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# STATE OF MICHIGAN

# COURT OF APPEALS

CINDY PIETRASZEWSKI, Personal Representative of the ESTATE OF LINDA LEE MARTINEZ,

Plaintiff-Appellee,

v

BERRIEN MENTAL HEALTH AUTHORITY, SCOTTDALE RTC, DEBRA KERSCHBAUM, LMSW, ANDREA LYNN IMMOOS, and DONAVON JACQUE PARSON,

Defendants-Appellants,

and

MICHAEL JAMES ZAVORAL,

Defendant.

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No. 377541
Berrien Circuit Court
LC No. 2024-000116-NH

Before: O'BRIEN, P.J., and CAMERON and MALDONADO, JJ.

PER CURIAM.

Defendants, Berrien Mental Health Authority (BMHA), Scottdale Residential Treatment Center (RTC), Debra Kershbaum, Andrea Immoos, and Donavon Parson, appeal as of right the trial court's order denying defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) (governmental immunity). We affirm in part, reverse in part, and remand.

## I. BACKGROUND

This wrongful death case arises from the death of Linda Lee Martinez on or about July 5, 2021, and was brought by plaintiff, Cindy Pietraszewski as personal representative of the Estate of Linda Lee Martinez. Martinez was a 73-year-old resident of Scottdale RTC, a licensed adult foster care facility owned and operated by BMHA. Defendant Kerschbaum is the administrator of Scottdale RTC, and defendants Immoos and Parson are employees of Scottdale RTC/BMHA.

On July 4, 2021, at about 9:00 p.m., Martinez went outside to smoke a cigarette. After smoking her cigarette, Martinez left Scottdale RTC and walked approximately a mile to a gas station north of Scottdale RTC on Scottdale Road. At about 12:05 a.m., Martinez was spotted walking back toward Scottdale RTC. However, about 15 minutes later, Michael Zavoral struck Martinez with his car. Although Zavoral stopped and called 911 to report the collision, he did not know what he had struck and when the police arrived, they did not find Martinez. The next morning, at approximately 8:48 a.m., Scottdale RTC reported Martinez missing. During a search conducted by police and Scottdale RTC staff, defendant Immoos found Martinez's body and she was pronounced dead. An autopsy confirmed that Martinez died from the injuries she sustained when Zavoral struck her with his car.

On May 22, 2024, plaintiff filed the underlying wrongful-death action against defendants BMHA, Scottdale RTC, Kerschbaum, Immoos, Parson, and Zavoral.[1] In general, plaintiff alleges that defendants violated "numerous regulations of the Adult Foster Care Act," breached the duty of care owed to Martinez, negligently trained and supervised employees, and committed medical malpractice. In summary, plaintiff alleges that defendants negligently failed to: properly supervise Martinez, protect Martinez from injury or death, report Martinez missing, ensure that Martinez returned after her smoke break, confirm through "frequent bed checks" that Martinez was actually in bed the night of July 4, 2021 to July 5, 2021, properly train employees to handle impaired residents, ensure that employees were properly qualified and trained, and recognize that Scottdale RTC could not meet Martinez's needs.

On August 7, 2025, defendants moved for summary disposition under MCR 2.116(C)(7), arguing that they were entitled to governmental immunity and that the medical care or treatment exception to governmental immunity did not apply. Plaintiff did not dispute that defendants were a governmental entity, or employees of one, and therefore entitled to governmental immunity provided that no exception applied. However, plaintiff argued that the medical care or treatment exception to governmental immunity did apply.

The trial court denied defendants' motion for summary disposition. Regarding BMHA, the trial court concluded that BMHA is a governmental agency entitled to governmental immunity provided that no exceptions applied. However, the trial court concluded that plaintiff demonstrated a "question of fact" regarding "whether the medical care/treatment exception applie[d]." Specifically, the trial court stated as follows: "Provided that Plaintiff can establish as a matter of fact that her allegation that Ms. Martinez received mental health care through BMHA at Scottdale RTC, then the medical care/treatment exception likely would apply." Accordingly, the trial court denied summary disposition under MCR 2.116(C)(7) regarding defendant BMHA.

