STATE OF MICHIGAN

COURT OF APPEALS

MYRA BUFFINGTON, Personal Representative of the ESTATE OF MAURICE FREEMAN,

Plaintiff-Appellant,

v

ALIC LAYNE, RYAN COOK, and CITY OF DETROIT,

Defendants-Appellees.

UNPUBLISHED
October 27, 2022

No. 357887
Wayne Circuit Court
LC No. 19-014064-NH

Before: RONAYNE KRAUSE, P.J., and JANSEN and MURRAY, JJ.

PER CURIAM.

Plaintiff, Myra Buffington,[1] personal representative of the estate of Maurice Freeman, appeals as of right the trial court order granting summary disposition in favor of defendants, Alic Layne, Ryan Cook, and the City of Detroit. Plaintiff argues that the trial court erred in granting defendants summary disposition in several respects—by making factual findings and credibility determinations and ignoring evidence, by determining that defendants were not grossly negligent, and by determining that defendants' conduct was not the proximate cause. We affirm.

I. FACTUAL BACKGROUND

This case arises from two emergency medical services (EMS) runs to Freeman's home in Detroit in April 2018. Freeman was 67 years old at the time, had chronic obstructive lung disease, and was diagnosed with chronic lymphocytic leukemia in February 2018. His medical records indicated that he never sought treatment for the leukemia.

Freeman's roommate, Steve Colvin, first called 911 at 9:18 p.m. on April 15, 2018, because Freeman had an at-home oxygen supply but could not breathe, the power was out, and Colvin had no car. Layne and Cook, employees of Detroit's fire and emergency services department, were

[1] Plaintiff is one of Freeman's sisters.

dispatched to Freeman's house both times. Cook and Layne testified that during the first run, Freeman refused treatment or transport to the hospital, but did request that defendants show Freeman how to use his auxiliary oxygen tank, which they did. Defendants did not have Freeman sign a refusal of care form. Cook stated that Colvin was intoxicated at the time. Defendants left, and Freeman was breathing normal. The EMS reports later compiled indicated a "code 3," meaning Freeman refused treatment.

Colvin again called 911 at 1:48 a.m. on April 16, 2018, and Cook and Layne responded. Colvin said that Freeman said he could not breathe, and assumed the tank was empty, but was not sure. Cook told Layne to prepare the stretcher, and tried to evaluate Freeman, but Colvin was interfering by being physically and verbally aggressive. Cook then transferred Freeman to a gurney and with Layne, into the ambulance. Freeman was taken to the hospital, and determined to have suffered from cardiac arrest. Freeman was put on life support at the hospital until his family decided to take him off, and he died on May 5, 2018.

II. PROCEDURAL HISTORY

Plaintiff filed suit against defendants, alleging: (I) medical malpractice against Layne and Cook, (II) medical malpractice against Detroit, and (III) gross negligence against Layne and Cook. Defendants moved for summary disposition, arguing that as governmental actors, they were immune from liability because their actions did not constitute gross negligence or willful misconduct that was the proximate cause of Freeman's injuries. Plaintiff responded, arguing that genuine issues of material fact existed that precluded summary disposition. The trial court granted defendants summary disposition, concluding that plaintiff failed to establish questions of fact regarding gross negligence or willful misconduct, and that defendants' action or inaction was not the proximate cause of Freeman's injuries. This appeal followed.

III. STANDARD OF REVIEW

The grant or denial of summary disposition is reviewed by this Court de novo. *Glasker-Davis v Auvenshine*, 333 Mich App 222, 229; 964 NW2d 809 (2020). Defendants did not specify under which subrule they were moving for summary disposition within their motion, but merely asserted that they were "entitled to summary disposition as a matter of law." The trial court, however, specifically granted the motion under MCR 2.116(C)(7) and (C)(10) in its order.

Summary disposition is appropriate under MCR 2.116(C)(7) when a claim is barred by immunity granted by law. *Dextrom v Wexford Co*, 287 Mich App 406, 428; 789 NW2d 211 (2010).

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

"[A] motion under MCR 2.116(C)(10) test the factual sufficiency of the complaint. . . ." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). "A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) when the affidavits or other documentary evidence, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law." *Glasker-Davis*, 333 Mich App at 229 (quotation marks and citation omitted). A genuine issue of fact exists if, when reviewing the record in the light most favorable to the nonmoving party, reasonable minds could differ. *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 116; 839 NW2d 223 (2013).

IV. ANALYSIS

Plaintiff argues that the trial court erred in granting defendants summary disposition by making factual findings and credibility determinations and ignoring evidence, by determining that defendants were not grossly negligent, and by determining that defendants' conduct was not the proximate cause. We disagree.

