

STATE OF MICHIGAN
COURT OF APPEALS

PAMELA AVERY, Personal Representative of the
ESTATE OF DEVIN JAMAAR BLEVINS,
Deceased,

UNPUBLISHED
March 22, 2005

Plaintiff-Appellee/Cross-Appellant,

v

No. 253068
Wayne Circuit Court
LC No. 02-227022-NI

CHARLES ROBERTS and EMMANULE
CALVAF,¹

Defendants-Appellants/Cross-
Appellees,

and

CITY OF DETROIT, BRIAN NICHOLS
and LAVISHA² WHITFIELD,

Defendants.

Before: Owens, P.J., and Sawyer and White, JJ.

PER CURIAM.

In this wrongful death action, defendants Charles Roberts and Emmanuel Calzada appeal as of right from the circuit court's order denying their motion for summary disposition under MCR 2.116(C)(7) premised on governmental immunity. Plaintiff cross appeals from the portion of the circuit court's order that granted defendants Brian Nichols and Lavishia Whitfield summary disposition on the basis that governmental immunity barred plaintiff's action. We affirm in part and reverse in part.

¹ The text of this opinion will employ the proper spelling of this codefendant's name, Emmanuel Calzada, reflected in the circuit court file.

² The circuit court pleadings and other documents spell this defendant's first name "Lavishia."

I

Plaintiff's decedent drowned in three or four feet of water, in the shallow end of a public swimming pool operated by defendant City of Detroit. On July 25, 2002, the day of the accident, the four individual defendants worked for the city as lifeguards at the Patton Park Recreation Center, where the drowning occurred. A fifth lifeguard, LaRhonda Tucker, also worked at the Patton Park pool on the day of the drowning, but was not named in plaintiff's action. At the time the decedent's body was discovered in the pool's shallow end, Whitfield had gone to use the bathroom, and Roberts and Calzada had left the park. Nichols was stationed at the deep end of the pool, and it is disputed whether Tucker had yet returned from the bathroom to substitute for Whitfield.

The individual defendants moved for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10). The circuit court granted the motion in part, finding that as a matter of law, defendants Nichols and Whitfield were entitled to governmental immunity under MCL 691.1407(2), because as city employees their actions did not constitute gross negligence that was the proximate cause of the decedent's death. Regarding defendants Roberts and Calzada, the court opined that a reasonable jury could find from the record that their actions amounted to grossly negligent conduct that was the proximate cause of the decedent's death, and accordingly denied the motion with respect to them.³

II

We review de novo the circuit court's summary disposition ruling. *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003).

Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by immunity granted by law. To survive such a motion, the plaintiff must allege facts justifying the application of an exception to governmental immunity. [The reviewing court] consider[s] all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them. [*Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001).]

We must consider the documentary evidence submitted in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *McDowell v Detroit*, 264 Mich App 337, 346; 690 NW2d 513 (2004).

The lifeguards' claim of entitlement to governmental immunity derives from MCL 691.1407(2), which at the time of the underlying events provided, in relevant part:

³ The circuit court also dismissed the city from the action because its operation of the public pool constituted a governmental function, and no exception to governmental immunity applied. The city's dismissal is not at issue in these appeals.

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 . . . is immune from tort liability for an injury to a person or damage to property caused by the officer. . . [or] employee . . . while in the course of employment or service . . . 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 officer's . . . [or] 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.

Thus, in the context of a (C)(7) motion for summary disposition by a governmental employee, the evidence must permit reasonable minds to conclude that the employee committed acts "so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Jackson v Saginaw Co*, 458 Mich 141, 150-151; 580 NW2d 870 (1998); see also *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999). "[E]vidence of ordinary negligence does not create a material question of fact concerning gross negligence." *Maiden, supra*.

The much less demanding standard of care – gross negligence – suggests, instead, almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks. It is as though, if an objective observer watched the actor, he could conclude, reasonably, that the actor simply did not care about the safety or welfare of those in his charge. [*Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004) (footnote omitted)].

Further, under MCL 691.1407(2)(c), to qualify as *the* proximate cause of injury, a governmental employee's conduct must amount to "the one most immediate, efficient, and direct cause of the injury or damage." *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000).⁴

B

We first address the claim of appellants Roberts and Calzada that their departure from the pool did not constitute an act of gross negligence. The evidence, viewed in a light most

⁴ In plaintiff's several appellate briefs, she maintains that Roberts, Calzada and Whitfield fail to qualify for immunity under MCL 691.1407(2)(a) because they had abandoned their assigned lifeguard posts and were not acting within the scope of their authority. Because this issue was not raised or addressed below, and it is not necessary to our decision, we will leave further exploration of the issue to the circuit court, if raised on remand.

favorable to plaintiff, established genuine issues of material fact regarding the issue of gross negligence.