Regarding the individual defendants, the trial court did not make a determination regarding whether defendants' actions constituted gross negligence, but it concluded that their actions were not the proximate cause of Martinez's death. Nonetheless, the trial court concluded that summary disposition was not warranted because although defendants were employed by BMHA and would be entitled to governmental immunity, plaintiff "established that a genuine question of material

[1] Zavoral settled the claims against him and is not a party to this appeal.

fact with regard to whether the medical care/treatment exception applies." Accordingly, the trial court denied summary disposition under MCR 2.116(C)(7) regarding the individual defendants.

Lastly, regarding defendant Scottdale RTC, the trial court concluded that "[d]efendants did not explain whether Scottdale RTC is a 'governmental agency' under MCL 691.1407 such that it may obtain immunity." Accordingly, the trial court also denied summary disposition as to Scottdale RTC because defendant failed to show that the claims against it should be dismissed.

Defendants now appeal.

## II. GOVERNMENTAL IMMUNITY

The trial court erred by denying defendants' motion for summary disposition on the basis of governmental immunity because no genuine issue of material fact existed and the court failed to determine as a matter of law whether governmental immunity applied.

### A. STANDARD OF REVIEW

We review de novo the trial court's decision on a motion for summary disposition. *McLean v McElhaney*, 289 Mich App 592, 597; 798 NW2d 29 (2010). Defendants moved for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10). "To survive a motion raised under MCR 2.116(C)(7), the plaintiff must allege specific facts warranting the application of an exception to governmental immunity." *Id*. "The facts as alleged in the complaint must be accepted as true unless contradicted by the submitted evidence, and the court must evaluate all the evidence in a light most favorable to the nonmoving party for purposes of MCR 2.116(C)(7)." *Reed v State*, 324 Mich App 449, 452; 922 NW2d 386 (2018). "If the pleadings or documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred." *McLean*, 289 Mich App at 597. We also review de novo whether governmental immunity applies, as well as other issues of statutory interpretation. *Id*. at 596.

### B. SUMMARY DISPOSITION AS TO SCOTTDALE RTC

As an initial matter, the trial court incorrectly denied summary disposition as to defendant Scottdale RTC because defendants had no obligation to explain whether Scottdale RTC was a governmental agency under MCL 691.1407. Plaintiff did not argue that Scottdale RTC was not a governmental agency, and instead readily admitted that "Scottdale RTC is a governmental entity subject to the Governmental Tort Liability Act." It is clear from both parties' briefs that the only issue the trial court needed to decide regarding governmental immunity was whether the medical care or treatment exception applied.

Although defendants have the burden to establish the affirmative defense of governmental immunity, *Law Offices of Jeffrey Sherbow, PC v Fieger & Fieger, PC*, 507 Mich 272, 304-305; 968 NW2d 367 (2021), if there are facts that are not in dispute, defendants have no obligation to affirmatively prove undisputed facts. Our Supreme Court has explicitly explained that "the burden of proof, in a strict sense, refers to the necessity or duty of affirmatively proving a fact or facts *in dispute* on an issue raised between the parties in a case." *Id*. at 303 (quotation marks and citation omitted; emphasis added). At no point during the summary disposition proceedings did plaintiff ever indicate any sort of dispute with the classification of Scottdale RTC as a governmental entity,

so it was improper for the trial court to indicate that defendant had to explain a fact that was not in dispute. Accordingly, the trial court incorrectly denied summary disposition as to defendant Scottdale RTC on this basis.

C. DETERMINATION OF WHETHER GOVERNMENTAL IMMUNITY APPLIES

The trial court also incorrectly denied summary disposition as to the remaining defendants because it improperly held that "[p]laintiff created a *question of fact* as to whether the medical care/treatment exception applies." The issue of whether governmental immunity applies, including whether an exception to governmental immunity is applicable, is a *question of law*. *Snead v John Carlo, Inc*, 294 Mich App 343, 354; 813 NW2d 294 (2011). It is the trial court that must decide questions of law on motions for summary disposition. *Id*. See also *Walsh v Taylor*, 263 Mich App 618, 624; 689 NW2d 506 (2004) ("[T]he trial court [is] obligated to evaluate the specific conduct alleged to determine whether a valid exception exists.").

