

STATE OF MICHIGAN
COURT OF APPEALS

ESTATE OF WILLIAM T. BEALS, Deceased, by
THERESA BEALS, Personal Representative

Plaintiff-Appellee,

v

STATE OF MICHIGAN,

Defendant,

and

WILLIAM J. HARMON,

Defendant-Appellant.

UNPUBLISHED
July 1, 2014

No. 310231
Barry Circuit Court
LC No. 11-000045-NO

ESTATE OF WILLIAM T. BEALS, Deceased, by
THERESA BEALS, Personal Representative,

Plaintiff-Appellee,

v

STATE OF MICHIGAN,

Defendant-Appellant,

and

WILLIAM J. HARMON,

Defendant.

No. 310565
Barry Circuit Court
LC No. 11-000045-NO

Before: METER, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

In these consolidated cases arising from the drowning death of decedent William Beals, defendants William Harmon and the State of Michigan appeal from the trial court order denying their motions for summary disposition on grounds of statutory immunity. In docket number 310231, we affirm the trial court's denial of summary disposition as to plaintiff's claim of gross negligence against Harmon. In docket number 310565, we reverse the trial court's denial of summary disposition as to plaintiff's claim that the State violated the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq.*

I. FACTS

At the time of his death, 19-year-old Beals attended Michigan Career and Technical Institute (MCTI), a residential facility providing vocational and technical training to students with disabilities with the aim of preparing those students for employment. Beals, who had been diagnosed with autism and a learning disability, enrolled in the school on May 12, 2009. On May 19, 2009, Beals, described by his mother as "an accomplished swimmer," and approximately 24 other students were using the indoor swimming pool at the MCTI facility. During this open swim time, the students were supervised by Harmon, a certified lifeguard who was both an employee and student of MCTI. Students present that day later criticized Harmon's attention to swimmers, describing him as "distracted" and indicating that he spent much of his time talking to girls and playing with a football.

At some point during the open swim time, Beals swam to the deep end of the pool, submerged underwater, and never resurfaced under his own power. Harmon did not notice or respond to Beals's distress. After what is believed to be a period of approximately seven or eight minutes, another student in the pool recognized Beals's plight and, after unsuccessfully and repeatedly calling for Harmon's attention, brought Beals to the surface of the pool. Eventually Harmon heard students yelling for his assistance and he responded to the emergency, helping students remove Beals from the pool and attempting CPR. These efforts proved futile and Beals was declared dead upon his arrival at the hospital a short time later. An autopsy later determined that the cause of death was drowning and the manner of death was accidental.

II. DOCKET NUMBER 310231

In her suit against Harmon, plaintiff pleaded in avoidance of governmental immunity by alleging that Harmon acted with gross negligence that was the proximate cause of Beals's death. Harmon moved for summary disposition arguing that reasonable minds could not conclude that he was *the* proximate cause of Beals's death. We disagree.

We review *de novo* a trial court's grant or denial of summary disposition. *Poppen v Tovey*, 256 Mich App 351, 353; 664 NW2d 269 (2003). The applicability of governmental immunity is also a question of law reviewed *de novo*. *County Road Ass'n of Mich v Governor*, 287 Mich App 95, 117-118; 782 NW2d 784 (2010). Under MCR 2.116(C)(7), summary disposition is appropriate if a claim is barred by governmental immunity. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). When considering a motion under MCR 2.116(C)(7), any documentary evidence must be considered in a light most favorable to the

nonmoving party and the contents of a plaintiff's complaint are accepted as true unless contradicted by the moving party's documentation. *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008). "If the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a claim is barred by immunity is a question for the court to decide as a matter of law." *Poppen*, 256 Mich App at 354.

Relevant to Harmon's assertion of governmental immunity, "[a]n employee of a governmental agency acting within the scope of his or her authority is immune from tort liability unless the employee's conduct amounts to gross negligence that is the proximate cause of the injury." *Kendricks v Rehfield*, 270 Mich App 679, 682; 716 NW2d 623 (2006), citing MCL 691.1407(2). Here, no one contests whether Harmon acted within the scope of his authority as an employee of a governmental agency engaged in the exercise of a governmental function. Nor has Harmon challenged whether a jury could reasonably find that his conduct amounted to gross negligence. Instead, we are asked to determine if reasonable minds could differ as to whether Harmon's conduct was "the proximate cause" of Beals's drowning death. As explained by the Supreme Court in *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000), for an employee's conduct to be "the proximate cause" under MCL 691.1407(2), it must amount to "the one most immediate, efficient, and direct cause of the injury or damage."

