detroit Public Schools Community District. Michael had Dravet Syndrome, also known as severe myoclonic epilepsy of infancy, which caused him to have frequent and prolonged seizures. Michael was confined to a wheelchair and needed assistance with all personal care needs, including feeding. He was to be continually monitored for safety, particularly during eating because Michael had a tendency to put too much food in his mouth and he did not chew his food. Defendants Justin Green and Aquila Merriweather were paraprofessionals, or teacher aides, who worked at Michael's school and their duties included monitoring and providing care to Michael and other students in room 18, which was the classroom of teacher Karen Kohfeldt.

On May 24, 2016, defendant Merriweather retrieved lunches from the school kitchen for the students in room 18. Upon her return to the classroom, Merriweather cut Michael's chicken sandwich into four pieces and noted that he also had fries and water. Defendant Green was sitting next to Michael, and Merriweather gave him Michael's food tray. She then asked Green if she

could leave to use the restroom and he said that she could. Upon her return, Merriweather sat down and asked what movie was playing in their classroom. She then heard Michael make a high-pitched noise. Defendant Green also heard Michael make the high-pitched noise. Merriweather asked Green—who was sitting next to Michael—if she should call the nurse and he said that she should. The school nurse arrived almost immediately, started the Heimlich maneuver, and said to call 911. Michael was then assisted to the floor where two nurses performed CPR. After emergency personnel arrived, Michael was transported to Sinai-Grace Hospital. Michael was unable to be resuscitated and died. An autopsy was conducted which revealed large portions of unchewed food in his stomach. The autopsy report concluded that the cause of Michael's death was "choking" and that Dravet Syndrome contributed to his death.

On March 8, 2018, this lawsuit was brought under MCL 691.1407(2) by Michael's mother, alleging that defendants Merriweather and Green were grossly negligent with regard to the supervision and feeding of Michael. In particular, plaintiff alleges that they allowed Michael to have unsupervised access to a whole pork chop[1] that was not properly cut-up which he consumed and caused him to choke to death.

Subsequently, defendants moved for summary disposition under MCR 2.116(C)(7), arguing that they were immune from liability under the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. Defendants argued that plaintiff's claim that they failed to properly prepare Michael's food and allowed him unsupervised access to a pork chop—even if true—would not amount to gross negligence, i.e., "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a). At most, defendants argued, their conduct would be considered ordinary negligence, not reckless conduct. In any case, defendants argued, plaintiff had no affirmative evidence establishing that either defendant prepared Michael's food improperly or allowed him unsupervised access to a pork chop or any other food. To the contrary, all evidence established that Michael was not unsupervised at any time while he was eating and his sandwich was cut into four equal-sized portions. In support of their arguments, defendants relied on evidence that included their own deposition testimony as well as the testimony of other witnesses, as set forth below.

In her affidavit, school employee Madeline Everson stated that she had gone into Michael's classroom and began playing the DVD movie Zootopia. Everson noticed that defendant Green was in the classroom. In other words, contrary to plaintiff's claim, defendant Green did not leave Michael with his tray of food while he started the DVD playing in their classroom.

Defendant Merriweather testified that she had left the classroom to retrieve lunches from the kitchen for the students. Upon her return, Merriweather cut Michael's chicken sandwich into four pieces, as she had in the past, and noted that he also had fries and water. She gave Michael's food to Green who was sitting next to Michael and was going to provide feeding assistance to him—as Green did since he began working there. While Michael required constant supervision, he had no food restrictions and could eat solid foods. Defendant Green began feeding Michael in a hand-over-hand manner, meaning his hand was over Michael's hand and he was guiding the food to Michael's mouth. Merriweather left the classroom to use the restroom and when she returned,

[1] The autopsy report referred to a "pork chop" as the food item that caused Michael to choke.

she noticed that Green was still sitting next to Michael in the same place and Michael had no problems. A short time later, Merriweather heard Michael make a high-pitched noise—which alerted her that he was having a seizure because she had heard him make that same noise a lot of times. Green was still sitting right next to Michael. While Michael had never before choked on food, he had frequent seizures at school and Merriweather believed that he was having a seizure at that time. The teacher, Karen Kohfeldt, had told them that if they ever had a situation with a student, call the nurse. After she heard Michael make that high-pitched noise, she asked Green if she should call for a school nurse and he said yes so she phoned for a nurse and the nurse arrived within about 60 seconds.

