STATE OF MICHIGAN

COURT OF APPEALS

EDDIE DANIELS and FAYE DANIELS Deceased,	UNPUBLISHED April 6, 2001
Plaintiffs-Appellants,	
v	No. 173275 Ingham Circuit Court
PAUL PETERSON and DONALD RIEL,	LC No. 93-74802-NO
Defendants-Appellees.	ON REMAND

Before: Saad, P.J., and Zahra and Collins, JJ.

PER CURIAM.

I. Facts and Proceedings

On December 27, 1990, plaintiff Eddie Daniels sustained injuries after his semi truck collided with a Grand Trunk Western Railroad (Grand Trunk) train at a crossing in Imlay Township. While driving down West Fourth Street near the intersection of West Fourth and Black Corners Road, Daniels crossed the railroad tracks and collided with the train.

Plaintiffs sued defendants individually as employees of the Railroad Safety and Tariffs Division of the Michigan Department of Transportation ("Division"). In their complaint, plaintiffs claimed that Peterson, an inspector in the Division, was grossly negligent for failing to timely issue a report to remedy hazardous conditions at the crossing after he inspected the crossing approximately one year before Daniels' collision. Plaintiffs also alleged that Riel, the acting administrator for the Division, was grossly negligent for failing to order Peterson to submit the inspection report or, if Peterson did issue the report, for failing to order Grand Trunk to install warning bells and gates at the Black Corners crossing.

In lieu of filing an answer, on November 10, 1993, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10), arguing that plaintiffs failed to present a viable claim of gross negligence to overcome the governmental immunity conferred by MCL 691.1407(2); MSA 3.996(107)(2), which provides, in pertinent part:

> Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each … employee of

> a governmental agency … is immune from tort liability for an injury to a person or damage to property caused by the … employee … while in the course of employment … 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 … employee's … conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

The subsequent procedural events are set out in the Supreme Court's opinion and remand:

> The trial court in this case granted summary disposition to defendants primarily on the ground that, under the Court of Appeals decision in *Dedes v South Lyon Community Schools*, 199 Mich App 385, 502 NW2d 720 (1993), defendants' conduct was not actionable because, for purposes of the governmental immunity statute, MCL 691.1407(2)(c); MSA 3.996(107)(2)(c), it was not the proximate cause of plaintiff's injuries. Before the Court of Appeals had an opportunity to decide this case, this Court invalidated the trial court's proximate cause ruling in *Dedes v Asch*, 446 Mich 99, 521 NW2d 488 (1994). The Court of Appeals in this case thereafter upheld summary disposition for defendants on the alternate basis of the public-duty doctrine. In [*Robinson v Detroit* and *Cooper v Wade*, 462 Mich 439, 613 NW2d 307 (2000)], we overruled our decision in *Dedes*. Therefore, the trial court's original basis for granting summary disposition to defendants in this case, that defendants were immune from suit because their conduct was not the proximate cause of plaintiff's injuries, has again become the proper focus of this appeal. Consequently, given this procedural history, we remand this case to the Court of Appeals for reconsideration in light of *Robinson/Cooper*. [*Daniels v Peterson*, 462 Mich 915; 615 NW2d 14 (2000).]

For reasons set forth below, we vacate the trial court order granting summary disposition and remand for reconsideration of the motion under MCR 2.116(C)(10) or MCR 2.116(C)(7).

II. Analysis

This Court reviews decisions on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Motions under MCR 2.116(C)(8) test the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted. *Id.* The trial court must grant the motion if no factual development could justify the plaintiff's claim for relief. *Id.*

Our Supreme Court's recent decision in *Robinson/Cooper, supra*, which overruled *Dedes*, controls our decision here. In *Dedes*, one child died and another was injured when they were struck by a car while walking to their school bus stop in South Lyon. *Dedes, supra*, 446 Mich 102. Relatives of the children sued, among others, the bus driver, Joan Shifford, for gross negligence for changing the bus stop to an unsafe location and they sued the Director of Transportation of South Lyon Community Schools, Jeanne Asch, for gross negligence for designating an unsafe location for the bus stop and for failing to design a safer route. *Id*. at 102-103. The trial court granted defendants' motions for summary disposition, finding that both were immune from suit pursuant to MCL 691.1407(2)(c); MSA 3.996(107)(2)(c) and that their allegedly negligent conduct was not "the" proximate cause of the children's injuries. *Id*. at 103. The Court of Appeals affirmed on the same grounds in *Dedes v South Lyon Community Schools*, 199 Mich App 385, 392-394; 502 NW2d 720 (1993), finding that *the* proximate cause of the injuries was the driver negligently swerving off the road.

