

STATE OF MICHIGAN
COURT OF APPEALS

DENISE McNAIR, Individually and as Next Friend of
ARTURO J. McNAIR, Minor,

UNPUBLISHED
February 1, 2000

Plaintiff-Appellant,

v

No. 211426
Wayne Circuit Court
LC No. 98-801595-NO

CITY OF DETROIT,

Defendant-Appellee,

and

JOHN DOE FIREMAN,

Defendant.

Before: O’Connell, P.J., and Meter and T. G. Hicks*, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court’s order granting summary disposition to defendant City of Detroit (defendant) on the basis of governmental immunity. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Arturo McNair sustained serious injury when he went into cardiac arrest during the course of an asthma attack. Plaintiff alleges that one of defendant’s firefighters, whose identity is unknown, was first on the scene and instructed her to stop inhalation therapy on her son Arturo because he would administer pure oxygen to Arturo. However, the firefighter was unable to get his oxygen equipment working, and Arturo suffered permanent brain damage.

Plaintiff brought this action, alleging that the firefighter was grossly negligent and that defendant was vicariously liable for his gross negligence. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10), arguing that it was engaged in a governmental function and was

* Circuit judge, sitting on the Court of Appeals by assignment.

therefore not vicariously liable for the actions of a grossly negligent employee. The court granted defendant's motion.

Although the court did not specify under which subsection of the court rule it was granting defendant's motion, summary disposition on the basis of governmental immunity is appropriate under MCR 2.116(C)(7). We review the trial court's decision whether to grant a motion for summary disposition under MCR 2.116(C)(7) de novo to determine whether the moving party was entitled to judgment as a matter of law. *DeCaminada v Coopers & Lybrand LLP*, 232 Mich App 492, 496; 591 NW2d 364 (1998). We conclude that the trial court properly granted summary disposition in this case.

The governmental tort liability act (GTLA), MCL 691.1401 *et seq.*; MSA 3.996(101) *et seq.*, provides that government agencies are immune from tort liability while engaged in the exercise or discharge of a governmental function. MCL 691.1407; MSA 3.996(107). Plaintiff does not dispute that the alleged negligence arose out of the discharge of a governmental function. The emergency medical services act (EMSA), MCL 333.20901 *et seq.*; MSA 14.15(20901) *et seq.*, however, provides that governmental agencies are immune from tort liability from negligent acts or omissions of emergency medical personnel, except in cases of gross negligence. MCL 333.20965(1)(f); MSA 14.15(20965)(1)(f). In *Malcolm v East Detroit*, 437 Mich 132, 139; 468 NW2d 479 (1991), our Supreme Court held that the EMSA created an exception to the GTLA's broader grant of immunity to governmental units. However, the Court was interpreting a prior version of the EMSA that was repealed and replaced in 1990. The 1990 amended statute provides also that the EMSA "does not limit immunity from liability otherwise provided by law" for governmental agencies. MCL 333.20965(2); MSA 14.15(20965)(2).

Plaintiff acknowledges that the 1990 amendment to the EMSA has the effect of barring her action if defendant possesses "immunity from liability otherwise provided by law," such as the GTLA. However, plaintiff argues that defendant is not immune under the GTLA because the firefighter was grossly negligent. Plaintiff relies on MCL 691.1407(2); MSA 3.996(107)(2), which provides that employees of governmental agencies are immune from tort liability except in cases of gross negligence. However, plaintiff mistakenly attempts to apply § 1407(2) to the governmental agency itself, when the statute explicitly applies to *employees* of the governmental agency. The gross-negligence exception to immunity does not apply to governmental agencies. *Gracey v Wayne Co Clerk*, 213 Mich App 412, 420; 540 NW2d 710 (1995), overruled on other grounds in *American Transmissions, Inc v Attorney General*, 454 Mich 135, 143; 560 NW2d 50 (1997). Therefore, defendant possesses immunity under the GTLA because plaintiff's action arises out of the performance of a governmental function. The amended EMSA does not limit this immunity, and the trial court properly granted defendant's motion for summary disposition.

Affirmed.

/s/ Peter D. O'Connell

/s/ Patrick M. Meter

/s/ Timothy G. Hicks