

STATE OF MICHIGAN
COURT OF APPEALS

TEARRA LOFTON, as personal representative of
THE ESTATE OF MYCHAL MATTHEWS,
deceased,

Plaintiff-Appellant,

v

DETROIT BD OF ED, DETROIT PUBLIC
SCHOOLS, CLARA GHOSTONE and CHARLIE
SLAUGHTER,

Defendant-Appellees.

UNPUBLISHED
September 30, 2008

No. 276449
Wayne Circuit Court
LC No. 05-527010-NO

Before: Schuette, P.J., and Zahra and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendants summary disposition and dismissing plaintiff's claims for wrongful death and violations of 42 USC 1983. We affirm.

I. Basic Facts and Proceedings

This case arose following the October 23, 2003, death of Mychal Matthews (Mychal). At the time of his death, Mychal was 16 years old. Plaintiff Tearra Lofton, is Mychal's maternal half sister. Defendants Detroit Board of Education and Detroit Public Schools (collectively referred to in the singular as "the school board") employ defendant Clara Ghostone (Ghostone) as a school bus driver and defendant Charlie Slaughter (Slaughter) as a school bus attendant. Plaintiff claims that defendants' failure to properly care for Mychal while on the school bus caused his death.

On July 1, 1996, Mychal's biological mother placed him in voluntary foster care. Both Mychal's biological parents had their parental rights terminated on March 25, 1999. On July 1, 1997, Mychal was placed into the care of Marilyn Ward-Hogan (Marilyn) with whom he resided the balance of his life. Mychal suffered from severe maladies. He first suffered a seizure at 13 months. The seizures continued and were likely the etiology of his disabilities, which included a general seizure disorder, a development disability, severe intellectual impairment and autistic disorder. He displayed severe maladaptive behaviors.

Mychal's condition required that while traveling by auto or in his wheelchair he wear an appropriate chest harness to secure him to the seats. There were early reports (November 2001) that Mychal had learned to unfasten the harness and that Mychal was occasionally getting out of his harness on the school bus. One report indicated that Mychal's teacher, Wanda Fenderson, believed that the harness was too small. The problem was apparently corrected, however, as the record does not indicate further instances of Mychal unfastening the harness.

On June 6, 2003, Mychal went on a school field trip to Belle Isle. The school nurse reported that Mychal had a seizure during the day and displayed symptoms of being sick, i.e. runny nose and cough. He was sent home on a bus in which there was no attendant, only the driver, Muqarrabah Miyzann (Miyzann). When the bus arrived at Mychal's home, Miyzann discovered that Mychal was unresponsive. Miyzann averred that the harness did not transgress Mychal's throat and was snug under his arms. She also noted mucus coming from his mouth and nose.

Marilyn's son, Demetrius Slater (Slater), was working in the home and noticed the standing school bus in front of the home. He stepped outside and Miyzann told him Mychal was not breathing. He ran onto the bus and observed that Mychal "was like slouched down. The harness was way up here around his neck." He also indicated that Mychal's lower body had slid forward toward the front of the seat. Slater unlatched Mychal and pressed on his chest causing mucus to come from his mouth. Mychal started to respond. Rodney Seay was the first EMT to arrive and further cleared Mychal's airway. He indicated that he first saw Mychal "slumped over with a harness high, like it was choking him." He admitted, however, that he did not know whether the harness actually impeded Mychal's airway.

Marilyn's daughter, Katina Hogan, rode with Mychal to the hospital. She averred that, "his neck, his neck was red and he had like a, like a welt. It was probably maybe from ear to ear, it was red, and then almost looks the same as if it was like a rope or something around his neck." Marilyn also claimed that following the incident there were red marks on Mychal's neck. However, she admitted that Mychal would often have red marks on his neck from moving his helmet and sliding behavior. Marilyn acknowledged two school reports indicating red marks on Mychal's neck. Defendants also note that the examining physicians did not note any red marks and indicated a normal neck examination.