The Supreme Court reversed, ruling that a plain reading of MCL 691.1407(2)(c); MSA 3.996(107)(2)(c) is ambiguous and that the lack of comment in the legislative history of the statute suggests that the phrase "the proximate cause" does not mean the *sole* cause, but *a* proximate cause of the injury. *Dedes, supra*, 446 Mich 115-119. Accordingly, the Court remanded the case to the trial court for further consideration. *Id*. at 119.

However, in *Robinson/Cooper*, the Court abrogated the holding in *Dedes* while addressing two consolidated cases in which passengers in cars fleeing from police suffered injuries when the fleeing cars caused the accidents. *Robinson/Cooper, supra*, 462 Mich 444. The Court opined:

> [W]e conclude the individual police officers are immune from liability because their actions were not "the proximate cause" of the plaintiffs' injuries. Thus, we overrule *Dedes v Asch*, 446 Mich 99, 521 NW2d 488 (1994), and hold that the phrase "the proximate cause" as used in the employee provision of the governmental immunity act, MCL 691.1407(2); MSA 3.996(107)(2), means the one most immediate, efficient, and direct cause preceding an injury, not "a proximate cause." Because the conduct of the individual police officers in these cases were not "the proximate cause," i.e., the one most immediate, efficient, and direct cause, of the passengers' injuries, the officers are entitled to governmental immunity. [*Robinson/Cooper, supra*, 462 Mich 445-446].

The Court further explained its rationale in overruling *Dedes*:

> Further, recognizing that "the" is a definite article, and "cause" is a singular noun, it is clear that the phrase "the proximate cause" contemplates one cause. Yet, meaning must also be given to the adjective "proximate" when juxtaposed between "the" and "cause" as it is here. We are helped by the fact that this Court long ago defined "the proximate cause" as "the immediate efficient, direct cause preceding the injury." The Legislature has nowhere abrogated this, and thus we conclude that in MCL 691.1407(2)(c); MSA 3.996(107)(2)(c) the Legislature provided tort immunity for employees of governmental agencies unless the

> employee's conduct amounts to gross negligence that is the one most immediate, efficient, and direct cause of the injury or damage, i.e., the proximate cause.
>
> Applying this construction to the present case, we hold that the officers in question are immune from suit in tort because their pursuit of the fleeing vehicles was not, as a matter of law, "the proximate cause" of the injuries sustained by the plaintiffs. The one most immediate, efficient, and direct cause of the plaintiffs' injuries was the reckless conduct of the drivers of the fleeing vehicles. [*Robinson/Cooper, supra*, 462 Mich 462 (citation omitted).]

In light of *Robinson/Cooper*, defendants are immune from tort liability if their alleged gross negligence was not "*the* proximate cause" of plaintiff's injuries. According to plaintiffs' complaint, Peterson inspected the Black Corners crossing in December 1989 and plaintiffs therefore claim that Peterson should have submitted a report to his employer on its condition within sixty days. Plaintiffs say that Riel should have supervised Peterson more closely and should have used Peterson's report to order Grand Trunk to install additional warning devices. Plaintiffs claim that the above inaction by defendants proximately caused Daniels' injuries.

In granting defendants' motion pursuant to MCR 2.116(C)(8), the trial court opined:

> [W]here gross negligence is pled as an exception to otherwise immune conduct … that gross negligence must be not a proximate cause but the proximate cause of the injury. And where there are multiple causes, it is not sufficient that the gross negligence of the government employee was one of those proximate causes.
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> ***
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> So in both of those cases no duty [sic] by the private individuals, who are the Defendants in this case, and even if there was a duty, the fact that their gross negligence is found by a jury to be such would only be one proximate cause, not the sole proximate cause of the Plaintiff's [sic]. I have no reason but to grant the Defendant's motion for summary disposition in (C)(8).

The trial court correctly stated that a governmental employee is immune from tort liability if the alleged gross negligence is one, but not *the* proximate cause of the plaintiff's injury. However, plaintiffs' complaint does *not* contain sufficient facts for the trial court to conclude that, as a matter of law, defendants' alleged conduct was *not* the proximate cause of Daniels' injuries.

