STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF RUTH MCCOY, by HELEN GRAHAM, Personal Representative,

Plaintiff-Appellant,

v

CAPITAL AREA TRANSPORTATION AUTHORITY a/k/a CATA, and JOSE PIZANA,

Defendants-Appellees,

and

BURCHAM HILLS RETIREMENT CENTER II,

Defendant.

UNPUBLISHED
November 19, 2019

No. 345460
Ingham Circuit Court
LC No. 17-000365-NO

Before: BORRELLO, P.J., and K. F. KELLY and SERVITTO, JJ.

PER CURIAM.

Plaintiff, Estate of Ruth McCoy by Helen Graham, Personal Representative, appeals as of right the trial court's order denying reconsideration of the order granting summary disposition in favor of defendants, Capital Area Transportation Authority a/k/a CATA and Jose Pizana (Pizana), in this action for negligence and gross negligence arising from Pizana's transportation of the decedent[1] on the CATA shuttle bus where she fell from the wheelchair ramp and suffered injury. We affirm.

[1] Initially, the complaint was filed by Helen Graham as the conservator for Ruth McCoy, a protected person. However, McCoy died on August 2, 2017. The parties stipulated to amend the case caption to reflect that Graham, McCoy's daughter, was now the personal representative of McCoy's estate. Although plaintiff attributes the death to defendants' actions, the parties did not

I. BASIC FACTS AND PROCEDURAL HISTORY

In 2011, the decedent broke her leg in a fall in her bathroom. Following surgery, she was transferred to a rehabilitation facility. After she returned home, the decedent fell again because of a blood sugar issue. The family was unable to pick the decedent up because she was a "larger lady," and she went back into the hospital. Because the decedent continued to have blood sugar issues and her residence was no longer solely a senior citizen community, she moved into a nursing home.

The decedent was prescribed her own wheelchair, but during her time in the nursing home, she gained weight. Consequently, she was provided a different wheelchair by the nursing home's physical therapy department. The decedent used this wheelchair for three years before her fall.

Pizana worked for General Motors for 31 years, and during his employment, he participated in various programs, including safety training. After his retirement, he obtained a commercial driver's license and drove school buses for approximately 3 ½ years. Pizana began driving for CATA in 2015. He drove the Spec-Tran bus, a bus able to transport up to four wheelchairs. The procedure for transporting wheelchair passengers involved lowering a ramp, rolling the wheelchair onto the ramp, locking the wheels by applying the brakes, and placing the seat or safety belt across the ramp. The ramp was then raised, the wheelchair was placed in the bus, and the wheelchair was strapped to the floor.

At approximately 12:30 p.m. on November 20, 2016, a cold, but sunny day, Pizana drove the Spec-Tran bus to the decedent's church to pick her up and return her to the nursing home. Graham, the decedent's daughter, pushed her wheelchair to the bus where they met Pizana, a driver unfamiliar to them. Graham testified that Pizana had an "attitude," and she had to admonish him to lock the brakes on the decedent's wheelchair.[2] Pizana denied having an attitude and asserted that he complied with all safety procedures, including locking the brakes on the wheelchair and extending the safety belt across the ramp. The decedent was placed on the bus without incident, and Graham returned to the church.

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submit any medical records or death certificate, and the ultimate cause of death is not pertinent to the issues raised on appeal. We use "the decedent" to refer to McCoy.

[2] Graham gave contradictory testimony regarding whether she or Pizana ultimately secured the brakes on the wheelchair. Initially, she indicated that Pizana locked the brakes on the wheelchair. Later in her deposition, she indicated that she locked the brakes. This contradiction is not dispositive of the appeal. Additionally, there was a contradiction between Graham and Pizana regarding whether the footplate on the decedent's wheelchair interfered with the safety plate on the wheelchair ramp. That dispute is also not pertinent to our resolution of the issues.

Upon arriving at the nursing facility, Pizana testified that he noticed the decedent had urinated on the floor during transport.[3] He wheeled the decedent to the ramp and was certain that he locked the brakes on her wheelchair. Pizana also noted that the safety belt had remained secured during the drive to the nursing home. Finally, a safety plate extending off the ramp was raised at the time the decedent was wheeled to the ramp. Pizana proceeded down the stairs of the bus to lower the lift when he noticed that the wheelchair was moving. He attempted to reach for the decedent's wheelchair. Pizana observed that the decedent was initially stopped by the ramp safety belt, but she fell underneath it and to the ground, suffering injury. When he asked, the decedent complained of pain to her leg. Pizana went into the nursing home to obtain aid. He could not recall how the decedent landed on the ground and where the wheelchair was in proximity to the landing. He also could not identify a cause of the accident and testified that it would require him to speculate.