The next day, June 7, 2003, Wanda Fenderson, the school principal, Drexel Claytor (Claytor), and Marilyn discussed the incident. Fenderson and Claytor both averred that Marilyn had never told them that Mychal had choked on the harness. However, there was an agreement, at the least, that Mychal only ride a bus with an attendant. Claytor later wrote a memo stating that Mychal was not to be loaded on a bus without an attendant. Marilyn averred that she agreed with Claytor's suggestion that Mychal be placed on a "medically fragile bus," which has fewer students and a nurse. However, she admitted that she primarily wanted an attendant on the bus. Further, Mychal's Individualized Education Plan (IEP) was not amended to reflect any agreement to provide a "medically fragile bus," but merely provided in regard to special transportation needs, "bus curb to curb." Marilyn in writing requested only that "he is not to loading (sic) on the bus without a bus attendant!!!" Claytor also averred she did not seek to amend the IEP because Marilyn did not obtain a doctor's order to place Mychal on a "medically fragile bus," and that Marilyn did not complain about the transportation except her demand for

an attendant. Marilyn admitted she was not concerned that Mychal did not ride a “medically fragile bus,” only that there “was a bus attendant on there.”

Claytor averred that after the June 2003 incident she had heard “stories” that Mychal “was on the ground when he got home and the harness was up around his neck.” Claytor then took “photos to see if the harness was fitting properly.” She stated that she was not concerned by the photographs, indicating that, “the harness was not up around his neck and that wasn’t going to rise up, from my understanding and what I could see, to be around his neck.”

In the fall of 2003, Mychal began riding on school bus driven by defendant Clara Ghostone, an employee of the school district. She regularly drove eight to ten children to school, not all of which were special education students, but some of which, including Mychal, needed to be secured to their seats. Slaughter was an attendant on the bus and also an employee of the school district. Ghostone and Slaughter knew that Mychal had previously been found unresponsive on the bus and they knew he needed to be closely watched. When the bus would arrive, Mychal would already have the harness on and Slaughter would assist him onto the bus and to his seat. Then, Slaughter would buckle the harness to the seat, secure Mychal, and tell Ghostone to proceed.

Slaughter averred that on October 22, 2003, he believed the harness was properly secured on Mychal and he had no trouble seating or buckling Mychal to the seat. Ghostone made three more stops and Slaughter indicated that at each stop he observed the children and did not notice any problem. At the last stop, Slaughter seated a student, observed the children, sat down and told Ghostone to proceed. Ghostone, however, noticed in her rear view mirror that Mychal’s head was slumped down and requested Slaughter attend to him. Slaughter’s deposition testimony is inconsistent on this point, but he admitted that he checked on Mychal and believed he was okay, but that Ghostone still believed Mychal did not look right and that she then checked on Mychal.

Slaughter unbuckled Mychal and laid him down on the seat. Ghostone found no pulse, called the bus terminal and requested EMS. Slaughter and Ghostone were not trained to perform CPR and had no knowledge on how to treat a seizure. EMS arrived ten minutes later and took Mychal to the hospital. Mychal died the next day. The postmortem report concluded that Mychal “died of seizure disorder due to cerebral palsy,” and noted that “[t]here was no trauma to the body,” and that “[t]he manner of death was natural.”

On September 14, 2005, Tearra Lofton, Mychal’s maternal half sister and personal representative of his estate, filed the instant complaint. The complaint alleged that while on the school bus Mychal choked on his harness, stopped breathing and lost consciousness. Plaintiff alleged that defendants had a duty “to provide special care and assistance and supervision for the safety and wellbeing of Mychal.” Further, that defendants failed to provide this care which proximately resulted in Mychal’s death. Plaintiff sought damages under the wrongful death act. Plaintiff also alleged the school board had a “custom, policy or practice, and/or tolerated custom within the school district, relating to the failure to provide proper and required supervision of mentally and/or physically and/or emotionally disabled and impaired children on school buses.” Plaintiff sought damages under 42 USC 1983.

