

STATE OF MICHIGAN
COURT OF APPEALS

NANCY D. REVELL, Personal Representative of
the Estate of WILLIAM ROBERT WENZ,
Deceased,

UNPUBLISHED
August 17, 2004

Plaintiff-Appellant,

v

D & J HOME CARE, INC.,

No. 249234
Macomb Circuit Court
LC No. 01-000017-NO

Defendant-Appellee.

Before: Neff, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition. We affirm.

I. Facts and Procedure

Decedent William Robert Wenz was a profoundly retarded thirty-four-year-old who, at the time of his death, was a resident of the D & J adult foster care group home, which was owned and operated by defendant. After an incident where Wenz threw a phone and some trophies out of two screen windows and damaged the screens, Joyce M. Lindsay, an administrator for defendant, gave a twenty-day notice that Wenz was going to be evicted from the home. Before this incident, Wenz had slapped, threatened, and swore at a few people during the approximately eighteen months that he had lived at the home, but Lindsay stated that these incidents had nothing to do with the decision to discharge him from the home.

Two days before Wenz's discharge date, residents of defendant's foster care home made a group outing to the City of Richmond's "Good Old Days Parade." Wenz requested that he attend the parade with the group and his request was granted. Amy Lindsay and Monique Holder, employees for defendant, acted as the residents' caretakers that day. Lindsay's boyfriend, Ed Laudebache, accompanied the group to the parade. When it came time to leave the parade, Holder asked Wenz to help carry a lawn chair back to the van. Wenz became upset and swung the chair at Holder, hitting her in the leg. Soon after, Wenz punched a mentally impaired resident of D & J in the face. Lindsay then approached and told Wenz that he would be riding home in the van with her. Wenz refused, swore at Lindsay, and hit her in the face. As a result, Laudebache became angry at Wenz and threatened him. Soon after, the police arrived.

Wenz was agitated and angry at Laudebache. One of the officers approached Wenz to calm him down and asked him what happened. In response, Wenz punched the officer in the face with his right fist, which was holding a plastic bag containing crayons and a ruler. Another officer attempted to restrain Wenz and took him to the ground. While falling, Wenz hit his head on a brick wall. Wenz suffered a small cut on his head from the fall and stated that he was dizzy, but otherwise appeared to be okay. When EMS arrived to take Wenz to the hospital, he fought against the EMTs and had to be restrained. At the hospital, doctors discovered that Wenz had a broken neck. A few weeks later, Wenz died from complications from the broken neck.

On January 2, 2001, plaintiff filed a complaint against several parties, including defendant.¹ Against defendant, plaintiff alleged that defendant was negligent when it breached its duty to decedent by failing to provide adequate supervision, protection, and personal care by placing him in a position of danger, and that defendant's negligence proximately caused decedent's death. The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10), concluding that any risk of harm caused by the conduct of defendant's staff was reasonable and that Wenz's death was caused by the unforeseeable conduct of the police officers.²

II. Analysis

A. Standard of Review

This Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition. *Rose v Nat'l Auction Group*, 466 Mich 453, 461; 646 NW2d 455 (2002). In reviewing a motion for summary disposition under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion. *Rose, supra* at 461. Summary disposition is appropriately granted if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

B. Discussion

Plaintiff first argues that the trial court erred in granting defendant's motion for summary disposition because defendant failed to properly support its motion with the required documentary evidence. We disagree. A motion for summary disposition under MCR 2.116(C)(10) must be supported by documentary evidence. MCR 2.116(G)(3)(b); *Patterson v*

¹ Plaintiff eventually settled her claims against Macomb County Emergency Medical Services, Richmond Lenox EMS (an emergency services corporation employed by Macomb County EMS), Pat Rosman (a paramedic employed by Richard Lenox EMS), and Brian M. Jasak (an emergency medical technician employed by Richard Lenox EMS). Only plaintiff's claims against defendant remained.

² The trial court did not address defendant's arguments that plaintiff's claims were barred by the two-year malpractice statute of limitations and were preempted by Michigan's statutes, rules, and regulations regarding adult foster care facilities.

Kleiman, 447 Mich 429, 432; 526 NW2d 879 (1994). Once the moving party meets its initial burden of supporting its position with documentary evidence, the burden shifts to the nonmoving party to establish that a genuine issue of disputed facts exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Here, defendant admits that it did not attach any affidavits, interrogatories, or deposition transcripts to its motion for summary disposition, but only attached the MDCIS Rules. However, after defendant filed its motion for summary disposition, but before plaintiff filed its response to defendant's motion and before the trial court ruled on defendant's motion, defendant filed Linsday's deposition with the trial court in support of its motion. Linsday's deposition set forth facts that served to negate elements of plaintiff's negligence claim. Therefore, defendant properly met its burden of supporting its position with documentary evidence.