Defendant Green testified that he began working at the school in August 2013 and began working with Michael in September 2014. Green would assist Michael with eating and had fed him well over 150 times without incident. Michael had no food restrictions—he ate solid food every day and would steal other people's food—but the food had to be cut into smaller pieces and Merriweather would cut up his food. Green was always with Michael, monitoring him when he was eating because Michael could have a grand mal seizure at any time. It was understood that he had to be monitored at all times. On the day of this incident, Green fed Michael each piece of chicken, one by one until the pieces were gone. He then fed him the fries. After the fries, Green gave Michael water and that is when Michael made the high-pitched noise. At that time, Merriweather asked if she should call the nurse and he said yes. Green then used his hand to try to see if something was in Michael's mouth but Michael "violently ripped it down," pushing his hand away. Green thought that was atypical for a seizure, after having seen Michael have more than a dozen seizures. In the statement Green gave right after the incident, he stated that Michael was drinking his second cup of water when "he started choking and spitting up." Green then "tried to reach into his mouth to see if I could pull out what was in his mouth [but] he pulled my hand down and swatted it away." Green repeated in his deposition that Michael made the high-pitched sound while he was drinking the second cup of water, and not while he was eating the chicken or fries.

Karen Kohfeldt, Michael's teacher, testified that she began teaching Michael in 2010. She was not in the classroom when this incident occurred; she was not in the building. Michael had no food restrictions but when she fed him she would cut up his food into bite-size pieces because he did not chew. No one told her that his food had to be cut up though. And he was supervised while eating but that was not written down anywhere as a requirement; rather, it was known. He was watched so he did not overstuff his mouth or take too much in at once. Michael had a lot of seizures in her classroom and the protocol was to call the nurse. Michael did not have difficulty eating food and was not limited to soft food, Kohfeldt testified, but he had difficulty chewing food so they did not give him large pieces of food at one time.

Dr. James Paxton was the emergency room doctor who attended to Michael when he arrived at about 10:59 a.m. in cardiac arrest with no vital signs. While trying to establish an airway through intubation, it was determined that Michael had a "large amount of gastric contents" in his airway—his trachea—which suggested that he aspirated food particles into his airway. Forceps were used to extract a "large chunk of meat," described by the resident physician as a "large piece of food bolus approximately the size of a half fist," from the back of Michael's throat. While trying to insert an orogastric tube into his esophagus to decompress Michael's gastrointestinal tract, it was determined that he had food stuck in his esophagus as well so the tube could not be

inserted. Michael was unable to be resuscitated and he was pronounced dead at 11:34 a.m. Dr. Paxton assumed that Michael suffered a cardiac arrest from asphyxiation after choking on a large chunk of meat. Dr. Paxton also testified that if Michael ate the chicken sandwich first, then fries, and then drank water, it was likely that Michael vomited and then aspirated which would allow the large food particles to come back up through the esophagus and get lodged in his airway. It would have to be "pretty forceful vomiting" considering the size of the chunk of meat. But if he ate the chicken first, and then ate other items, the chicken would have had to have gone into the stomach and then been vomited back up. Dr. Paxton also noted that a person who is having a seizure could make some noises and people can vomit when they are having a seizure.

Defendants argued that, considering the evidence, plaintiff could not establish her claims that Michael was allowed unsupervised access to any food, that he was unsupervised at any time before or during this incident, or that his meal was not properly prepared for him. Further, plaintiff could not establish that their actions were the proximate cause of Michael's death. Accordingly, plaintiff could not establish that the gross negligence of either defendant with regard to the supervision and feeding of Michael was the proximate cause of his death and this lawsuit was barred by governmental immunity.

Plaintiff responded to defendants' motion for summary disposition, arguing a jury could conclude that defendants Green and Merriweather were grossly negligent. "They left a vulnerable, dependent child with a known history of unsafe eating behaviors unsupervised with a plate of food. The evidence establishes that, as he had done before, Michael put too much food in his mouth. He began to choke." Plaintiff argued that defendant Green put on the Zootopia DVD movie for the children and left Michael unsupervised with his tray of food which led to him overstuffing his mouth and choking. There was no evidence that Michael had a seizure that caused him to choke. The nurses who responded to Merriweather's call for help indicated that they were told Michael was choking and Green even attempted to remove food from Michael's mouth before being swatted away by Michael. Plaintiff argued that the emergency room physicians found that Michael's trachea and esophagus were occluded by large chucks of food and the autopsy revealed a large amount of unchewed food in his stomach which also was evidence that Green and Merriweather could not have been supervising Michael while he ate. According to plaintiff's experts, Dr. Werner Spitz and Dr. Joseph Schwartzberg, this amount of food could not have accumulated if Michael was being properly supervised while eating. Thus, plaintiff argued, a reasonable jury could conclude that leaving Michael alone with an unsafe quantity of improperly prepared food while Green put on a DVD and Merriweather went to the bathroom constituted gross negligence that was the proximate cause of his injuries and defendants' motion must be denied.