Defendants filed a motion for partial summary disposition, arguing that Mychal had no remaining heirs to inherit the proceeds of a wrongful death action through intestacy, and that plaintiff could not maintain a wrongful death action.¹ Before any decision on defendants' motion for partial summary disposition, defendants filed a "motion for summary disposition on all of plaintiff's claims." Defendants first claimed that plaintiff's claims were barred by governmental immunity. Defendants claimed that the school board was absolutely immune and that Ghostone's and Slaughter's actions did not amount to gross negligence in the performance of their hired duties. Defendants also claimed plaintiff failed to establish causation because Mychal died of natural causes. Defendants also requested dismissal of plaintiff's 42 USC 1983 claim. Defendants argued no special relationship existed because defendants did not impose or create Mychal's medical condition. Further, defendants claimed plaintiff failed to show a practice, policy or custom of reckless indifference to children having seizures on buses. Specifically, defendants maintained that their policy was to call for medical assistance in case of seizure, which was done in this case.

Plaintiff filed a response to defendants' motion for summary disposition on January 22, 2007. Plaintiff included an expert affidavit from a forensic scientist. The affiant contested defendant's claim that Mychal died of natural causes and, instead, concluded that the harness slipped around Mychal's neck and resulted in strangulation. In regard to the 42 USC 1983 claim, plaintiff argued a special relationship arose because the State was Mychal's guardian, Mychal required one-on-one care through his IEP, Claytor indicated that the control began over Mychal when he got on the bus, and that Mychal was restrained on the bus. Plaintiff also claimed the state-created danger exception applied because defendants took custody of Mychal and exposed him to substantial risk.

The trial court concluded, among other things, that plaintiff had not presented evidence that the individual defendants committed acts of gross negligence, as that term is defined by statute, so as to avoid application of governmental immunity. The trial court also dismissed plaintiff's claim under 42 USC 1983 for lack of factual and legal support.² This appeal ensued.

¹ Defendants argued that although plaintiff is Mychal's half-sister, their legal relationship was severed by the termination of Mychal's parents' parental rights. Defendants also assumed that Marcelo Matthews and Angelo Lindsey Lofton, later proven whole siblings, legal relationships' to Mychal were severed by the termination of Mychal's parents' parental rights. Plaintiff responded, arguing that the wrongful death act specifically allows the "deceased's spouse, children, descendants, parents, grandparents, brothers and sisters," to recover. MCL 600.2922(3)(a).

² The trial court also held that while Tearra could be appointed personal representative of Mychal's estate, Mychal had no legal heirs and, thus, plaintiff could not maintain a wrongful death action. In regard to causation, the trial court rejected the opinion of plaintiff's expert as conclusory.

II. Standard of Review

This Court reviews de novo a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(10); *Veenstra v Washtenaw Country Club*, 466 Mich 155; 159, 645 NW2d 643 (2002). In deciding the motion, the trial court must consider the affidavits, pleadings, depositions, admissions, and any other evidence submitted by the parties in a light most favorable to the nonmoving party. *Id.* at 539-540. Summary disposition should be granted if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 540; MCR 2.116(C)(10) and (G)(4). Further, statutory interpretation is a question of law that is considered de novo on appeal. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

III. Analysis

A. Gross Negligence

Plaintiff argues that Ghostone and Slaughter were grossly negligent in failing to closely observe Mychal. We disagree.

MCL 691.1407(2) provides:

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, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency 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, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

Gross negligence is not merely negligent conduct that results in grave consequences. Rather, gross negligence is statutorily defined. MCL 691.1407(7)(a) explains that, "[a]s used in this subdivision, 'gross negligence' means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." The definition of gross negligence in the governmental immunity act suggests a willful disregard of precautions or measures to attend to safety and a

singular disregard for substantial risks. *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004).