Lawrence Hodge was a fellow parishioner at the decedent's church and a CATA bus operator for six years. He was present at the church on the day of the accident, but did not witness the decedent's wheelchair being loaded onto the bus. A week after the incident, Graham complained to Hodge about the decedent's fall and the manner in which Pizana transported the decedent. Although the church had cameras that recorded, the video was taped over after 30 days. The church did not preserve the videotape because an incident had not occurred on church property. In his capacity as a CATA bus operator, Hodge had transported the decedent before and described the transport of a wheelchair passenger. He noted that the decedent had a problem keeping both of her feet on the wheelchair footplates and "often her left foot would be in between the two plates." Although Hodge acknowledged that a wheelchair may fall off the ramp if the wheels were not locked, he did not have an opinion about how the decedent's wheelchair fell off the ramp that day.

Although CATA employees could not identify the cause of the accident, plaintiff presented an affidavit from Roger C. Allen, a commercial transportation and safety consultant, which concluded that Pizana was responsible for the decedent's fall. The affidavit delineated the documents that Allen reviewed before concluding, in pertinent part, as follows:

> 9. It is my opinion that Defendant Pizana did not lock the brakes on Plaintiff's wheelchair and failed to have the safety strap properly in place on the date/time of the incident in question.
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> 10. It is my opinion that Defendant Pizana could not have properly locked Ms. McCoy's wheelchair brakes based on the evidence that Ms. McCoy's wheelchair rolled.
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> 11. It is my opinion that if Defendant Pizana had the passenger hooked up correctly, there is no way Ms. McCoy could have fallen out of her chair onto the

[3] Summary disposition was also granted to the nursing home, but it is not a party to this appeal. The documentary evidence submitted with that motion indicated that a nursing home aide observed a leaking water bottle that had soaked the decedent's purse.

ground. If she is correctly strapped into place, her own body will keep the wheel chair from moving any further.

* * *

13. Defendant Pizana failed to use ordinary care, meaning that degree of care that a company of ordinary prudence would use under the same or similar circumstances.

14. It is my opinion that the failures to comply with or even known industry minimum standards for safe commercial vehicle operations along with the other acts and omissions stated above by Defendant Pizana were a cause of the collision that occurred on November 11, 2016.

15. Defendant CAPITAL AREA TRANSPORTATION AUTHORITY ("CATA") failed to follow industry standards and properly qualify and train their drivers as it is a company's responsibility to have a driver training program in place. CATA had a duty to hire safe and prudent drivers in compliance with both State and Federal Regulations.

16. It is my opinion that failure to comply with both State and Federal Regulations by Defendant CATA were a cause of the collision that occurred on November 11, 2016.

As a result of the accident, plaintiff filed a complaint against these defendants alleging negligence and gross negligence. Specifically, plaintiff alleged that Pizana failed to follow proper wheelchair unloading safety procedures, negligently failed to engage the wheel locks on the wheelchair, and negligently failed to use the safety belt strap. Plaintiff acknowledged that CATA was a governmental entity and Pizana, its employee, but asserted that they were not entitled to immunity in light of the alleged negligent operation of the Spec-Tran bus by Pizana and gross negligence, citing MCL 691.1405 and MCL 691.1407.

Defendants moved for summary disposition of the claims, citing Pizana's certainty that he engaged the locks on the wheelchair, and therefore, the cause of the accident was premised on speculation and conjecture. Plaintiff asserted that she presented sufficient documentary evidence to create an issue for the jury in light of the circumstantial evidence of Graham's contact with Pizana when the decedent was loaded onto the bus before the accident occurred. Plaintiff also cited the affidavit by Allen that opined defendants failed to use ordinary care and failed to comply with industry standards. The trial court declined to address whether Pizana breached a duty, but rather held that the Allen affidavit failed to create a genuine issue of material fact regarding causation because the affidavit was "entirely conclusory" and contained "no facts" in support of his opinion. The trial court also held that the wheelchair's movement failed to automatically show that the wheelchair brakes were not engaged. Although plaintiff was not required to eliminate other possible causes, the trial court held that plaintiff failed to establish a logical sequence of cause and effect. Because the only evidence offered was speculative and conclusory, the trial court held that a negligence action could not be maintained. Further, because plaintiff could not establish negligence, the trial court concluded that there could be no

showing of gross negligence. The trial court denied plaintiff's motion for reconsideration of the summary disposition decision. From this ruling, plaintiff appeals.