In the present case, there was no dispute regarding the services that defendants provided Martinez; instead, the only dispute was whether those services qualified as medical care or treatment. In other words, the underlying facts regarding the services that defendants provided Martinez were not in dispute, rather the legal effect of those facts, i.e., whether the services constituted medical care or treatment, was in dispute. How the exception to governmental immunity is interpreted in relation to the undisputed facts, is a matter of law. *Snead*, 294 Mich App at 354. In addition, determining whether certain facts meet statutory requirements is also an issue of statutory interpretation and a question of law. See *Linton v Arenac County Rd Comm'n*, 273 Mich App 107, 112, 116-117; 729 NW2d 883 (2006).

Here, the crux of this case is the determination of the threshold issue—whether governmental immunity protects defendants' conduct or whether the conduct falls outside the immunity provided by the Governmental Tort Liability Act (GTLA) because the medical care or treatment exception applies. This determination must be made by the trial court rather than a jury. See *Dextrom v Westford County*, 287 Mich App 406, 430-431; 789 NW2d 211 (2010). Accordingly, we remand this matter to the trial court to determine as a matter of law whether defendants' actions were subject to the medical care or treatment exception to governmental immunity. However, we recognize that for the trial court to determine whether defendants are entitled to governmental immunity, it is necessary to define "medical care or treatment" pursuant to MCL 691.1407(4).

D. THE MEDICAL CARE OR TREATMENT EXCEPTION

In general, the GTLA, MCL 691.1407 *et seq*., provides broad immunity for governmental agencies, like defendants, engaged in governmental function unless a statutorily defined exception is applicable. The exception at issue here is the medical care or treatment exception, which provides as follows:

> (4) This act does not grant immunity to a governmental agency or an employee or agent of a governmental agency *with respect to providing medical care or treatment to a patient*, except medical care or treatment provided to a patient in a hospital owned or operated by the department of community health or a hospital owned or

> operated by the department of corrections and except care or treatment provided by an uncompensated search and rescue operation medical assistant or tactical operation medical assistant. [MCL 691.1407(4) (emphasis added).]

Exceptions to governmental immunity are to be narrowly construed. *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 614; 664 NW2d 165 (2003).

In *Briggs v Oakland County*, 276 Mich App 369, 373-374; 742 NW2d 136 (2007), this Court held that the medical care or treatment exception was clear and unambiguous, so its meaning could be discerned from its plain language. And, in *McLean*, 289 Mich App at 600-601, this Court concluded that the language of the exception applied not only to physical health care, but also mental health care. Further, the *McLean* Court defined "patient" under the exception as "[o]ne who is suffering from any disease or behavioral disorder and is under treatment for it." *Id*. at 602. The *McLean* Court also explained that just because a person fits the definition of "recipient"[2] under the Mental Health Code, it does not preclude that person from also being a "patient" under the medical care or treatment exception. *Id*. at 601-602.

As an initial matter, on appeal, plaintiff does not dispute that defendants are governmental agencies or "employee[s] or agent[s] of a governmental agency." MCL 691.1407(1), (4). And defendants do not dispute that Martinez was a patient. Therefore, the only issue for the trial court to decide is whether defendants provided "medical care or treatment" to Martinez. MCL 691.1407(4).

Notably, the phrase "medical care or treatment" is not defined in the statute and has not been defined by any published caselaw. At most, as discussed earlier, *Briggs* and *McLean* held that the language of the medical care or treatment exception was clear and unambiguous, so its meaning could be discerned from its plain language. Since then, this Court has encountered this very issue in several unpublished cases.[3]

First, in *Perez v Oakland County*, unpublished per curiam opinion of the Court of Appeals, issued December 9, 2008 (Docket No. 278129), p 3, this Court defined "medical care or treatment" as "to administer or apply remedies of or relating to the practice of medicine, by a medical

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[2] The Mental Health Code defines "recipient" as follows:

> "Recipient" means an individual who receives mental health services, either in person or through telemedicine, from the department, a community mental health services program, or a facility or from a provider that is under contract with the department or a community mental health services program. For the purposes of this act, recipient does not include an individual receiving substance use disorder services under chapter 2A unless that individual is also receiving mental health services under this act in conjunction with substance use disorder services. [MCL 330.1100c(13).]