Viewing the evidence in a light most favorable to plaintiff, the facts indicate that Beals, a capable swimmer, swam into the deep end of the pool. He went underwater and did not reemerge. There has been no suggestion that Beals violated pool rules or otherwise acted in a negligent manner so as to endanger his own life or cause his own death. Indeed, no explanation has been presented by the parties to explain precisely why Beals failed to reemerge under his own power. His distress was apparently not of his own making, nor that of any other identifiable cause. Instead, what is known is that Beals remained underwater for seven or eight minutes until observed by another student. In the interim, Harmon acted in a manner that could be found to be grossly negligent. There is evidence that, in contravention of Mich Admin Code R 325.2198(3)(b), Harmon was "distracted," talking to girls and throwing a ball in the air, when he should have been focused on monitoring the pool and responding to persons in distress. Based on this evidence, it would be reasonable to conclude that, because of Harmon's gross negligence, he failed to notice Beals's distress and failed to respond appropriately. That his failure to identify and respond to Beals's distress caused Beals's death could reasonably be concluded from expert testimony from plaintiff's expert Gerald M. Dworkin, "a professional Aquatics Safety and Water Rescue Consultant," who authored a preliminary report on the incident in which he opined that Beals's death "could have been and should have been easily prevented." In Dworkin's opinion, failures by MCTI and Harmon resulted "in the prolonged, unrecognized, and fatal submersion" of Beals. Dworkin further opined that timely rescue would have provided a window of opportunity "for a successful outcome with early CPR, early defibrillation, and early Advanced Cardiac Life Support." In short, there is evidence to indicate that proper intervention and rescue could have prevented Beals's death. Cf. *Love v Detroit*, 270 Mich App 563, 566; 716 NW2d 604 (2006) (holding firefighters were not the proximate cause of death where "no evidence established that the firefighters could have reached the victims or that, if firefighters had acted more aggressively, the victims would have been rescued"). As a lifeguard, Harmon had an obligation to provide that intervention and rescue. Given the evidence presented, reasonable minds could conclude that Harmon's failure to intervene constituted the one most

immediate, efficient, and direct cause of Beals's death. Because a question of fact thus remains, the trial court did not err by denying summary disposition under MCR 2.116(C)(7). See *Zwiers v Growney*, 286 Mich App 38, 42; 778 NW2d 81 (2009).

III. DOCKET NUMBER 310565

Plaintiff's suit against the State is based on her claim that the State violated decedent's rights under the PWDCRA. The trial court denied the state's motion for summary disposition.¹

Appellate review of a motion for summary disposition is de novo. *Poppen*, 256 Mich App at 353. A motion for summary disposition under MCR 2.116(C)(10) questions the factual support of the plaintiff's claim and should be granted, as a matter of law, where no genuine issue of material fact exists to warrant a trial. *Spiek v Mich Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). A genuine issue of material fact exists "when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). In reviewing a motion under MCR 2.116(C)(10), the pleadings, affidavits, depositions, admissions and other evidence submitted by the parties must be considered in a light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999); MCR 2.116(G)(5).

PWDCRA, formerly the Handicappers' Civil Rights Act, "protects individuals from discrimination based on their handicapped status." *Petzold v Borman's, Inc*, 241 Mich App 707, 713; 617 NW2d 394 (2000). Pursuant to MCL 37.1302(a), except where permitted by law, a person shall not:

Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation or public service because of a disability that is unrelated to the individual's ability to utilize and benefit from the goods, services, facilities, privileges, advantages, or accommodations

From the evidence presented, it appears undisputed that Beals had a diagnosis of autism and a learning disability, disabilities which did not impact his ability to enjoy and benefit from the pool facilities and services. See MCL 37.1103(d)(i)(B); MCL 37.1302(a). Further, MCTI opened the pool facilities to the public for community swim events, rendering it a place of public accommodation within the meaning of the statute. See MCL 37.1301(a). However, plaintiff has

