STATE OF MICHIGAN

COURT OF APPEALS

MARIE DEAN, Personal Representative of the Estates of TALEIGHA MARIE DEAN, Deceased, AARON JOHN DEAN, Deceased, CRAIG LOGAN DEAN, Deceased, and EUGENE SYLVESTER, Deceased,	FOR PUBLICATION May 13, 2004 9:05 a.m.
Plaintiff-Appellee,	
v	No. 244627 Oakland Circuit Court
JEFFREY CHILDS and CHARTER TOWNSHIP OF ROYAL OAK,	LC No. 2001-029844-NO
Defendants-Appellants.	Official Reported Version

Before: Cooper, P.J., and Griffin and Borrello, JJ.

GRIFFIN, J. (*concurring in part and dissenting in part*.)

I agree with the majority that plaintiff's third amended complaint fails to state a claim on which relief can be granted under 42 USC 1983. *Canton v Harris*, 489 US 378; 109 S Ct 1197; 103 L Ed 2d 412 (1989); *DeShaney v Winnebago Co Dep't of Social Services*, 489 US 189; 109 S Ct 998; 103 L Ed 2d 249 (1989); *Monell v New York City Dep't of Social Services*, 436 US 658; 98 S Ct 2018; 56 L Ed 2d 611 (1978). Accordingly, I concur in the result of reversing the partial denial of defendant Charter Township of Royal Oak's motion for summary disposition. MCR 2.116(C)(7) and MCR 2.116(C)(8).[1]

[1] Plaintiff's third amended complaint is conclusory, only, in regard to the claim that defendant township acted with "deliberate indifference" in the training of its firefighters. Under our fact-based pleading rules, MCR 2.111(B)(1), plaintiff's factually unsupported conclusions are inadequate to state a claim on which relief can be granted. *Stann v Ford Motor Co*, 361 Mich 225, 232-233; 105 NW2d 20 (1960); *Binder v Consumers Power Co*, 77 Mich App 343, 346-347; 258 NW2d 221 (1977). Significantly, pursuant to the lower court's order of September 11,
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However, in regard to plaintiff's state law claims, I respectfully dissent. In my view, the township acting fire chief, defendant Jeffrey Childs, is immune from liability pursuant to MCL 691.1407(2) because the factual support for plaintiff's allegations is insufficient for a reasonable juror to conclude that the alleged gross negligence[2] of defendant Childs was "*the* proximate cause" of the deaths of plaintiff's decedents. MCR 2.116(C)(7) and MCR 2.116(C)(10).[3]

In *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000), our Supreme Court held that the phrase "the proximate cause" contained in the governmental immunity act, MCL 691.1407(2), means *the* proximate cause, not *a* proximate cause. Further, the *Robinson* Court defined "the proximate cause" as "the most immediate, efficient, and direct cause preceding an injury, not 'a proximate cause.'" *Id.* at 445-446.

The majority concludes, for purposes of withstanding the motion for summary disposition, that plaintiff presented sufficient documentary evidence that defendant Childs's gross negligence in fighting the fire may have been "the proximate cause" of the children's deaths, rather than the fire itself. I disagree.

In opposing the motion for summary disposition, plaintiff relied heavily on the affidavit of John Soave. In his affidavit, Soave stated that defendant Childs drove the fire engine to a fire hydrant approximately one block away from the burning house, although there was another fire hydrant located directly across the street from the fire scene. Further, "had Mr. Child's [sic] hooked up to that fire hydrant directly in front of the house, time would have been saved and I would likely have had more time to save the plaintiff's decedents." In his affidavit, Soave was also critical of the firefighting strategy employed by Childs once the fire hose was finally connected at the scene. In hindsight, Soave opined[4] that the fire suppression efforts directed at

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2001, plaintiff was afforded an opportunity to amend her complaint to cure this pleading deficiency.

