STATE OF MICHIGAN

COURT OF CLAIMS

CRYSTAL SMITH,

Plaintiff,

v

MATTHEW BROWN,

Defendant.
_____/

OPINION AND ORDER

Case No. 21-000195-MZ

Hon. Thomas C. Cameron

Pending before the Court are several motions in this gross-negligence matter, including defendant's MCR 2.116(C)(7) and (C)(10) motion for summary disposition, defendant's motion to strike the complaint, and defendant's motion to file a supplemental brief in support of summary disposition. For the reasons discussed in this opinion and order, the Court concludes that no reasonable fact-finder could decide, under the circumstances, that defendant was grossly negligent. Therefore, the Court GRANTS defendant's motion for summary disposition and GRANTS defendant's motion to file supplemental briefing. Defendant's supplemental brief and plaintiff's response to the same are accepted as-filed. Defendant's motion to strike the complaint is DISMISSED AS MOOT.

I. BACKGROUND

On March 13, 2019, plaintiff was eating lunch in a residential cafeteria on the campus of Central Michigan University (CMU) when a plastic lid covering an ice dispenser for a soda fountain fell off the back of the dispenser and hit her on the head. Plaintiff was living in a CMU

residence hall (Trout Hall) at the time of the incident, but she was not a CMU student. Instead, plaintiff participated in a program called the Chippewa Achievement Program, which allows non-CMU students to live in the residence halls while taking classes at a nearby community college.

On the day of the incident, plaintiff went to Robinson Cafeteria (also known as Robinson Residential Restaurant), which is connected to Trout Hall, to have lunch. Robinson Cafeteria is owned by CMU, but operated by an entity named Aramark. Defendant was a relatively new employee and had been working as a part-time "runner" in the dining hall for a couple days before the incident. The parties dispute in their briefs whether defendant was a CMU employee or an Aramark employee. However, in her complaint, plaintiff alleges that "[d]efendant Matthew Brown was in the course and scope of his employment with Central Michigan University" when the incident occurred. Defendant admitted this allegation in his answer. Defendant has also submitted his W-2 form, which identifies CMU as his employer. According to defendant, he worked directly for CMU because he was a student. Defendant's supervisor, Billie Jo Davis, testified that CMU hires students as part of a work-study program, with some of their pay credited toward their tuition.

Plaintiff sat down at a table by herself near a "half wall" and a countertop holding a soda fountain. While plaintiff was sitting at the table, defendant was checking the ice level in the dispenser attached to the fountain. Plaintiff did not notice defendant checking the ice levels while she was eating lunch. Defendant testified that he followed the same protocol to check the ice levels as he had on previous occasions, which was how he was trained to add ice to the dispenser. To check the ice levels, defendant stepped on a stool and slid the plastic lid back from the top of the ice dispenser. The lid was form-fitted for the dispenser, but it was not attached. Defendant saw that the ice levels were low, and so he reached down to pick up a bucket of ice next to the machine. He explained, "Immediately after checking the levels of the ice, I do not remove the lid. I reach

down to retrieve my buckets of ice. Then I proceed to remove the lid." Davis confirmed, during her deposition, that defendant performed the task exactly how he was trained to do it.

As he reached down for the ice, according to plaintiff, defendant "lost his grip of the lid." The plastic lid slid off the back of the machine and hit plaintiff on the head. Defendant testified that he was unaware of any other student who had been injured because of the lid sliding off the ice dispenser. The parties dispute whether plaintiff temporarily lost consciousness after the lid hit her. According to plaintiff, she was in shock because of how quickly the incident happened. Davis spoke with plaintiff immediately after the incident to check on her wellbeing. Plaintiff eventually walked back to her dorm room and did not seek immediate medical treatment. According to plaintiff, Davis told her that she could not receive medical treatment on campus because she was not a CMU student. The only witnesses to the incident were defendant, Davis, and another cafeteria employee named Steven Dean (who saw defendant checking the ice dispenser). However, no one saw the lid hit plaintiff on the head.