II. STANDARD OF REVIEW

A trial court's ruling on a motion for summary disposition is de novo. *Bennett v Russell*, 322 Mich App 638, 642; 913 NW2d 364 (2018). Summary disposition is appropriate pursuant to MCR 2.116(C)(7) when the moving party is entitled to "immunity granted by law." When reviewing a motion for summary disposition premised on immunity, this Court examines the affidavits, depositions, admissions and other documentary evidence to determine whether the moving party is entitled to immunity as a matter of law. *Margaris v Genesee Co*, 324 Mich App 111, 115; 919 NW2d 659 (2018). The evidence is viewed in the light most favorable to the nonmoving party. *Id*.

Summary disposition is appropriate pursuant to MCR 2.116(C)(10) where there is "no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). When reviewing a motion for summary disposition challenged under MCR 2.116(C)(10), the court considers the affidavits, pleadings, depositions, admissions, and other admissible documentary evidence then filed in the action or submitted by the parties. MCR 2.116(G)(4), (G)(5); *Puetz v Spectrum Health Hosps*, 324 Mich App 51, 68; 919 NW2d 439 (2018).

We review the trial court's decision on a motion for reconsideration for an abuse of discretion. *St John Macomb Oakland Hosp v State Farm Mut Auto Ins Co*, 318 Mich App 256, 261; 896 NW2d 85 (2016). The trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Id*.

III. APPLICATION OF GOVERNMENTAL IMMUNITY

Pursuant to the government tort liability act (GTLA), MCL 691.1401 *et seq*, governmental agencies and their employees are entitled to immunity from tort liability when engaged in the exercise or discharge of a governmental function. *Ray v Swager*, 501 Mich 52, 62; 903 NW2d 366 (2017). A governmental employee has the burden of proving entitlement to immunity as an affirmative defense. *Id*. Plaintiffs asserted two theories of liability, negligence and gross negligence pursuant to MCL 691.1405 and MCL 691.1407.[4] MCL 691.1405 states:

> Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner, as defined in Act No. 300 of the Public Acts of 1949, being sections 257.1 to 257.923 of the Compiled Laws of 1948.

[4] Because plaintiff does not dispute that CATA constitutes a government agency subject to the immunity provisions and that Pizana is an employee, it was not addressed.

MCL 691.1407 provides, in pertinent part:

> (1) Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.
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> (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 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:
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> (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.
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> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
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> (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.
>
> (3) Subsection (2) does not alter the law of intentional torts as it existed before July 7, 1986.
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> * * *
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> (8) As used in this section:
>
> (a) "Gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

Thus, MCL 691.1405 holds governmental agencies responsible for injury and damage resulting from an employee's "negligent operation" of a motor vehicle. To establish a prima facie case of negligence, the burden of proof rests with the plaintiff to show that (1) the defendant owed a legal duty to the plaintiff; (2) the defendant breached the duty; (3) the plaintiff suffered damages; and (4) the defendant's breach was a proximate cause of the damages sustained by the plaintiff. *Hill v Sears, Roebuck & Co*, 492 Mich 651, 660; 822 NW2d 190 (2012).

With regard to proximate cause, the *Ray* Court held as follows:

> Proximate cause is an essential element of a negligence claim. It involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences. Proximate cause is distinct from cause in fact, also known as factual causation, which requires showing that but for the defendant's actions, the plaintiff's injury would not have occurred. Courts must not conflate these two concepts. We recognize that our own decisions have not always been perfectly clear on this topic given that we have used proximate cause both as a broader term referring to factual causation and legal causation together and as a narrower term referring only to legal causation. All this broader characterization recognizes, however, is that a court must find that the defendant's negligence was a cause in fact of the plaintiff's injuries before it can hold that the defendant's negligence was the proximate or legal cause of those injuries. In a negligence action, a plaintiff must establish both factual causation, i.e., the defendant's conduct in fact caused harm to the plaintiff, and legal causation, i.e., the harm caused to the plaintiff was the general kind of harm the defendant negligently risked. If factual causation cannot be established, then proximate cause, that is, legal causation, is no longer a relevant issue. [*Ray*, 501 Mich at 63-64 (citations and quotations omitted).]