[3] Unpublished opinions are not binding authority but may be persuasive or instructive. MCR 7.215(C)(1); *Kern v Kern-Koskela*, 320 Mich App 212, 241; 905 NW2d 453 (2017).

professional, to a patient for a disease or injury." The *Perez* Court's explanation of this definition provides as follows:

> We find it more prudent to focus on the more basic dictionary, and more specialized medical dictionary, definitions for clarification of the relevant terms.
>
> The 7th edition of Black's Law Dictionary contains no definition of "medical care" or "treatment." "Medical" is defined in the American Heritage Dictionary (4th ed.) as "of or relating to the study or practice of medicine" and "requiring treatment by medicine." "Care" is defined in a variety of ways in this publication, including, "attentive assistance or treatment to those in need." "Treatment" is defined as the "administration or application of remedies to a patient for a disease or injury."
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> Most instructive are the definitions found in Stedman's Medical Dictionary (26th ed.). There, "medical" is defined as "relating to medicine or the practice of medicine" and "practice means "the exercise of the profession of medicine or one of the allied health professions." Stedman's Medical Dictionary defines "care" as "in medicine and public health, a general term for the application of knowledge to the benefit of a community or individual" and "treatment" is defined as the "medical or surgical management of a patient." Reading the above definitions together, we find that "medical care" and "treatment" mean to administer or apply remedies of or relating to the practice of medicine, by a medical professional, to a patient for a disease or injury. [*Id*. at 4.]

Then, even more recently, in *Lavallii v Jackson*, unpublished per curiam opinion of the Court of Appeals, issued January 13, 2022 (Docket Nos. 354833; 354899), p 5, this Court once again defined "medical care or treatment" using dictionary definitions. Specifically, the *Lavallii* Court defined "medical care" as "the application of a physician's medical knowledge for a patient's benefit" and defined "medical treatment" as "the application of a noninvasive remedy." *Id*. This Court explained how it arrived at its definition as follows:

> The governmental tort liability act does not define "medical care or treatment," so we turn to a medical dictionary to define the term. See *Woodard v Custer*, 476 Mich 545, 561; 719 NW2d 842 (2006). *Stedman's Medical Dictionary* (28th ed) defines "care" as "[i]n medicine and public health, a general term for the application of knowledge to the benefit of a community or individual patient or client" and "medical care" as "the portion of [care] under a physician's direction." It also defines "treatment" as "[m]edical or surgical management of a patient" and "medical treatment" as treatment "of disease by hygienic and pharmacologic remedies, as distinguished from invasive surgical procedures." *Id*. Thus, "medical care" is the application of a physician's medical knowledge for a patient's benefit, whereas "medical treatment" requires the application of a noninvasive remedy. By using the disjunctive word "or" the Legislature expressed a clear intention for either one to fulfill the governmental-hospital exception. See, e.g., *Richards v Richards*, 310 Mich App 683, 700-701; 874 NW2d 704 (2015). [*Id*.]

On appeal, plaintiff relies on a different unpublished opinion, *Estate of Ball v State of Michigan*, unpublished opinion of the Court of Appeals, issued August 26, 2014 (Docket No. 314861), p 3, to support her argument that defendants provided medical care or treatment. However, *Estate of Ball* does not define "medical care or treatment"; instead, it defines "with respect to." In that case, a divided panel of this Court interpreted the phrase "with respect to" from MCL 691.1407(4) using the definition of "respect," i.e., "to concern; relate to," as defined in Webster's New World Dictionary (1984). After defining the phrase "with respect to." this Court concluded that "[governmental] immunity is waived when the claim arises from facts *relating to* medical care or treatment." *Estate of Ball*, unpub op at 3 (emphasis added).

Relying on *Estate of Ball*, plaintiff argues that every service that Scottdale RTC provided constituted medical care or treatment because Martinez had a mental illness. This argument does not "narrowly construe" the exception to governmental immunity. "Because the statutory exceptions to governmental immunity are to be narrowly construed, this Court must apply a narrow definition of the undefined phrase 'medical care or treatment' in MCL 691.1407(4)." *McLean*, 289 Mich App at 589. Under plaintiff's argument, any person could provide medical care or treatment if they are providing a service remotely related to a person's mental health. Even if Martinez was admitted to Scottdale RTC because she had a mental illness, to conclude that every single service provided by Scottdale RTC was medical care or treatment is untenable because not all, if any, services provided to Martinez had to do with treating or caring for her mental illness. Accordingly, we adopt the narrower definition of medical care or treatment as defined in *Perez* or *Lavallii*.