Plaintiff alleged medical malpractice against all defendants, and gross negligence against Layne and Cook. Under MCL 600.2912e(1), a defendant in a medical malpractice action must file an affidavit of meritorious defense signed by an expert health professional. However, "[b]ecause governmental immunity is a complete defense to such a suit, . . . where a plaintiff has otherwise failed to overcome the barrier of governmental immunity, such defendants are relieved from the burden of filing an affidavit of meritorious defense." *Costa v Community Emergency Med Servs, Inc*, 475 Mich 403, 406; 716 NW2d 236 (2006). Layne and Cook are governmental employees; therefore, they are entitled to immunity if (1) they are acting within the scope of their authority, (2) they are engaged in the exercise or discharge of a governmental function, and (3) their conduct does not amount to gross negligence that is the proximate cause of injury or damage. *Id*. at 409, citing MCL 691.1407(2). This legislation "evidences a clear legislative judgment that public and private tortfeasors should be treated differently." *Costa*, 475 Mich at 409 (quotation marks and citation omitted). Moreover, MCL 600.2912e requires that the affidavit of meritorious defense address whether the medical malpractice defendant complied with the applicable medical "standard of practice or care," which sounds in ordinary negligence. *Id*. at 411. The Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq.*, limits governmental employee liability to "gross negligence"—a higher standard of care. *Id*.

Additionally, the Emergency Medical Services Act (EMSA), MCL 333.20901 *et seq*., "share[s] the common purpose [of the GTLA] of immunizing certain agents from ordinary negligence and permitting liability for gross negligence." *McLain v Lansing Fire Dep't*, 309 Mich App 335, 341; 869 NW2d 645 (2015) (quotation marks and citation omitted). Thus, the terms of the two statutes "should be read in pari materia." *Id*. (quotation marks and citation omitted). MCL 333.20965(1) states:

> Unless an act or omission is the result of gross negligence or willful misconduct, the acts or omissions of a medical first responder, emergency medical technician, emergency medical technician specialist, paramedic, medical director of a medical control authority or his or her designee, . . . while providing services to a patient outside a hospital, in a hospital before transferring patient care to

> hospital personnel, or in a clinical setting that are consistent with the individual's licensure or additional training required by the medical control authority . . . do not impose liability in the treatment of a patient on those individuals or any of the following persons:
>
> * * *
>
> (f) The authoritative governmental unit or units.

The GTLA defines "gross negligence" as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). "Evidence of ordinary negligence does not create a material question of fact concerning gross negligence." *McLain*, 309 Mich App at 343 (quotation marks, citation, and brackets omitted). Only admissible evidence can establish gross negligence. *Id*. "Willful misconduct" is defined as "conduct with intent to harm." *Id*. (quotation marks and citation omitted).

Plaintiff alleges that Layne and Cook failed to transport Freeman or advise him that his oxygen supply was limited to a few hours, follow EMS protocol and conduct a physical examination, or follow City policy and have a refusal form signed. None of these acts or omissions rise to the level of gross negligence or willful misconduct, nor can plaintiff create any genuine issues of material fact. Therefore, summary disposition in favor of defendants was proper.

There is no genuine issue of material fact that Freeman refused transport and treatment during the initial 911 response. Cook testified several times that Freeman said that he did not want to go to the hospital. Cook said that Freeman was adamant, and used an expletive. Layne testified that Freeman refused defendants taking his vitals or going to the hospital. Layne said that Freeman said that he did not call 911, his roommate did, so he refused all assessments. Freeman asked defendants to show him how to use his auxiliary oxygen tank, which they did. Cook stated that he did not have the opportunity to medically assess Freeman, and he did not calculate how much oxygen was left in the tank. Layne, however, testified that he saw the gauge on the oxygen tank regulator that indicated 2000 pounds per square inch, but did not determine how long this tank would last. Cook admitted that he did not have a discussion with Freeman or Colvin regarding Freeman's oxygen supply.

Plaintiff relies on the following exchange during Colvin's deposition to create a question of fact regarding whether Freeman refused treatment:

> *Q*. Did they have a conversation with Mr. Freeman that you didn't hear?
>
> *A*. A conversation with him that said what?
>
> *Q*. That you did not hear.
>
> *A*. No.
>
> *Q*. So what exactly was the conversation between Mr. Freeman and the paramedics?

> *A.* They hooked up the tank and said that he would be all right and that's basically all they said. Because after that, they stood there and conversed for a few minutes amongst themselves and then they left.

When asked if Freeman did not say a single word to defendants, Colvin said Freeman was trying to breathe, and "I didn't listen to everything they were saying. I got out of the way. I was thinking they were going to do some work, but I don't know—if he told them he didn't want to go, I did not hear." Colvin testified that he did not hear Freeman say that he did not want to go to the hospital and did not recall Freeman saying that.

