

S T A T E O F M I C H I G A N
C O U R T O F A P P E A L S

BERNARD WATTS and TINA MOORE, Co-
Personal Representatives of the Estate of KINTE
JAMAR WATTS, Deceased,

UNPUBLISHED
September 18, 2007

Plaintiffs-Appellees/Cross-
Appellants,

v

No. 267503
Cheboygan Circuit Court
LC No. 03-007255-NO

ANDRE NEVILS and PATRICIA EWING,

Defendants-Appellants,

and

MRS. BROWN,

Defendant-Appellant,

and

DEBRA HARRIS and JOYCE EWING,

Defendant/Cross-Appellee,

and

NORTHERN STRAITS MANAGEMENT
COMPANY, d/b/a QUALITY INN & SUITES,
MIDWEST INNKEEPERS, CITY OF PONTIAC,
CITY OF PONTIAC SCHOOL DISTRICT,
SUSAN DECHOW, and MARTIN
MAYERHOFER,

Defendants.

Before: Bandstra, P.J., Zahra and Owens, JJ.

PER CURIAM.

In this wrongful death action, defendants Jada Brown,¹ Andre Nevils, and Arlee Ewing² appeal the trial court's order denying their motion for summary disposition pursuant to MCR 2.116(C)(7) (governmental immunity). Plaintiffs cross-appeal the portion of the order granting summary disposition to defendants Joyce Ewing and Debra Harris. We affirm the trial court's order granting summary disposition to Harris and Joyce Ewing. We reverse the portion of the order denying summary disposition to Brown, Nevils, and Arlee Ewing.

This action arose from the tragic death of 11-year-old Kinte Watts, who drowned in a hotel pool while attending a school-sponsored overnight field trip in Mackinaw City. Just before Watts drowned, defendant Joyce Ewing was the sole chaperone in the pool area. At one point, Watts appeared to be floating or swimming underwater. At first, Joyce thought that Watts was playing, but a student told Joyce that he did not think so. Joyce immediately jumped into the pool and attempted to save him. At approximately the same time, defendant Susan Dechow arrived, noticed Watts in the water, and jumped into the pool to assist.³ After multiple attempts, Joyce and Dechow removed Watts from the pool. Tragically, all efforts to revive him failed.

Plaintiffs sued the individual defendants, among others, alleging that their gross negligence was the proximate cause of Watts' death. Defendants Nevils, Brown, Harris, Joyce Ewing, and Arlee Ewing asserted that they were not liable under MCL 691.1407(2). We agree. We review *de novo* a trial court's handling of a MCR 2.116(C)(7) motion for summary disposition based on asserted governmental immunity. *Tarlea v Crabtree*, 263 Mich App 80, 87; 687 NW2d 333 (2004).

In both the appeal and cross-appeal in this case, the parties debate whether Brown, Nevils, Harris, Joyce Ewing, and Arlee Ewing were grossly negligent in their supervision of the students on this field trip and whether their actions were the proximate cause of Watts' death. We need not address the parties' gross negligence arguments because we conclude that the actions of Brown, Nevils, Harris, Joyce Ewing, and Arlee Ewing were not the proximate cause of Watts' death.

MCL 691.1407(2) states:

(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

¹ Jada Brown is referred to as "Mrs. Brown" in the caption in this case.

² Arlee Ewing was Watts' principal. Apparently, she is identified as "Patricia Ewing" in the trial court record. It is unclear whether "Patricia Ewing" is a pseudonym or whether Arlee was misidentified in the caption.

³ Plaintiffs' claims against Dechow were dismissed. Dechow is not a party to this appeal.

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.

On appeal, the parties do not dispute that Brown, Nevils, Harris, Joyce Ewing, and Arlee Ewing were acting on behalf of the City of Pontiac School District, a government agency. We conclude in this appeal that these defendants were entitled to immunity from liability pursuant to the terms of MCL 691.1407(2) because even if their actions were grossly negligent, they were not *the* proximate cause of Watts' death.

"[T]he phrase 'the proximate cause' as used in the employee provision of the governmental immunity act, MCL 691.1407(2) . . . , means the one most immediate, efficient, and direct cause preceding an injury, not 'a proximate cause.'" *Robinson v Detroit*, 462 Mich 439, 445-446; 613 NW2d 307 (2000). When interpreting this provision, our Supreme Court noted, "The Legislature's use of the definite article 'the' clearly evinces an intent to focus on one cause. The phrase 'the proximate cause' is best understood as meaning the one most immediate, efficient, and direct cause preceding an injury." *Id.* at 458-459.

Admittedly, the proximate cause of Watts' death is not known with certainty. The evidence presented by the parties establishes that Watts drowned in the deep end of the hotel pool either after his fellow students pushed him in or after he willingly entered the deep end of the pool. However, the parties have not presented evidence indicating that an action, or the inaction, of Brown, Nevils, Harris, Joyce Ewing, or Arlee Ewing was the one most immediate, efficient, and direct cause of Watts' death. Instead, the evidence provided by the parties indicates that Brown, Nevils, Harris, and Arlee Ewing were not even at the pool at the time Watts drowned.⁴ Further, Joyce Ewing was standing near the pool watching the children when Watts entered the deep end of the pool. Although she conceivably might have been distracted or was looking elsewhere at the moment when Watts either jumped into or was pushed into the pool, she neither pushed Watts into the deep end of the pool nor forced him to enter that area of

⁴ Admittedly, it is arguable that Brown, Nevils, and Harris, who were chaperones on the trip, were negligent because they were not supervising the pool at the time. However, their absence did not directly cause Watts to enter the deep end of the pool and drown. Accordingly, their absence was not *the* proximate cause of Watts' death.

the pool. Instead, Watts' action of entering the deep end of the pool (either by his own free will or upon being pushed in by classmates), despite his inability to swim, constituted the one most immediate, efficient, and direct cause of his death. Defendants' arguably negligent actions might have been *a cause* of Watts' death, but they were not *the proximate cause* of his death—either Watts' actions or those of his classmates were.

Watts' death, like that of all young children, is tragic, and this panel sympathizes with his family. Further, the chaperones may well have been negligent for failing to keep a closer watch on the whereabouts of these sixth-graders and to diligently oversee the activity in the pool. But again, defendants were not *the proximate cause* of Watts' death. Accordingly, MCL 691.1407(2) protects defendants from tort liability. Therefore, we affirm the trial court's grant of summary disposition to defendants Joyce Ewing and Debra Harris, and we reverse the trial court's denial of summary disposition to defendants Jada Brown, Andre Nevils, and Arlee Ewing. All defendants are entitled to summary disposition pursuant to MCR 2.116(C)(7).

Affirmed in part, reversed in part and remanded to the trial court for further proceedings consistent with this decision. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Donald S. Owens