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YVONNE HERRINGTON, as Personal Representative of the Estate of ROLAND HERRINGTON, Plaintiff-Appellant, v LIFECARE AMBULANCE SERVICE, JOHN SCOTT, CHRISTINA ROBINSON, MELISSA SCHALABACH, and DUANE MORAN, Defendants-Appellees.

No. 263583

COURT OF APPEALS OF MICHIGAN

2006 Mich. App. LEXIS 205

January 24, 2006, Decided

NOTICE: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY: Kalamazoo Circuit Court, LC No. 03-000021.

DISPOSITION: Affirmed.

JUDGES: Before: Zahra, P.J., and Murphy and Neff, JJ.

OPINION

PER CURIAM.

Plaintiff appeals the trial court's March, 2005, order granting defendant summary disposition, holding that plaintiff failed to allege defendant emergency medical technicians were grossly negligent under Michigan's Emergency Medical Services Act (EMSA), *MCL 333.20901, et seq.*, and thus were barred from recovery. We affirm.

I. Basic Facts and Procedure

Plaintiff's decedent was on a business trip in October, 2000, when, while staying at a hotel, he suffered an asthma attack. Decedent called the hotel's front desk, reported that he was having an asthma attack, and asked for directions to the nearest hospital. Hotel personnel called 911. Upon arrival, the defendant emergency medical technicians (EMTs) treated the decedent using a nebulizer, 100 percent oxygen in a bag valve mask, Epi-

nephrine, and inserting, first, an esophageal tracheal double lumen airway [*2] tube (combitube) into decedent and, that not working sufficiently to revive decedent, who had collapsed, inserting an endotracheal tube (ET). During the course of treatment, decedent was transported to Borgess Hospital where he was pronounced dead.

The trial court concluded that defendants were entitled to immunity under EMSA and granted them summary disposition. On appeal, plaintiff contends that the trial court erred in granting summary disposition because a question of fact exists as to whether defendants were grossly negligent in their treatment of decedent. We disagree.

II. Analysis**A. Standard of Review**

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Grahovac v Munising Twp*, 263 Mich. App. 589, 591; 689 N.W.2d 498 (2004). When deciding a motion under *MCR 2.116(C)(7)*, which tests whether a claim is barred because of immunity granted by law, this Court must take all well-pleaded allegations as true and construe them in favor of the nonmoving party. *Id.* "If the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a claim [*3] is barred by immunity is a question for the court to decide as a matter of law." *Id.*, quoting *Poppen v Tovey*, 256 Mich. App. 351, 354; 664 N.W.2d 269 (2003).

A motion under *MCR 2.116(C)(10)* tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich. 109, 120; 597 N.W.2d 817 (1999). In reviewing a court's decision on a motion for summary disposition under *MCR 2.116(C)(10)*, this Court must consider the pleadings, depositions, admissions and other documentary evidence in the light most favorable to the nonmoving party. *Morris & Doherty, PC v Lockwood*, 259 Mich. App. 38, 41-42; 672 N.W.2d 884 (2003). If the evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Franchino v Franchino*, 263 Mich. App. 172, 181; 687 N.W.2d 620 (2004). Where a motion for summary disposition is brought under both *MCR 2.116(C)(8)* and *(C)(10)*, but the parties and the trial court relied on matters outside the pleadings, as is the case here, *MCR 2.116(C)(10)* [*4] is the appropriate basis for review. *Driver v Hanley (After Remand)*, 226 Mich. App. 558, 562; 575 N.W.2d 31 (1997).

B. Statutory Immunity Under EMSA

The purposes of the EMSA are: (1) to provide for the uniform regulation of emergency medical services and (2) to limit emergency personnel's exposure to liability. *Jennings v Southwood*, 446 Mich. 125; 521 N.W.2d 230 (1994). Thus, the EMSA provides:

Unless an act or omission is the result of gross negligence or willful misconduct, the acts or omissions of a medical first responder, emergency medical technician, emergency medical technician specialist, paramedic, medical director of a medical control authority or his or her designee . . . while providing services to a patient outside a hospital . . . do not impose liability in the treatment of a patient on those individuals . . . [MCL 333.20965(1).]

For purposes of the EMSA, gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Jennings, supra* at 136. Moreover, evidence of ordinary negligence [*5] does not create a material question of fact regarding gross negligence. *Maiden, supra* at 122-123; *Costa v Community Emergency Medical Services, Inc*, 263 Mich. App. 572, 578; 689 N.W.2d 712 (2004). Thus, a plaintiff must come forward with specific facts to show reckless conduct on the part of the defendant. *Maiden, supra* at 123.