Defendants filed a reply to plaintiff's response to their motion for summary disposition, arguing that there was no affirmative evidence that defendants left Michael unsupervised with a tray of food. But even if they did, such conduct would only amount to ordinary negligence and would not, as a matter of law, be "the" proximate cause of his death. In particular, the evidence was unrefuted that Madeline Everson, a teacher at the school, set up the DVD movie to play for the children—as she stated in her affidavit. There was no evidence that Green ever left Michael alone with his tray of food. That Merriweather went to the bathroom was of no consequence to this incident; she had returned by the time Michael became distressed. And Merriweather cut up Michael's sandwich as she always had—into four pieces. That the pieces could have been cut smaller does not amount to gross negligence. Plaintiff's experts improperly speculate that

defendants left Michael alone with a plate of food but there is no evidence that Michael was left unsupervised with his food. In fact, as the emergency room doctor testified, people vomit when they have a seizure and then they can aspirate the contents of that vomit and choke. That is likely what happened here, defendants argued, because both Green and Merriweather heard Michael make a noise like he did before a seizure and Green testified that Michael was choking and spitting up. Further, defendants' conduct could not be the proximate cause of Michael's death because the asphyxiation from choking was the proximate cause of his death and that came after Michael allegedly ate the food while unsupervised.

Following oral arguments, the trial court denied defendants' motion for summary disposition. The trial court held that, considering the evidence in a light most favorable to plaintiff, there was a question of fact as to whether defendants were grossly negligent. The court seemed to conclude that Michael would not have had large amounts of food, including big chunks, in his trachea and esophagus if Michael's food had been cut up smaller and Green had been supervising him properly. The trial court also held that there was a question of fact as to whether defendants' conduct was the proximate cause of Michael's death, and thus, it was for the jury to decide the matter. This appeal followed.

Defendants argue that the trial court erred in denying their motion for summary disposition because no reasonable juror could conclude that their conduct amounted to gross negligence that was the proximate cause of Michael's death. We agree.

A trial court's decision on a motion for summary disposition under MCR 2.116(C)(7) is reviewed de novo. *Grimes v Mich Dep't of Transp*, 475 Mich 72, 76; 715 NW2d 275 (2006). Summary disposition is proper under MCR 2.116(C)(7) when a claim is barred by immunity granted by law. *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). All documentary evidence submitted by the parties is considered, and the allegations in the complaint are accepted as true unless specifically contradicted by appropriate documents. *Id*. "If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred by governmental immunity is an issue of law." *Pierce v City of Lansing*, 265 Mich App 174, 177; 694 NW2d 65 (2005). "Questions of statutory interpretation are also reviewed de novo." *Grimes*, 475 Mich at 76.

Under MCL 691.1407(2), governmental employees are immune from liability for negligent torts if the employee caused the alleged injury while acting in the course of employment and (1) was acting within the scope of authority, (2) the governmental agency was engaged in a governmental function, and (3) the employee's conduct does not amount to gross negligence that was the proximate cause of the alleged injury. *Odom v Wayne Co*, 482 Mich 459, 479-480; 760 NW2d 217 (2008). "Gross negligence" is defined by the statute as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a). Ordinary negligence is insufficient; rather, the contested conduct must be "substantially more than negligent." *Maiden v Rozwood*, 461 Mich 109, 122; 597 NW2d 817 (1999). A plaintiff must produce proof of conduct that would lead an objective observer to reasonably conclude "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). And "[t]he phase '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).

Defendants argue that plaintiff cannot prove that they acted in any manner that could be considered grossly negligent with regard to the food they gave to Michael or their supervision of Michael while he was eating. Instead, plaintiff merely speculates that defendants left Michael alone with improperly prepared food on which he gorged himself to the point of choking. But such speculation is insufficient to establish a question of fact for the jury. We agree.

Plaintiff claims that defendants failed to cut up Michael's sandwich into bite-sized pieces and failed to properly supervise him while he was eating. But Plaintiff offers no evidence of Merriweather's or Green's specific conduct in these regards. First, the evidence is unrefuted that Merriweather cut up Michael's sandwich into four pieces—as was her routine.[2] Because there is no evidence as to the precise size of Michael's chicken sandwich, one is left to speculate as to the size of each food piece. In any case, the evidence is unrefuted that Michael had absolutely no food restrictions that the school or its employees were to enforce. Michael ate solid food. There was no evidence of a physician mandate or family request that defendants were defying by providing Michael a chicken sandwich, either cut up or whole. And there is no evidence that Michael had any history of choking on his food while at school. Under these circumstances, no reasonable person could conclude that Merriweather and Green were grossly negligent for providing or feeding Michael the chicken sandwich.