To establish cause in fact, the plaintiff must present substantial evidence from which the jury may conclude that more likely than not, but for the defendant's action, the plaintiff's injuries would not have occurred. *Patrick v Turkelson*, 322 Mich App 595, 617; 913 NW2d 369 (2018). The plaintiff presents sufficient evidence of causation to create a question of fact for the jury in response to a motion for summary disposition if it establishes a logical sequence of cause and effect irrespective of the existence of other plausible theories that may have evidentiary support. *Id*. However, causation cannot be established by mere speculation. *Id*.

In *Skinner v Square D Co*, 445 Mich 153, 165-166; 516 NW2d 475 (1994), the Court delineated the threshold evidentiary standard necessary for a plaintiff to prove factual causation in negligence cases:

> The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.
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> The mere possibility that a defendant's negligence may have been the cause, either theoretical or conjectural, of an accident is not sufficient to establish a causal link between the two.
>
> There must be substantial evidence which forms a reasonable basis for the inference of negligence. There must be more than a mere possibility that unreasonable conduct of the defendant caused the injury. We cannot permit the jury to guess . . . . [Citations and quotations omitted.]

The plaintiff's proofs must amount to a reasonable likelihood of probability, not possibility. *Id*. Although the plaintiff's evidence need not negate all other possible causes, the evidence must exclude other reasonable hypotheses with fair certainty. *Id*. Thus, the proofs must lead to a conclusion which is more probable than any other hypothesis indicated by the evidence. *Id*. "However, if such evidence lends equal support to inconsistent conclusions or is equally consistent with contradictory hypotheses, negligence is not established." *Id*. (Citation omitted).

Irrespective of the duty owed by Pizana and whether or not he locked the brakes (the duty and breach elements of negligence), plaintiff must still show cause in fact, factual causation, which requires showing that but for the defendant's actions, the plaintiff's injury would not have occurred. *Ray*, 501 Mich 63.

Pursuant to the deposition of Graham, the decedent was prescribed a wheelchair, but she was a larger woman that had gained weight. Consequently, her nursing home gave her a wheelchair from the physical therapy department that she used for three years. It is unknown if the decedent gained additional weight during this three-year period. Furthermore, the decedent was not seated conventionally in the wheelchair, but rather her leg that was previously broken was straight according to Graham's testimony. Also, Hodge testified that the decedent would drop her leg from the footplate, and because of his history with her, he would place it back on the wheelchair's footplate.

The wheelchair was initially returned to the decedent, but Graham requested a new one and did not know what became of the wheelchair involved in the incident. Further, although Graham immediately requested an incident report upon being notified of the decedent's fall,[5] there is no indication that she requested that the church preserve the security footage of Pizana's pickup of the decedent from there. Hodge reported that Graham complained about Pizana's transport of the decedent to him the week after the incident, and the video would have been available at that time. Thus, Graham did not preserve the wheelchair as evidence to assess its functionality and the brakes or a video of Pizana's transport to determine whether he complied with safety policies and procedures of CATA. Although evidence of Pizana's negligence during the church pickup would not be dispositive of his conduct during the drop off at the nursing home, the wheelchair and the video recording from the church as well as the nursing home may have elevated plaintiff's proofs from possibility to reasonable likelihood of probability. See *Skinner*, 445 Mich at 166.

[5] Graham also indicated that there were security cameras at the nursing home, and an individual usually sat at the front desk. However, such evidence was not presented to the lower court. Additionally, plaintiff failed to secure affidavits or deposition testimony from the nursing home employees that moved the decedent following her fall. Because Pizana could not recall whether the decedent was still strapped to the wheelchair and where the wheelchair landed in relationship to her, the individuals that deemed it safe to move the decedent into the nursing home to keep her warm arguably could have shed light on this information. However, Pizana testified that he was certain that he secured the brakes because he drove the Spec-Tran bus for the majority of his shifts, and it was also his practice in his prior employment as a school bus driver.

Under the circumstances, plaintiff failed to present sufficient evidence to show factual causation, but rather, merely provided speculation and conjecture. The decedent had a wheelchair that was prescribed for her, but her weight gain caused the nursing home's physical therapy department to give her a different wheelchair. There is no evidence regarding whether the decedent had continued to gain weight and whether this wheelchair was ever evaluated to meet the needs of her weight as well as maintain the straightness of her previously broken leg. Further, it is unclear if the decedent's weight coupled with the placement of her one leg in a raised position caused her to become unbalanced under the circumstances. Although plaintiff and defendants represent that the decedent urinated on the bus, the report from the nursing home indicates a leaking water bottle was responsible for the wetness as evidenced by the decedent's wet purse. It is possible that the decedent may have tried to move to avoid the wetness of the water bottle or may have tried to move her foot that, according to Hodge, she commonly removed from the wheelchair's footplates. These adjustments may have caused her to become off balance and result in the wheelchair toppling over.