Plaintiff sued defendant, alleging in her one-count complaint that defendant's gross negligence proximately caused her injuries. Plaintiff initially filed the case in circuit court, but the matter was transferred to this Court. Defendant moved for summary disposition under MCR 2.116(C)(7) and (C)(10) before the close of discovery, arguing that he was entitled to governmental immunity because plaintiff could not establish that he was grossly negligent. In response, plaintiff argues that (1) there is a question of fact about whether defendant was a CMU employee entitled to governmental immunity, (2) there exists a question of fact about whether defendant was grossly negligent, (3) defendant was not performing a "governmental function" at the time of the incident, and (4) plaintiff required more time in discovery to depose certain individuals who would support her theory of liability.

Defendant then moved to strike the complaint, arguing that plaintiff failed to verify her complaint as required under the Court of Claims Act, MCL 600.6434(2). Plaintiff counters that defendant waited too long to raise the verification issue and that the verification requirement does not apply to an individual state employee. Defendant also moved to file a supplemental brief in support of summary disposition to respond to plaintiff's argument that further discovery would uncover additional support for her claim. Plaintiff responds that defense counsel indicated they would provide contact information for a witness that plaintiff requested to depose regarding defendant's employment status (Corby Blem), but defense counsel never provided the contact information.

II. ANALYSIS

Defendant requests summary disposition under MCR 2.116(C)(7) and (C)(10). MCR 2.116(C)(7) permits summary disposition of a claim barred by immunity granted by law. In reviewing a motion under MCR 2.116(C)(7), a court must consider the pleadings and the documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *Pike v Northern Mich Univ*, 327 Mich App 683, 690; 935 NW2d 86 (2019). A motion for summary disposition under MCR 2.116(C)(7) must be granted when the undisputed facts establish that the moving party is entitled to immunity granted by law. *Id*. at 690-691.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). The evidence submitted by the parties is reviewed in a light most favorable to the nonmovant. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "Summary disposition under MCR 2.l16(C)(10) is appropriately granted if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Greene v AP Prod, Ltd*, 475

Mich 502, 507; 717 NW2d 855 (2006) (citation and quotation marks omitted). A genuine issue of material fact exists when the "record which might be developed . . . would leave open an issue upon which reasonable minds might differ." *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013) (citation and quotation marks omitted). When a motion for summary disposition is filed before the close of discovery, the operative question is whether summary disposition is premature because further discovery stands a fair chance of uncovering factual support for the nonmovant's position. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009).

Plaintiff alleges that defendant's conduct was grossly negligent. MCL 691.1407(2) of the Governmental Tort Liability Act (GTLA) provides, in relevant part:

> 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 . . . 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 . . . 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.

MCL 691.1407(8)(a) defines gross negligence as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." As the Michigan Supreme Court recently emphasized in *Ray v Swager*, 501 Mich 52, 83; 903 NW2d 366 (2017), "the Legislature amended the GTLA to provide a *narrow exception* to governmental immunity for grossly negligent acts that were 'the proximate cause' of a plaintiff's injuries." (Emphasis added.) The Legislature intended

to limit governmental-employee liability to only "situations where the contested conduct was substantially more than negligent." *Maiden v Rozwood*, 461 Mich 109, 122; 597 NW2d 817 (1999). The Court of Appeals has clarified that gross negligence involves "almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks." *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). In other words, "[i]t 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." *Id*. And "[s]imply 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." *Id*.

"Generally, once a standard of conduct is established, the reasonableness of an actor's conduct under the standard is a question for the fact-finder, not the court." *Tallman v Markstrom*, 180 Mich App 141, 144; 446 NW2d 618 (1989). However, if the plaintiff fails to raise a question regarding gross negligence on which reasonable minds could differ, summary disposition must be granted in the defendant's favor. *Jackson v Saginaw Co*, 458 Mich 141, 146; 580 NW2d 870 (1998).