Second, plaintiff has presented no evidence to support the claim that Merriweather and Green allowed Michael unsupervised access to his lunch tray of food. In fact, the unrefuted evidence is that Green was sitting next to and assisting Michael from the time Merriweather delivered the food tray to the time of the incident. In particular, Green was helping Michael drink his water—after he had already eaten the chicken sandwich and fries—when the choking incident began. Plaintiff had speculated that Green may have been setting up the DVD movie and, while doing so, left Michael unattended with his food tray. But another school employee, Madeline Everson, averred in her affidavit that she set up the DVD movie and Green was in the classroom at the time. It is unclear whether Merriweather had even brought the food trays into the classroom by that time. But in any case, plaintiff has presented no evidence that Michael had unsupervised access to any food on which he gorged before he began choking.

Although plaintiff has no direct evidence of grossly negligent conduct by Merriweather or Green, plaintiff essentially argues that such gross negligence can be inferred from the results—that Michael choked to death. More particularly, plaintiff suggests that because the emergency room physicians found that Michael's trachea and esophagus were occluded by large chucks of food and the autopsy revealed a large amount of unchewed food in his stomach, defendants had to have been grossly negligent. Plaintiff's experts, Dr. Werner Spitz and Dr. Joseph Schwartzberg, opined in their affidavits that Green and Merriweather could not have properly prepared Michael's food and supervised Michael while he ate in light of these findings. But in *Maiden*, 461 Mich at 127, our Supreme Court rejected a similar argument. In that case, the plaintiff's decedent's died of asphyxiation after being restrained by a mental health facility's employees. The plaintiff argued that because her decedent "died of compressional asphyxia after being restrained, gross negligence

[2] Both Merriweather and Green had worked with Michael—and fed him—numerous times over a considerable length of time. Green testified that he had fed Michael well over 150 times.

is presumed." *Id*. The *Maiden* Court explained that the primary "purpose of the doctrine of res ipsa loquitur is to create at least an inference of negligence when the plaintiff is unable to prove the actual occurrence of a negligent act." *Id*. (citation omitted). But, the Court held, that "doctrine is not available where the requisite standard of conduct is gross negligence or wilful and wanton misconduct." *Id*.

Here, the fact that Michael had large chunks of food in his trachea and esophagus, as well as unchewed food in his stomach, does not prove that defendants left Michael alone with food that he gorged on in their absence. As Michael's teacher testified, Michael did not chew his food. And it is unknown whether Michael ate breakfast at home before he came to school and, if so, what he ate at home. Defendants Green and Merriweather consistently testified that Green was with Michael the entire time that Michael had access to food. Green testified that Michael ate his chicken sandwich first, then his fries, and then was drinking water when he made the high-pitched noise and started choking and spitting up. In other words, according to Green, Michael did not choke on the chicken sandwich. The evidence was unrefuted that Michael had frequent, severe, and prolonged seizures while at school. Merriweather testified that when she heard Michael make the high-pitched noise, she was alerted that he was having a seizure because she had heard him make that noise a lot of times. Green testified that when he used his hand to attempt to check Michael's mouth, it was violently pushed away—which could be consistent with seizure activity. Dr. Paxton testified that people can make noise during a seizure and people can vomit when having a seizure. Dr. Paxton also testified that if Michael ate the chicken sandwich first, then fries, and then drank water, it was likely that Michael vomited and then aspirated which would allow the large food particles to come back up through the esophagus and get lodged in his airway. Further, it was unrefuted that the school nurse performed the Heimlich maneuver on Michael before starting CPR which may have moved some stomach contents up, although not out of his trachea and esophagus. In any case, that Michael had food in his trachea and esophagus, as well as unchewed food in his stomach, does not prove that Merriweather and Green left Michael alone with his food tray. Plaintiff has presented no evidence that Merriweather and Green allowed Michael unsupervised access to any food on which he gorged and choked.

In summary, the trial court erred when it denied defendants' motion for summary disposition because reasonable minds could not conclude that defendants' conduct was "so reckless as to demonstrate a substantial lack of concern for whether an injury results." See MCL 691.1407(8)(a); see also *Oliver v Smith*, 290 Mich App 678, 685; 810 NW2d 57 (2010). Considering the unrefuted evidence, no objective observer watching defendants could reasonably conclude that they simply did not care about the safety or welfare of Michael. See *Tarlea*, 263 Mich App at 90. In light of our dispositive conclusion, we need not consider defendants' argument that their conduct was not the proximate cause of Michael's death.

Reversed and remanded for entry of an order granting defendants' motion for summary disposition and dismissing this case which is barred by governmental immunity. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Thomas C. Cameron