Deposition testimony⁵ indicates that at times when five or six lifeguards were simultaneously present at the Patton Park pool, they would be posted as follows: one at the far deep end, one at the far shallow end, one at each side of the pool, one roving the pool area, and one at the first aid station near the pool.⁶ All of the lifeguards undisputedly had the responsibility to protect the safety of the pool occupants. While Roberts and Calzada claim that they left the pool with permission,⁷ after receiving a call from an elderly man who regularly swam at the pool, asking for help with his car, plaintiff presented evidence tending to show that the two were in fact behind the building smoking marijuana.

Viewing the facts in the light most favorable to plaintiff, we find that a reasonable juror could find that defendants' actions were so reckless as to demonstrate a substantial lack of concern for whether an injury results. Most important is the fact that the purpose of defendants' jobs was to make sure that those in the pool do not drown. In this context, a jury could find that in abandoning their posts, Roberts and Calzada demonstrated a substantial lack of concern for whether injury would result. Further, a factual issue exists as to why the Roberts and Calzada left their posts, and the resolution of that issue is also material to whether the actions of Roberts and Calzada constitute gross negligence.

C

Defendants also assert that their actions in their leaving their posts were not the one most immediate, efficient, and direct cause of the injury or damage. Rather, they assert, the proximate cause here was the inability of plaintiff's decedent to swim. We disagree. Under the circumstances that plaintiff's decedent was properly in the shallow end of the pool, where non-swimmers are allowed to be in the water, and that the job of a lifeguard is to respond when those in the pool are in trouble, we agree with plaintiff that while plaintiff's decedent's inability to swim might be the most immediate, efficient and direct cause of his distress, a reasonable jury

⁵ To the extent that plaintiff's briefs on appeal improperly refer to deposition excerpts not contained within the circuit court file, our analysis does not consider this testimony. *Nationwide Mutual Ins Co v Quality Builders, Inc*, 192 Mich App 643, 648; 482 NW2d 474 (1992). However, under the circumstance that defendants did not object below to the fact that although plaintiff quoted at length from various deposition transcripts, she did not attach the actual depositions to her brief in opposition to summary disposition, we have reviewed and taken into consideration deposition testimony that was quoted verbatim in plaintiff's brief filed in the circuit court.

⁶ On July 25, 2002, the sixth lifeguard who worked at Patton Park had accompanied park supervisor Karen Peltola on a visit to another park.

⁷ Plaintiff's brief refers to the deposition testimony of Robert Skates stating that Roberts did not ask him for permission to leave the premises and did not inform him that he was leaving. However, excerpts from Skates' deposition were not presented or provided below, and we will therefore not consider this testimony.

could conclude that the absence of the lifeguards was the most immediate, efficient and direct cause of his drowning.

II

On cross appeal, plaintiff argues that the court erred in granting defendants Whitfield and Nichols summary disposition, finding that they were not grossly negligent as a matter of law. We agree with respect to Whitfield, and disagree with respect to Nichols. While the facts as contended by Whitfield would not support a finding of gross negligence, plaintiff points to deposition testimony that contradicts the testimony relied on by Whitfield. It is undisputed that Whitfield was in the restroom at the time of the drowning. Whitfield and Tucker both testified that Tucker relieved Whitfield and assumed the position of lifeguard at the shallow end before Whitfield went to the restroom. However, two other witnesses testified that when the children went to Nichols for help, they saw no other lifeguards on duty. Tucker testified that about thirty seconds after she came back on deck, a boy approached her and told her that someone was drowning, and that she immediately jumped in the pool. She located the boy and brought him to the surface of the water, and then Nichols helped her bring him out of the water onto the pool deck, and the two administered CPR. Nichols testified that two boys came to him and told him that there was a boy at the bottom of the pool. He asked whether they were serious, and when they said “yes,” he ran to the shallow end and saw Tucker entering the pool motioning toward the boy that was submerged in the pool. She told him she needed help. He took five seconds to run to the operator to have her call 911, and then he went back to the pool, saw Tucker coming up with boy, and went to the side of the pool to help Tucker keep the boy’s neck stable and get him out of the pool. They then administered CPR. After three or four minutes of CPR, Whitfield returned and helped them. Whitfield testified that she went to the restroom at the front of the facility and was there for ten minutes. She also testified that when she returned, she saw Tucker pulling the boy out of the pool. She ran down to the pool, and the boy was already out of the water. When viewed in the light most favorable to plaintiff, there is a genuine issue whether Whitfield left for the restroom before Tucker assumed her post. Under the circumstances that Whitfield knew that Nichols was the only other lifeguard on duty, a reasonable jury could conclude that leaving the shallow end unattended, without even notifying Nichols, demonstrated a substantial lack of concern for whether an injury results. We thus conclude that the court erred in finding that Whitfield was not negligent as a matter of law.

Regarding Nichols, there is no evidence that he was grossly negligent. He was at his post at all times.

Affirmed in part and reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Helene N. White