In regard to gross negligence the trial court held:

[even if the] young man choked on his harness . . . [a jury] could not conclude that the individual . . . defendants here, the bus driver and the attendant, were guilty of gross negligence, which is, of course, a complete disregard. The knowing of a known danger and complete disregard.

What is their gross negligence alleged to be? Well, they weren't trained in C.P.R. and they weren't trained in seizure disorders. Well, that's not their problem. If they weren't trained, they weren't trained.

All that does, if it does anything, it tends to exonerate them, that they didn't have the knowledge that should have been given in order to recognize the danger. That's not their fault. If it's anyone's, it's the School Board's. The School Board is immune.

Did the driver and the attendant see that the boy was choking and turn away and say oh, well, maybe he's choking but I'm not going to check into that, we'll just let him hang there until either he dies or recovers.

I'm exaggerating to make a point. That's what gross negligence is. Not the fact that they were sitting there and happened not to notice that the boy was in distress because he was choking on his harness. Of course, I'm assuming something that I've already said can't be established. [i.e., that Mychal choked on his harness.] But even if you could, that's not – their inattention that prevented them from seeing the boy in this unfortunate circumstance is not gross negligence. It's inattention at best.

We conclude that the trial court properly concluded that plaintiff failed to establish gross negligence. We agree with the learned trial judge that plaintiff has not shown a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks. “[E]vidence of ordinary negligence does not create a material question of fact concerning gross negligence.” *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999).

Here there can be no negligence ascribed to Ghostone where there is no dispute that she discovered Mychal slumped down in his seat and immediately told Slaughter to check on him. After finding that Mychal had no pulse, she properly called EMS services. Defendant's suggestion that she should have been trained to perform CPR is not evidence that Ghostone was grossly negligent.

In the light most favorable to plaintiff, there is evidence that Slaughter was not seated near enough to Mychal to carefully watch him. However, Slaughter's position on the bus was largely immaterial as Ghostone, the bus driver, was seated near him and noticed that Mychal had slumped down in his seat. At best, plaintiff has shown that Slaughter simply failed to notice that Mychal had slumped down in his seat. However, evidence that Slaughter failed to notice, for an

undetermined amount of time, that Mychal had slumped down in his seat is simply insufficient to establish gross negligence. The statutory definition of gross negligence, MCL 691.1407(7)(a), requires plaintiff to establish:

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 supra* at 90.

Here, there is no evidence of how much time passed between Slaughter last observing Mychal before Mychal slumped down in his seat. Thus, plaintiff cannot establish with any certainty the significance of Slaughter failing to notice Mychal slumped down in his seat. Further, other than beyond a moment of inattention, there is no evidence that Slaughter did not care about Mychal's safety or welfare. Slaughter's inaction simply does not support an inference of gross negligence.

B. 42 USC 1983

Plaintiff argues that the school board's acts or omissions constituted a state-created danger that caused Mychal's injury, and that a "special relationship" between Mychal and the school board gave rise to an affirmative duty on the part of the school board to protect Mychal's constitutional rights and that they violated that constitutional duty, which caused injury to Mychal.

42 USC 1983 provides in part that,

[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

In *DeShaney v Winnebago County Dep't of Social Servs*, 489 US 189, 201 n 9; 109 S Ct 998; 103 L Ed2d 249 (1989), the United States Supreme Court "recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." The Court then noted two exceptions to this rule. First, when the government places a person in custody, thereby preventing him from protecting himself, a special relationship is created. This special relationship places the government under a heightened duty to protect that person. Second, the government has a duty to protect under the "state-created danger theory" when the government either created the danger or took actions rendering the person more vulnerable to the danger.

In *Sargi v Kent City Bd of Educ*, 70 F3d 907 (6 CA, 1995), a young public school student collapsed of heart failure while on a school bus. School authorities knew that the child suffered from both a seizure disorder and "Q.T. Syndrome," a heart condition. The bus driver was unable to contact authorities because of broken equipment, but, "[b]elieving that decedent was having a

seizure, the school bus driver thought that medical attention was unnecessary and continued to take the other children who were on the bus to their homes.” *Id.* at 909. The child had fallen into a coma by the time the bus arrived at her home, and she died three days later.