Next, plaintiff argues that there is a genuine issue of material fact regarding whether defendant was negligent in failing to protect Wenz from injury and death. "To establish a prima facie case of negligence, a plaintiff must be able to prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Haliw v City of Sterling Heights*, 464 Mich 297, 309-310; 627 NW2d 581 (2001). Generally, there is no duty to aid or protect another unless a special relationship exists between the plaintiff and the defendant. *Hammack v Lutheran Social Services of Michigan*, 211 Mich App 1, 4; 535 NW2d 215 (1995). Here, defendant acknowledges that it had a special relationship with Wenz, and that it was entrusted with Wenz's protection. But defendant argues, and the trial court concluded, that defendant only had a duty to protect Wenz from foreseeable injury, and that Wenz's injury and ultimate resulting death was unforeseeable. " 'The questions of duty and proximate cause are interrelated because the question whether there is the requisite relationship, giving rise to a duty, and the question whether the cause is so significant and important to be regarded a proximate cause both depend in part on foreseeability.' " *Babula v Robertson*, 212 Mich App 45, 53; 536 NW2d 834 (1995), quoting *Moning v Alfonso*, 400 Mich 425, 439; 254 NW2d 759 (1977).

Liability for negligence does not attach unless the plaintiff establishes that the injury in question was proximately caused by the defendant's negligence. Proximate cause means such cause as operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the injuries would not have occurred. Ordinarily, the determination of proximate cause is left to the trier of fact, but if reasonable minds could not differ regarding the proximate cause of the plaintiff's injury, the court should rule as a matter of law. [*Babula, supra* at 54 (citations omitted).]

Here, Wenz's death was not directly caused by defendant, but instead by the police officer who knocked Wenz down and caused him to hit his head on a brick wall. Thus, the police officer's action was an intervening cause of Wenz's injury that led to his death. An intervening cause, one which actively operates to produce harm to another after the negligence of the defendant, breaks the chain of causation and constitutes a superseding cause which relieves the original actor of liability, unless it is found that the intervening act was reasonably foreseeable. *Meek v Dep't of Transportation*, 240 Mich App 105, 120; 610 NW2d 250 (2000); *McMillian v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985). Plaintiff argues that Wenz's death was foreseeable, because "[d]efendant was negligent in accepting William Wenz for profit,

since his disabilities were such that he was not a candidate for an adult group home, then taking him to a hectic public event, supervised by the boyfriend of a worker who was untrained, when William was in an agitated state and unable to handle the sensory overload of the crowd.” Plaintiff contends that the involvement of the police, as well as the actions of the police in knocking Wenz to the ground and fatally injuring him, were foreseeable consequences of defendant’s actions. We disagree.³

Plaintiff does not point to any evidence supporting her allegation that defendant had knowledge that Wenz had mental disabilities that made him ineligible to live in an adult foster care group home such as D & J. Although there were several incidents of Wenz yelling and slapping people in the approximately eighteen months he lived at defendant’s group home, these incidents were controlled by defendant’s staff and dealt with accordingly. Defendant’s staff had no reason to refuse Wenz’s request to go to the parade based on a belief that Wenz might act in a way that would cause the intervention of the police.⁴ Further, it was unforeseeable that Wenz would strike a police officer and then struggle with police, and that police would have to take him to the ground. Finally, it was unforeseeable that the police officer’s act of taking Wenz to the ground would cause an injury that would lead to Wenz’s death.

Defendant’s staff’s decision to allow Lauebache, who was Lindsay’s boyfriend, to attend the parade with the D & J residents did not cause Wenz’s injury and death to be foreseeable. There is no evidence that Wenz did not like Lauebache or became violent when strangers interacted with the D & J staff and residents. There is no indication that Lauebache caused Wenz to become violent on the day of the parade, as Wenz had already injured three people before Lauebache confronted him. The police officer did not physically engage Wenz because of his argument with Lauebache, but instead took Wenz to the ground after Wenz punched another officer in the face. Therefore, Lauebache’s actions did not cause the events that led to Wenz’s injury and death. Even if Wenz’s confrontation with Lauebache caused Wenz to become so angry that he punched one police officer and struggled with another officer, causing him to be taken to the ground and fatally injured, it was unforeseeable that merely allowing Lauebache to accompany the D & J group to the parade would lead to this tragic result.

³ Plaintiff also argues that the trial court erred in disregarding the opinion of her expert witness. However, although plaintiff quoted portions of her expert witness’s deposition in her response to defendant’s motion for summary disposition, she did not attach the witness’s deposition transcripts to her response brief. As plaintiff herself explained, a quotation of the purported content of a deposition is no substitute for the actual deposition transcript. *Reeves v Kmart Corp*, 229 Mich App 466, 481 n 7; 582 NW2d 841 (1998). Therefore, the trial court did not err in disregarding plaintiff’s expert’s purported deposition testimony.

⁴ In fact, defendant’s staff’s refusal to allow Wenz to attend the parade might have resulted in a violation of MDCIS Rules. MDCIS Rule 400.14303(4)(c) provides that defendant, as a licensee of an adult foster care group home, was required to provide “[a]n opportunity for community-based recreational activities.”

Because it was wholly unforeseeable that defendant's staff's decision to bring Wenz to the parade would lead to an injury that would cause his death, defendant's general duty of care to protect Wenz did not extend to the specific harm done in the immediate case. See *Babula, supra* at 51-52. Further, we conclude that reasonable minds could not differ with regard to whether the alleged negligence attributed to defendant was a proximate cause of Wenz's death. We conclude that the police officer's act of knocking defendant's head against a brick wall while trying to restrain him was an unforeseeable superceding cause of Wenz's injury that led to his death. Therefore, the trial court did not err in granting defendant's motion for summary disposition.

Affirmed.

/s/ Janet T. Neff

/s/ Michael R. Smolenski

/s/ Brian K. Zahra