¹ Plaintiff contends on appeal that the State did not challenge the sufficiency of her pleadings in its application for leave to appeal. Because we limited our grant of leave to appeal to issues raised in the State's application, plaintiff argues that we may not consider whether she failed to state a cause of action under MCR 2.116(C)(8). Our review of the State's application shows that the matter of plaintiff's pleadings was discussed in the State's argument. The matter, having been raised in the application, was thus not excluded by our order granting leave to appeal. MCR 7.205(D)(4). In any event, we may consider a question of law on appeal provided that, as here, all the facts necessary to resolve the issue have been presented. *Electrolines, Inc v Prudential Assurance Co, Ltd*, 260 Mich App 144, 151 n 1; 677 NW2d 874 (2003).

failed to provide prima facie evidence that the State denied Beals “full and equal enjoyment” of the facilities and services, or that any such alleged denial was “because of a disability.” MCL 37.1302(a). In opposing the State’s motion for summary disposition, plaintiff asserted that MCTI denied Beals full and equal access to the pool on two grounds: (1) that there were fewer lifeguards on duty during student swim times as opposed to times when the pool was open to the public and (2) that those lifeguards were student workers with disabilities as opposed to MCTI staff members who worked during community swim times. A review of the evidence presented in the trial court demonstrates, however, that plaintiff’s assertions in this regard have no basis in fact.

First, the only evidence offered to the trial court on the number of lifeguards at the pool came from Harmon and other MCTI employees, whose uncontroverted testimony plainly dispels any contention that MCTI denied Beals equal access to the services of lifeguards because of his disability. In particular, Harmon testified that there was typically one lifeguard on duty for student swim but two lifeguards at community swim events because, at a community swim, “you could get 75 people in the pool at night at a minimum.” Other employees confirmed that the number of lifeguards related directly to the number of swimmers anticipated in the pool. For instance, at student swim, for which it was “rare” that more than 20 students would avail themselves of the pool, only one lifeguard would be scheduled. Further, it was MCTI’s policy that “when we get, you know, between 25 and 30 students in there, that the lifeguard can call another lifeguard down.” This deposition testimony, the only evidence on the issue at hand, plainly demonstrates the number of lifeguards related to the relative number of swimmers at a given time. For student swims, the numbers were routinely small and there was one lifeguard scheduled with another to be called if the numbers exceeded 25 or 30. For community swim, MCTI expected higher numbers, 75 people “at a minimum,”² and for this reason there were usually two lifeguards scheduled to work. It appears that MCTI provided as good, if not better, a lifeguard ratio for students with disabilities than it did for the general public. Even viewing this evidence in a light most favorable to plaintiff, we conclude that, on this record, no reasonable jury could find that the State denied Beals the services of lifeguards equal to that provided to the general public, nor that any disparity was because of Beals’s disability. See MCL 37.1302(1).

Plaintiff also asserted that MCTI staffed student open swim events with student lifeguards with disabilities as compared to MCTI staff members who worked at the community swim times. Contrary to plaintiff’s arguments, nothing in evidence demonstrates a policy or practice of staffing student swim nights with student lifeguards and community swim events with non-student staff members. In any event, there has been no evidence to suggest that the student lifeguards were somehow less qualified than the non-student lifeguards. It appears uncontested that all the lifeguards – both staff and students – were certified lifeguards. Thus, MCTI furnished both the public and the student swimmers full and equal access to the services of a certified lifeguard while using the pool facility in compliance with the PWDCRA.

² Mich Admin Code R 325.2198(2) requires one lifeguard per 75 people in the swimming area, meaning MCTI would be required to provide a second lifeguard when those numbers exceed 75.

On appeal, plaintiff points to three additional safety measures that she now argues were denied to the students at MCTI during student swim. These arguments were not presented to the lower court and they are supported mainly with reference to materials not found in the lower court record. Consequently, these additional arguments need not be considered. See *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002); MCR 7.210(A)(1). We have nevertheless considered them, and conclude that they also lack a factual basis.