The affidavit by Allen does not create a genuine issue of material fact. An affidavit consisting of mere conclusory allegations that are devoid of facts is insufficient to demonstrate that there is no genuine issue of material fact for trial. See *Quinto v Cross & Peters Co*, 451 Mich 358, 371-372; 547 NW2d 817 (1999). The Allen affidavit concludes that Pizana failed to lock the brakes and the safety strap and that the wheelchair brakes could not have been locked because the wheelchair rolled. Further, he opined that if the decedent had been hooked up correctly, there was no way possible that she could have fallen out of the chair onto the ground and her own body weight would have kept the wheelchair from moving. However, the Allen affidavit failed to discuss the circumstances of the decedent's body weight and the maintenance of the wheelchair. Again, this was not a wheelchair that was prescribed and configured for the decedent, but rather, was used by her because she gained weight and could not use her own wheelchair anymore. Although she used this wheelchair for three years, there was no evidence regarding how much weight she gained over this period and whether the wheelchair received any maintenance. Therefore, if the decedent continued to gain weight, the question becomes whether this wheelchair was equipped to handle a person of her size, and whether the brakes would have been impacted as a result.

Additionally, Allen concluded that the decedent was not properly strapped into the wheelchair and would not have fallen out of the wheelchair if the strap was properly in place. However, Pizana could not recall how the decedent fell. Graham testified that the decedent was secured in the wheelchair when she left the nursing home, and her personal wheelchair straps were not adjusted. Again, the evidence of how the decedent fell was not presented. The nursing home staff assessed whether it was safe to transport the decedent into the facility to keep her warm and decided to use a blanket and perform a "fireman's lift" to bring her out of the cold. However, there is no indication that these individuals were deposed. Thus, Allen reached a conclusion that is inconsistent with the evidence available, and evidence from the nursing staff to

support his conclusion was not presented.[6] Under the circumstances, plaintiff did not meet the necessary evidentiary standard to demonstrate negligence, but relied on speculation and conjecture.

Alternatively, plaintiff alleged that Pizana was grossly negligent. Gross negligence means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. MCL 691.1407(8)(a). Even assuming that Pizana erroneously failed to lock the decedent's brakes, it does not rise to the level of "conduct so reckless as to demonstrate a substantial lack of concern for whether injury results." Pizana acknowledged that the wheelchair lift ramp had other safety features, including the metal plate that raised to prevent a wheelchair from rolling off and a safety belt which actually caught the decedent for a brief period of time. Additionally, the decedent was a large, heavy woman, and as Allen noted, her body weight should have stopped the wheelchair from rolling. Pizana testified that he attempted to reach the wheelchair to prevent the fall.

In summary, although plaintiff contends that Pizana's testimony that he locked the wheelchair brakes was merely self-serving, there is no evidence to contradict his assertion. Even if we assumed that Pizana failed to lock the brakes, plaintiff had to establish that this failure was the proximate cause of the decedent's injuries. However, there were alternate safety features on the ramp and safety belt to stop the wheelchair from rolling off the lift platform. Despite these safety features, the decedent was stopped by the safety belt, but nonetheless slipped under. It is unclear then how the accident occurred. However, the decedent was an overweight woman who gained additional weight and could no longer use the wheelchair prescribed for her. Therefore, the nursing home provided an alternative wheelchair for three years. There was no evidence regarding whether this wheelchair could handle a person of the decedent's weight and no evidence that the brakes on the wheelchair were maintained. Although Allen rendered an opinion that Pizana was at fault, he made conclusions without providing a foundation for the opinion. Therefore, the trial court properly granted summary disposition because plaintiff's theory of the case was premised on speculation and conjecture. Further, the trial court's denial of the motion for reconsideration did not constitute an abuse of discretion because the holding was within the range of reasonable and principled outcomes.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly
/s/ Deborah A. Servitto

[6] The incident occurred on November 20, 2016, the complaint was filed on May 15, 2017, and the decedent passed on August 2, 2017. There is no indication that a statement was ever taken from her, and thus, the only witness to the event was Pizana.