Here, there is no question that CMU, as a state university, is a governmental agency and that defendant was acting within the scope of his authority as a cafeteria employee. Plaintiff has raised three issues: (1) whether defendant was grossly negligent, (2) whether CMU was engaged in the exercise or discharge of a governmental function, and (3) whether defendant was a CMU employee. Regarding defendant's employment, Davis testified that defendant was a CMU employee because he worked part-time as a CMU student. Defendant has also provided an affidavit from Dean, an Aramark employee, who states that defendant was a CMU employee (Dean

was never deposed in discovery even though plaintiff identified him on her initial disclosures). Plaintiff also asserted in her complaint that defendant was a CMU employee, and defendant admitted the allegation in his answer to the complaint. Finally, defendant also submitted his W-2 as an exhibit, which identifies CMU as his employer. Plaintiff has not provided this Court with any evidence to substantiate her theory that defendant was an employee of Aramark, rather than CMU. She argues that defendant worked in the cafeteria as part of a work-study program, but has not explained why defendant's participation in a work-study program would make him any less of a CMU employee. Her argument that defendant *may* have been an Aramark employee is speculative.

Plaintiff argues that discovery had not closed at the time defendant moved for summary disposition, and she intended to depose a CMU employee named Corby Blem, who would testify about CMU's relationship with Aramark. Plaintiff argues that Blem's testimony *may* create a genuine issue of material fact regarding defendant's status as a CMU employee. But discovery closed in early August 2022, and plaintiff never deposed Blem. Plaintiff argues that she was waiting for defense counsel to provide Blem's contact information, but Blem was a third-party, and plaintiff never moved during discovery to compel his deposition (or production of his contact information). As defendant notes, Blem's contact information is publicly available because he is a CMU employee. Moreover, plaintiff recognized that defendant was a CMU employee in her complaint, and defendant's W-2 identifies CMU as his employer, establishing defendant's status as a CMU employee. Therefore, the Court concludes that defendant was a CMU employee protected by governmental immunity in the absence of gross negligence.

Plaintiff has also questioned whether CMU and defendant were engaged in a governmental function when providing food services at a residential facility on CMU's campus. The term

"governmental function" means "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(b). The term "governmental function" should be broadly construed based on the general activity rather than the specific conduct alleged to have been involved in the incident. *NL Ventures VI Farmington, LLC v Livonia*, 314 Mich App 222, 224; 886 NW2d 772 (2015). Recently, in *Elia Cos, LLC v Univ of Mich Regents*, 335 Mich App 439, 449; 966 NW2d 755 (2021), lv pending 967 NW2d 237 (2021), the Court of Appeals concluded that a campus union, which provided a social gathering place and "[t]he provision of commercial food establishments," served a governmental, rather than a proprietary, function. See also MCL 390.558 (explaining that CMU's board may acquire, equip, and maintain buildings to be used as residence halls and dining facilities, among other things). MCL 390.558 expressly authorizes the activity of providing food services on a state-university campus. Plaintiff has not supplied the Court with any legal basis for her argument that defendant was *not* engaged in a governmental function at the time of the incident, and the Court will not search for that authority on her behalf.

Turning to the issue of gross negligence, the Court concludes that plaintiff has not established a factual dispute regarding whether defendant engaged in conduct so reckless as to demonstrate a substantial lack of concern for whether an injury would result. Plaintiff argues that defendant "knew or should have known" of the possibility that the lid would fall on a student like plaintiff, but this is the standard for negligence—not gross negligence. Plaintiff did not witness defendant's conduct. Davis testified that defendant refilled the ice dispenser how he was trained, and there is no indication that defendant was aware of any prior injuries resulting from this protocol. The parties both agree that the lid from the ice dispenser accidentally "slid" off the top of the machine and onto plaintiff's head while defendant was reaching for ice. There is no evidence

to support that defendant was aware of the risk of injury or acted in willful disregard of that risk. For this reason, reasonable minds could not conclude that defendant simply did not care about plaintiff's safety in this circumstance.[1]