First, plaintiff asserts that during community swim a rope buoy delineated the deep end of the pool from the shallow end and that such a divider was not in place during student swim. A surveillance video included in the lower court file, depicting the student swim event at which Beals tragically drowned, shows a rope buoy dividing the pool, belying plaintiff's contention in this regard. Second, plaintiff alleges that swim-aptitude tests were administered during community swim time, but not during student swim time. However, in the testimony to which plaintiff cites, Harmon plainly indicates that tests were done at both student and community swim events at the discretion of the lifeguard when he or she believed a test was required. He explained, "You could do it with people you didn't feel comfortable with, you saw them swimming, said to do the test." He goes on to explain that he had only personally ever conducted one such test and that it happened to have occurred at the community swim. This in no way, however, demonstrates that swim-aptitude tests were denied to MCTI students with disabilities. Lastly, plaintiff alleges that during community swim time an MCTI staff member monitored the pool via a closed-circuit video feed but that such monitoring did not occur during student swim. The record reveals, however, that while employees testified that "sometimes" the camera feed in the dorm area showed the pool during community swim, they also testified that there "are different times when it's on the pool area" and it might be on during student swim as well, depending on what was going on elsewhere. The result was that sometimes the pool was monitored remotely and sometimes not, a fact true for both community and student swim. In other words, it was not the policy or practice of MCTI to provide video monitoring of community swim events or to deny the same to MCTI students because of their disabilities.

In sum, viewing the evidence in a light most favorable to plaintiff, reasonable minds could not conclude that Beals was denied full and equal access to MCTI's facilities and services – namely, pool access, lifeguards, and other accompanying safety measures. Because no question of material fact exists, the trial court erred by denying the State's motion for summary disposition under MCR 2.116(C)(10).

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Douglas B. Shapiro

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O'CONNELL, J. (*concurring in part and dissenting in part*).

The loss of a young person is devastating. In this case, the loss is particularly intense, because one must wonder whether any of a myriad of differences in the chain of events could have averted William Beals's death. Considering the devastating loss to Mr. Beals's family, the majority may be correct that the fair and just result would be to allow the family to pursue their claim against defendant Harmon. This Court, however, is bound by the limitations the Legislature has placed on lawsuits against governmental employees like defendant Harmon. Those limitations explicitly preclude the family's claim in this case. For that reason, I respectfully dissent from the majority's decision on defendant Harmon's summary disposition motion.

Our Legislature has precluded lawsuits against governmental employees except under very narrow circumstances defined by statute. MCL 691.1407. Further, our Supreme Court has held that we must strictly construe the statute that defines the circumstances under which lawsuits are permitted. *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000). This case requires us to apply one aspect of that statute, i.e., whether defendant Harmon's conduct was "*the proximate cause of the injury or damage.*" MCL 691.1407(2)(c) (emphasis added). To apply the statute, we must determine whether a reasonable person could find that defendant Harmon was "the one most immediate, efficient, and direct cause" of Mr. Beals's death. *Robinson*, 462 Mich at 462.

The undisputed facts establish that defendant Harmon was not the one most immediate, efficient, and direct cause of Mr. Beals's death. Indeed, the majority recognizes the four key facts of Mr. Beals's death: Mr. Beals was an accomplished swimmer; he swam to the deep end of the pool; he submerged; and he did not resurface. Harmon's actions had no effect on these events. Nonetheless, the majority contends that reasonable minds could differ regarding whether Harmon could have *intervened* and *prevented* Mr. Beals's death (majority opinion, unpub op at 5). In other words, the majority recognizes that Harmon's alleged failure to intervene was part of a chain of events that resulted in Mr. Beals's death. A chain of events, however, cannot logically be the *one most direct and immediate cause* of a death, and as such cannot be the source of tort liability against a governmental employee. See *LaMeau v Royal Oak*, 490 Mich 949; 805 NW2d 841 (2011) (adopting the reasoning of Talbot, J., dissenting, 298 Mich App 153, 194-195; 796 NW2d 106 (2010)). Because defendant Harmon's conduct cannot be deemed the proximate cause of Mr. Beals's death, the trial court should have granted Harmon's summary disposition motion under MCR 2.116(C)(7).

For these reasons, I respectfully dissent from the majority's decision to affirm the trial court's denial of defendant Harmon's motion for summary disposition. I concur with the majority's decision to reverse the trial court's denial of the State's motion for summary disposition under MCR 2.116(C)(10).

/s/ Peter D. O'Connell