Plaintiff alleges that defendants were grossly negligent because they failed to follow the written protocol for airway management when they inserted an esophageal tracheal double lumen airway (combitube) before they attempted to insert an endotracheal tube (ET). However, Dr. William Fales, the medical director for emergency medical services for the Kalamazoo County Medical Control Authority, who helped formulate the regional protocols, testified that the protocol is a guideline and that paramedics are not expected to follow the procedures set forth in the protocol in sequential order. Rather, he stated that paramedics are permitted and encouraged to use professional judgment in determining when it is appropriate to implement a particular protocol. Moreover, he testified that the protocol does [*6] not prohibit paramedics from using the combitube as the primary airway.

Defendant EMT Scott testified that he chose to use the combitube instead of the ET because his partner, Duane Moran, was a basic EMT who was not authorized to intubate patients, because he could establish an airway more quickly with a combitube, because decedent had a short, muscular neck, and because decedent's mouth was clenched. Thus, because the evidence demonstrates that Scott chose to use the combitube based on his professional judgment and his assessment of the emergency, we conclude that Scott's decision to use the combitube rather than the ET did not constitute "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Jennings, supra* at 136.

1 The act of placing a tube inside a person's passageway.

Plaintiff also alleges that defendants were grossly negligent in failing to properly place the combitube a sufficient distance from decedent's teeth, causing the balloon [*7] on the combitube to rupture, failing to confirm the placement of the combitube by listening for lung and belly sounds, and failing to properly ventilate decedent during this emergency. However, Dr. Fales testified that it is not uncommon for a combitube to be punctured by a patient's teeth. Rather, according to Dr. Fales, it happens with some frequency. Moreover, Scott testified that he listened for lung sounds after placing the combitube and that he felt the bag to determine whether any air was going into decedent's lungs. Thus, we conclude that plaintiff's allegations amount, at most, to ordinary negligence because reasonable minds could not agree that defendants engaged in "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Jennings, supra* at 136. And, because evidence of ordinary negligence does not create a material question of fact concerning gross negligence, we

hold that the trial court did not err in granting summary disposition in favor of defendants. *Maiden, supra* at 122-123; *Costa, supra* at 578.

C. Testimony By Plaintiffs Witnesses

The trial court did not err in excluding [*8] the testimony of plaintiff's expert paramedic, John Grady, with regard to establishing gross negligence. In reviewing the evidence in the light most favorable to plaintiff, Grady's testimony established at most that defendants may have been negligent in their treatment of decedent. However, Grady's statement that defendants' acts or omissions amounted to gross negligence is not sufficient to create a question of fact as to gross negligence. As the Supreme Court stated in *Maiden*:

[The doctor] averred that defendant's performance was grossly negligent as defined by statute. However, the witness did not create a question of fact by merely opining that defendant's performance violated the statutory standard. Whether the statutory standard of care was violated is a legal conclusion. The opinion of an expert does not extend to legal conclusions. *Downie v Kent Products, Inc, 420 Mich. 197, 205; 362 N.W.2d 605 (1984)*. [*Maiden, supra* at 130 n 1.]

We also hold that the trial court did not err in excluding the testimony of Dr. Tucker Bierbaum. "A party offering the testimony of an expert witness must demonstrate the witness' [*9] knowledge of the applicable standard of care." *Bahr v Harper-Grace Hospitals, 448 Mich. 135, 141; 528 N.W.2d 170 (1995)*. An expert familiar with the standard of care in a community may testify concerning the standard of care in that community

even if the expert has not practiced in the community. *Id.* A trial court's decision regarding the qualification of an expert witness is reviewed for an abuse of discretion. *Id.*

Because local medical control authorities, which are organized and administered by local hospitals, govern the statewide emergency medical services system, the applicable standard of care in this case is a local standard of care. See *MCL 333.20918; Denboer v Lakola Medical Control Authority, 240 Mich App 498, 500-501; 618 N.W.2d 8 (2000)*. Plaintiff failed to present any evidence that Dr. Bierbaum was familiar with the standard of care for Kalamazoo County or a similar community. Thus, the trial court did not abuse its discretion when it held that Dr. Bierbaum was not qualified to testify regarding the local standard of care.

D. Vicarious Liability Of Defendant Ambulance Service

[*10] Generally, "a master is responsible for the wrongful acts of his servant committed while performing some duty within the scope of his employment." *Rogers v J B Hunt Transport, Inc, 466 Mich. 645, 651; 649 N.W.2d 23 (2002)*. However, because plaintiff failed to produce evidence of gross negligence on the part of the EMTs, Life Care Ambulance Service cannot be held vicariously liable for acts or omissions of its employees when recovery against the employees is precluded by statute.

Affirmed.

/s/ Brian K. Zahra

/s/ William B. Murphy

/s/ Janet T. Neff