Colvin's testimony does not create a question of fact. Cook and Layne both testified that Freeman adamantly refused treatment and transport. The EMSA provides that "[t]his part and the rules promulgated under this part do not authorize medical treatment for or transportation to a hospital of an individual who objects to the treatment or transportation," as long as the individual is capable and competent. MCL 333.20969. There is no allegation that Freeman was incompetent. Moreover, "allegations or evidence of inaction or claims that a defendant could have taken additional precautions are insufficient" to establish gross negligence. *Bellinger v Kram*, 319 Mich App 653, 660; 904 NW2d 870 (2017). Therefore, there is no genuine issue of material fact that Cook and Layne's failure to transport, treat, or advise Freeman regarding his oxygen supply constituted gross negligence or willful misconduct when Freeman refused treatment or transport.

Next, plaintiff argues that Layne and Cook's failure to obtain a signed refusal of treatment or transport form constituted gross negligence. Layne and Cook testified as to different reasons why they did not obtain a form. Cook said Freeman was not required to sign the form because he was not the one to call 911; Colvin was the caller. Layne testified that because Freeman refused treatment, he was not required to sign a refusal of rights form.

In a response to discovery, the City responded that it had procedures in place at the time that this incident occurred, and produced those policies. Section 7-19 of the Michigan Procedures for Refusal of Care by an Adult and Minor provide:

> A. All patients with signs or symptoms of illness or injury shall be offered assessment, medical treatment and transport by EMS.
>
> B. Clearly explain the nature of the illness/injury and the need for emergency care or transportation.
>
> C. Explain possible complications that may develop without proper care or transportation.
>
> D. For individuals with signs or symptoms of serious or potentially fatal illness or injury, consider contacting medical control.
>
> E. Request that the individual sign an EMS Refusal Form. If the individual refuses to sign the EMS Refusal Form, attempt to obtain signatures of witnesses (family, bystanders, public safety personnel).
>
> F. Document assessment and complete approved EMS Refusal Form.

> G. Inform the individual that if they change their mind and desire evaluation, treatment, and/or transport to a hospital, to re-contact the emergency medical services system or seek medical attention. [Mich Procedures, Refusal of Care, Section 7-19(2).]

Plaintiff relies on the affidavit of her expert, John Everlove, to argue that the absence of a refusal form constitutes evidence that Freeman did not refuse transportation during the first EMS response, and that Layne and Cook retroactively claimed that he did to avoid liability. See *Bellinger*, 319 Mich App at 660 ("evidence that a defendant engaged in affirmative actions contrary to professionally accepted standards and then sought to cover up those actions does establish gross negligence."). However, this requires speculation, and "parties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact." *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). Thus, Layne and Cook's failure to obtain a signed refusal form also does not constitute gross negligence or willful misconduct, nor any genuine issues of material fact.

In conclusion, plaintiff failed to present sufficient evidence to create any genuine issue of material fact regarding gross negligence.[2] Therefore, the trial court properly granted defendants summary disposition under MCR 2.116(C)(7) and (C)(10).

Alternatively, plaintiff argues that the trial court engaged in factual finding and made credibility determinations when it decided this motion. In its order granting summary disposition, the trial court stated the following:

> Adverse events unfortunately happen every day in a busy, big city like Detroit. People die, people get injured and people get sick. Bad results do not alone, in the absence of more, equate to legal liability.
>
> * * *
>
> Such discrepancies [in Layne's and Cook's testimonies] do not make EMS techs liars, bad guys or grossly negligent. EMS techs are PAID to transport citizens to the hospital. What motive would there be not to unless there was a refusal by Mr. Freeman?
>
> Bad things happen in the world. In a world of accountability, everybody likes to point fingers and sit in judgment. The real world is a different place than the comfort of an office sitting behind a computer. Fault by which humans can be held legally liable does not always flow from bad things happening in the real world. While Mr. Freeman's death is tragic, an even greater tragedy is pinning blame (gross negligence/willful misconduct) on EMS techs doing a difficult job under trying circumstances. Those of us fortunate to sit in the relative comfort and safety of offices on our computers using big fancy words like gross negligence,

[2] This conclusion renders discussion regarding proximate cause unnecessary.

should keep in mind, as we are tasked with determining legal liability for folks in the real world, that tragic results are not always avoidable and don't always equate with the high bar of gross negligence.

"[I]t is well settled that the circuit court may not weigh the evidence or make determinations of credibility when deciding a motion for summary disposition." *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 480; 776 NW2d 398 (2009). Some of the trial court's statements in the order are not supported by evidence in the record. There was no evidence regarding how many people get sick, injured, or die on a daily basis in Detroit, nor was there any evidence regarding Layne's and Cook's wages for their employment. However, when read in context, it appears that the trial court's comments are dictum that do not constitute binding authority. *Pew v Mich State Univ*, 307 Mich App 328, 334; 859 NW2d 246 (2014). "Dictum is a judicial comment that is not necessary to the decision in the case." *Id*. It does not appear that the trial court engaged in impermissible fact-finding or credibility determinations that would render summary disposition improper.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Kathleen Jansen
/s/ Christopher M. Murray