The definitions in *Lavallii* and *Perez* share the common consensus that medical care or treatment requires the application of a "remedy" and should be based on the practice of medicine by medical professionals. However, the definition from *Perez* does not distinguish between types of remedies so it is simpler to apply. Accordingly, we adopt the definition of "medical care or treatment" similar to the definition from *Perez*, unpub op at 4, and hold that "medical care or treatment" means "to administer or apply remedies of or relating to the practice of medicine, by a medical professional, to a patient for a disease or injury" but clarify that it is sufficient for a medical professional to direct the medical care or treatment at issue.

This definition adequately encompasses each of these unpublished decisions and complies with this Court's obligation to "narrowly construe" exceptions to governmental immunity. Notably, this definition does not conflict with the decision from *Estate of Ball* because that case does not actually define "medical care or treatment." Further, it narrowly construes the definition to include services that are "*remedies* of or related to the practice of medicine" rather than any service that is related to practice of medicine. In addition, although the definition mentions "medical professionals" it does not require that allegations are grounded in medical malpractice. Instead, it notes that the remedies must only be related to the practice of medicine by medical professionals, it does not require that the remedies are administered only by medical professionals. This is an important distinction because often medical professionals will direct nonmedical professionals to carry out services that are rendered to treat or remedy an illness but are not required to be performed by a medical professional.

In sum, for an action to fall under the medical care or treatment exception, the action must be administering or applying remedies of or relating to the practice of medicine. In other words, it is not enough to simply render services to individuals with a mental or physical illness. Instead,

the action must be rendered to treat or remedy the illness and must be related to the practice of medicine by a medical professional, or at the medical professional's direction.[4]

Because the trial court held that plaintiff created a question of fact as to whether the medical care or treatment exception applied, it seems that the trial court required further inquiry or clarification in order to determine whether the exception applied. Therefore, as noted, we remand this matter and instruct the trial court to hold an evidentiary hearing for the purpose of obtaining such factual development as is necessary to determine whether defendants are subject to the medical care or treatment exception to governmental immunity as just defined. See *Dextrom*, 287 Mich App at 432-433. Then, on the basis of that hearing, if the trial court determines that defendants' conduct was subject to the medical care or treatment exception as a matter of law, then it should deny defendants' motion for summary disposition under MCR 2.116(C)(7). See *id*. However, if the trial court determines that defendants' conduct was not subject to the medical care or treatment exception as a matter of law, then the trial court should grant defendants' summary disposition motion under MCR 2.116(C)(7). See *id*. at 433.

D. GROSS NEGLIGENCE EXCEPTION

In the present case, the trial court also concluded that the gross negligence exception did not apply to defendants because they were not the proximate cause of Martinez's death. We agree.

Under MCL 691.1407(2)(c), a governmental agency and its employees, members, and volunteers are immune for liability unless their conduct amounts to "gross negligence that is the proximate cause of the injury or damage." In other words, for this exception to apply the governmental agency must be grossly negligent *and* be the proximate cause of the injury. See *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c). See also *Maiden*, 461 Mich at 121. "In addition to requiring that a plaintiff show reckless conduct, the content or substance of the evidence proffered must be admissible in evidence." *Maiden*, 461 Mich at 122. Notably, "evidence of ordinary negligence does not create a material question of fact concerning gross negligence." *Id*.

Plaintiff has not carried her burden of establishing that the individual defendants were grossly negligent. Plaintiff's gross negligence argument centers on what plaintiff describes as "illusory bed checks." Plaintiff argues that defendants were grossly negligent when conducting bed checks because staff were not trained on how to perform "adequate bed checks" and the bed checks were "nothing more than peeking in a dark bedroom to confirm a 'mass under the covers.' " However, the record indicates that staff were trained on-the-job how to perform bed checks and that night-shift workers would check each resident's room every 30 minutes throughout the night