Plaintiffs' complaint does not set forth a description of the events immediately preceding Daniels' collision. Therefore, based on the pleadings alone, the record is insufficient to determine whether defendants' conduct, or some other conduct or event may have constituted the most efficient, direct cause of Daniels' injuries. While we recognize that it is very likely that defendants' alleged failure to submit a report and order was simply too remote in time and place to constitute "*the* proximate cause" of Daniels' injuries, it would appear that there should be a fuller record regarding what other events may have preceded the crash. Accordingly, we hold

that the trial court prematurely granted defendants' motion for summary disposition under MCR 2.116(C)(8).

However, our conclusion that the pleadings alone provide an insufficient basis for a grant of summary disposition does not preclude the dismissal of plaintiff's complaint pursuant to MCR 2.116(C)(7) or MCR 2.116(C)(10), both of which require the court to consider, in addition to the pleadings, affidavits and other documentary evidence. *Barrow v Pritchard*, 235 Mich App 478, 480; 597 NW2d 853 (1999). We are aware of this Court's prerogative to review a motion for summary disposition under the correct rule if the trial court improperly grants the motion under the wrong rule. *Spiek, supra*, 456 Mich 338 n 9. However, the documentary evidence attached to the parties' motion and response briefs does not reveal sufficient facts regarding the events leading to the collision to determine *the* proximate cause of plaintiff's injuries. Therefore, we find it necessary to remand this case for further proceedings to establish a sufficient record to support the grant or denial of defendants' motion.

Accordingly, we vacate the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) and remand for further proceedings of defendants' motion pursuant to MCR 2.116 (C)(7) and MCR 2.116(C)(10).[1] We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Jeffrey G. Collins

[1] We note that the trial court denied defendants' motion as premature under MCR 2.116(C)(10) because discovery was incomplete. The trial court may allow defendants to renew their motion at the close of discovery, when discovery of the disputed issue is complete, or when there is sufficient evidence showing "there is no reasonable chance that further discovery will result in factual support for the nonmoving party." *Colista v Thomas*, 241 Mich App 529, 537-538; 616 NW2d 249 (2000). Moreover, although defendants did not cite MCR 2.116(C)(7) as a basis for dismissal, their brief specifically contends that plaintiff's claim is barred because of immunity granted by law.

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ON REMAND

Before: Saad, P.J., and Zahra and Collins, JJ.

ZAHRA, J. (*dissenting*)

I respectfully dissent. The majority remands this matter to the trial court because, "based on the pleadings alone, the record is insufficient to determine whether defendants' conduct, or some other conduct or event may have constituted the [proximate cause]." I conclude that plaintiffs were required to specifically plead that defendants' gross negligence was the proximate cause of their injuries. Plaintiffs' failure to so plead is fatal to their action. I would affirm the judgment of the trial court.

At the time plaintiffs' complaint was originally dismissed by the trial court, *Dedes v South Lyon Community Schools*, 199 Mich App 385, 391-393; 502 NW2d 720 (1993), required plaintiffs to plead that defendants' gross negligence was ***the*** proximate cause of plaintiffs' injuries. Plaintiffs failed to satisfy this pleading requirement and, consequently, the trial court dismissed plaintiffs' action. While *Dedes* was reversed by the Supreme Court in 1994, *Dedes v Asch*, 446 Mich 99; 521 NW2d 488 (1994), the rule established in the original *Dedes* opinion was reinstated by the Supreme Court in *Robinson v Detroit* and *Cooper v Wade*, 462 Mich 439, 458; 613 NW2d 307 (2000) (holding "[w]e overrule *Dedes* to the extent that it interpreted the phrase 'the proximate cause' in subdivision (c) [of MCL 691.1407(2); MSA 3.996 (107) (2)] to mean 'a proximate cause'").

The Supreme Court has directed us on remand to reconsider this case in light of *Robinson/Cooper*. Thus, the legal question presented to us is not whether plaintiffs could plead facts to support the conclusion that these defendants were ***the*** proximate cause of plaintiffs' injuries. Rather, the question before us is whether plaintiffs did indeed allege such facts. Plaintiffs merely alleged defendants were ***a*** proximate cause of plaintiffs' injuries. This is insufficient as a matter of law.

I would agree that remand would be appropriate if *Robinson/Cooper* imposed new pleading requirements on plaintiffs. However, this is not the case. *Robinson/Cooper* merely reinstates the law that existed at the time the trial court rendered its original ruling in this matter. Plaintiffs' failure to affirmatively plead defendants' gross negligence as ***the*** proximate cause is therefore fatal to their claim.

/s/ Brian K. Zahra