Similar to the instant case, the plaintiff in *Sargi* claimed that the decedent was under the “physical custody and control of the school board through its agent such that her freedom to act was restricted.” *Id.* at 910. Further, the plaintiff in *Sargi* claimed that, “[t]hese restrictions, along with state law duties of care regarding pupil transportation and decedent’s medical condition . . . created a special relationship between decedent and the school district that gave rise to an affirmative duty on the part of the Board to protect the decedent from the consequences of a seizure while on board a school bus.” *Id.*

The *Sargi* court rejected the plaintiff’s arguments, concluding that the school board did not have a duty to “protect the decedent from the consequences of a seizure” on a school bus. Plaintiff attempts to distinguish *Sargi* on the basis that defendants restrained Mychal by buckling him to the seat. However, the record is clear that Marilyn suited Mychal in the harness and requested that Mychal be buckled to the seat to protect him from himself and protect others from his behavior. There is no real dispute that if Mychal were not buckled to the seat, he could cause himself and other children harm. Thus, plaintiff cannot maintain that defendants restrained Mychal in violation of his constitutional rights.

Also, plaintiff similarly argues that the school board’s knowledge of Mychal’s medical condition created a special relationship between Mychal and the school board. However, as stated in *Sargi, supra* at 910, citing *DeShaney, supra* at 201 n 9, “[a] special relationship can only arise when the state restrains an individual. Here, “[Mychal]’s medical condition and its debilitating effects . . . were not restrictions imposed or created by the state.” *Id.*

Plaintiff also argues that there existed a “special contract” between Mychal and the school board that required the school board provide Mychal one-on-one supervision. We reject plaintiff’s claim that the document entitled, “individualized education program team report,” is a contract. The IEP is merely an evaluation of Mychal’s performance and needs. Further, the report only mentions in regard to special transportation that Mychal receive curb to curb bus service. Nothing in the report even indicates that the school board was to provide Mychal with a personal aide on the bus.

Plaintiff also argues that *Sargi* is distinguishable because Mychal was a foster child. In this regard, foster care triggers some affirmative duties, including “the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes.” *Meador v Cabinet for Human Resources*, 902 F2d 474, 476-477 (CA 6, 1990). However, there is no basis to infer that defendant’s status as a foster child in any way alters defendants’ affirmative duty to protect Mychal on a school bus. This duty would be owed equally to all children. Accordingly, plaintiff has failed to establish a special relationship.

Plaintiff also claims that defendants adopted a practice, policy or custom of reckless indifference to children on school buses that caused Mychal’s death. However, defendant has failed to cite any practice, policy or custom of reckless indifference in regard to children on school buses. The only practice, policy or custom that can be inferred from the lower court record is one by which employees on school buses call for emergency medical services upon

discovering a child in medical distress. Plaintiff has failed to show how taking this action is tantamount to reckless indifference.

Last, we agree with defendants that plaintiff's unpreserved claim under the theory of state-created danger must fail. Defendants did not create the assumed danger of Mychal choking on a harness; rather, defendant's medical condition required that he wear a harness. Further, as discussed, defendants' actions in calling EMS services upon discovering an emergency on a school bus defeats plaintiff's allegation of state-created danger. Therefore, the trial court properly dismissed plaintiff's 42 USC 1983 claim.

III. Conclusion

Given our conclusion that plaintiff failed to establish gross negligence or plaintiff's 42 USC 1983, we need not address additional issues raised on appeal. Accordingly, we affirm the trial court's decision granting defendants summary disposition and dismissing plaintiff's complaint.

/s/ Bill Schuette

/s/ Brian K. Zahra

/s/ Donald S. Owens