[4] *Morgan v Lifeways*, unpublished per curiam opinion of the Court of Appeals, issued February 14, 2006 (Docket No. 264254), p 2-3, is another unpublished case that defines "medical care or treatment." However, the *Morgan* Court relied on the definitions of "practice of medicine," "medical care," and "treatment" as defined by the Michigan Mental Health Code. *Id*. We do not find *Morgan* persuasive in light of this Court's published holding in *McLean* and find that these definitions still do not adequately define "medical care."

to make sure that the residents appeared to be in bed. Although plaintiff argues that the bed checks were not adequate, she does not explain what made the bed checks inadequate. A mere statement that defendants' acts or omissions amounted to gross negligence is not sufficient to evade immunity. *Maiden*, 461 Mich at 135. Further, the fact that the bed checks were performed every night every 30 minutes does not suggest that the staff was engaging in "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." Scottdale RTC and staff were aware of the need to monitor residents, even when they were sleeping, therefore, they implemented the nightly bed checks. This demonstrates concern for the safety of the residents.

Second, plaintiff emphasizes the fact that Martinez had only two hours of freedom of movement, as opposed to unlimited freedom of movement and defendants were grossly negligent when they failed to communicate as such to the direct care workers. Regardless of whether Martinez had two hours of freedom of movement or unlimited, she was still allowed to leave the home whenever she pleased because that is what freedom of movement meant. Therefore, regardless of whether Martinez could only be gone for two hours or more, the undisputed fact is that Martinez was allowed to leave. Accordingly, defendants cannot be grossly negligent because they allowed Martinez to exercise her freedom of movement.

Third, plaintiff argues that Martinez had a "documented history of wandering" and a "visible psychotic decline in the days before her death." These assertions are not supported by any evidence that was presented to the trial court. Further, Immoos and Parson observed Martinez the night of her death and did not recall Martinez acting out of the ordinary and also did not recall Martinez having a tendency to wander out of the home at night. Defendants' responses to plaintiff's interrogatories also clearly provide that there have been no prior incidents of a resident of Scottdale RTC leaving the facility unsupervised, failing to return, or being reported missing. Further, plaintiff fails to explain how this alleged history of wandering and psychotic decline made defendants grossly negligent.

Lastly, plaintiff argues that defendants were grossly negligent because they did not promptly contact the police or a supervisor to inform them that Martinez was missing and argues that if defendants had discovered that she was missing sooner, Martinez may not have been in danger. Again, this argument is based on the allegation that staff conducted "illusory bed checks." For the same reasons discussed earlier, plaintiff has not demonstrated that these bed checks were grossly negligent. Further, as soon as it was discovered that Martinez was not in the home, the staff called their supervisor, the police, and conducted a thorough search of the area surrounding the home, going as far as obtaining surveillance footage from a nearby gas station, and using a dog to track Martinez's scent. These actions do not indicate gross negligence, but in fact indicate that defendants were concerned about Martinez and doing everything they could to find her.

Regarding defendants BMHA and Scottdale RTC, plaintiff does not make any clear allegations of negligence specifically against BMHA or Scottdale RTC. Nonetheless, plaintiff seems to allege that Scottdale RTC, and thereby BMHA, failed to abide by the adult foster care licensing regulations and those failures are evidence of negligence. Notably, plaintiff asserts that the failures just discussed are proof of the regulatory violations. For the same reasons just discussed, none of these alleged failures establish gross negligence. Regardless, this Court need not address whether defendants violated the regulations, because a regulatory violation is typically evidence only of ordinary negligence, not gross negligence, see *Poppen v Tovey*, 256 Mich App

351, 358; 664 NW2d 269 (2003), and evidence of ordinary negligence does not create a factual question concerning gross negligence, *Maiden*, 461 Mich at 122-123.

Because defendants were not grossly negligent, they cannot be a proximate cause. Accordingly, the trial court properly determined that the gross negligence exception does not apply to defendants.

## III. CONCLUSION

We affirm the trial court's determination regarding the gross negligence exception; however, we reverse the trial court's order denying summary disposition as to defendant Scottdale RTC, and the remaining defendants because the trial court improperly held that plaintiff created a question of fact regarding whether the medical care or treatment exception applied. Whether the medical care or treatment exception applied is a question of law and absent a genuine issue of material fact, should be decided by the trial court. Accordingly, we remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Thomas C. Cameron
/s/ Allie Greenleaf Maldonado