Plaintiff compares this case to *Ray*, 501 Mich at 59-60. In *Ray*, the plaintiff (a teenager) was a relatively new member of a high-school cross-country team, and the defendant was his coach. *Id*. at 59. The defendant held an early-morning practice while it was still dark outside, taking the team off the school campus to run on public roads. *Id*. The team approached an intersection in the road with a "Do Not Walk" symbol illuminated. *Id*. at 59-60. Defendant and most of the team initially stopped at the crosswalk, but defendant instructed the runners to cross the intersection after determining that an oncoming vehicle was far enough away from the intersection to allow safe passage. *Id*. at 60. Most of the team safely crossed the road, but the plaintiff and another teammate were struck by the vehicle and injured. *Id*.

After the plaintiff sued, the defendant moved for summary disposition, arguing that he was entitled to governmental immunity against the plaintiff's claims. *Id*. Initially, the trial court denied the motion, explaining that whether the defendant's actions were grossly negligent and whether he proximately caused the plaintiff's injuries were questions of fact for the jury. *Id*. at 60-61. The Court of Appeals panel reversed, holding that reasonable minds could not conclude that the

[1] The Court also agrees with defendant that whether CMU or Aramark has changed the way that employees are trained to add ice to the soda fountains is irrelevant to the issue whether defendant was grossly negligent, and would constitute evidence of a subsequent remedial measure that is inadmissible under MRE 407. See MCR 2.116(G)(6) ("Affidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)-(7) or (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion.").

defendant was the proximate cause of the plaintiff's injuries. *Id*. at 61. The Michigan Supreme Court reversed that decision, explaining that the Court of Appeals had used an incorrect legal standard to analyze proximate causation. *Id*. at 73-76. On remand, the Court of Appeals held there were material questions of fact regarding "the actors' respective negligence, weighing their competing legal responsibilities, determining the proximate cause of [the plaintiff's] injuries, and resolving [the defendant's] claim to governmental immunity as a matter of law." *Ray v Swager (On Remand)*, 321 Mich App 755, 760-761; 909 NW2d 917 (2017).

This case differs significantly from *Ray*, where the defendant (a coach) had directed the plaintiff (a high-school student) to enter an intersection despite a Do Not Walk command and even when the defendant was able to see an oncoming vehicle in the distance. Here, plaintiff presents no evidence that defendant was aware of the risks of his conduct and acted in willful disregard of those risks. In fact, defendant performed the task as he was trained to do it, and he testified that he was unaware of any previous incidents involving the ice-dispenser lid. Nor was defendant in a position of authority over plaintiff, like the defendant in *Ray*. Therefore, the Court finds *Ray* unpersuasive in this context. Because plaintiff has not established gross negligence to overcome application of governmental immunity, defendant is entitled to summary disposition.[2]

III. CONCLUSION

IT IS HEREBY ORDERED that defendant's motion for summary disposition is GRANTED.

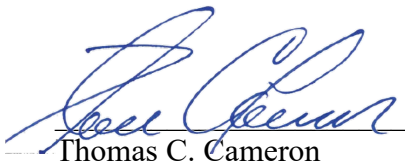
[2] Considering the Court's conclusion that summary disposition is warranted because defendant was not grossly negligent, the Court need not address defendant's alternative argument that he did not proximately cause plaintiff's injuries.

IT IS FURTHER ORDERED that defendant's motion to file a supplemental brief is GRANTED.

IT IS FURTHER ORDERED that defendant's motion to strike the complaint is DISMISSED AS MOOT.

This is a final order that dispenses with the final claim and closes the case.

Date: November 30, 2022



Thomas C. Cameron
Judge, Court of Claims