[2] For purposes of his motion for summary disposition, defendant Childs concedes that his conduct may amount to gross negligence. Accordingly, the only issue on appeal regarding the governmental immunity statute is whether plaintiff provided sufficient documentary evidence for a reasonable trier of fact to conclude that defendant Childs's conduct was the proximate cause of the children's deaths. Defendant Childs does not argue that he is entitled to absolute tort immunity as the highest appointive executive official of the township fire department. MCL 691.1407(5). Cf. *Payton v Detroit*, 211 Mich App 375, 394; 536 NW2d 233 (1995), and *Meadows v Detroit*, 164 Mich App 418, 426-427; 418 NW2d 100 (1987).

[3] In opposing defendant's motion for summary disposition based on MCR 2.116(C)(7) and MCR 2.116(C)(8), plaintiff submitted documentary evidence that was relied upon by the trial court. Because the factual basis of plaintiff's complaint was ruled on by the lower court, we review the order as having been granted under MCR 2.116(C)(7) and MCR 2.116(C)(10). *Shirilla v Detroit*, 208 Mich App 434; 528 NW2d 763 (1995). See also *Fanc v Detroit Library Comm'r*, 465 Mich 68, 74; 631 NW2d 678 (2001).

[4] The qualifications of John Soave as an expert witness were never established.

the front of the house "caused the fire in the front of the house to be pushed towards the rear of the house where plaintiff's decedents were located." Finally, he speculated that "the actions of Jeffrey Childs increased the danger to the plaintiff's decedents and prevented me from rescuing the children."

After reviewing the facts in a light most favorable to plaintiff, I conclude "the most immediate, efficient, and direct cause," *Robinson, supra* at 459, of the tragic deaths of plaintiff's children was the fire itself,[5] not defendant's alleged gross negligence in fighting it. Plaintiff's original, amended, and second amended complaints, in effect, concede that the fire was the proximate cause of the deaths: "That on April 6, 2000, a fire occurred at the residence of plaintiff and decedents. *That the decedents died as a result of said fire*." (Emphasis added.)

Although the alleged gross negligence of defendant Childs in fighting the fire may have been a "substantial factor," *Brisboy v Fibreboard Corp*, 429 Mich 540, 547-548; 418 NW2d 650 (1988), in causing the deaths, in my view, its causal connection is insufficient to meet the governmental immunity threshold standard of "the" proximate cause.

In this regard, the present case bears similarities to *Kruger v White Lake Twp*, 250 Mich App 622; 648 NW2d 660 (2002), where our Court held, as a matter of law, that the alleged gross negligence of the township police department was not the proximate cause of a decedent's death. In *Kruger*, the plaintiff called the township police department and requested that her daughter be taken into custody because her daughter was intoxicated and could pose a danger to herself and others. Thereafter, the plaintiff's daughter was transported to the township police department and placed alone in a holding cell. She later escaped, fled from the police, and ran into heavy traffic on Highway M-59, where she was tragically struck and killed by an automobile. In affirming the grant of summary disposition in favor of the defendant police department, we held:

> In the instant case, there were several other more direct causes of Katherine's injuries than defendant officers' conduct, e.g., her escape and flight from the police station, her running onto M-59 and into traffic, and the unidentified driver hitting plaintiff's decedent. Any gross negligence on defendant officers' part is too remote to be "the" proximate cause of Katherine's injuries. As a result, the officers are immune from liability. [*Id.* at 627.]

See also *Poppen v Tovey*, 256 Mich App 351; 357 n 2; 664 NW2d 269 (2003), and *Curtis v City of Flint*, 253 Mich App 555; 655 NW2d 791 (2002).

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[5] If it were proven that an arsonist started the fire, the arsonist may be the proximate cause of the deaths.

For these reasons, I would hold that defendant Childs is immune from tort liability for plaintiff's state law claims pursuant to the governmental immunity statute, MCL 691.1407(2). The circuit court erred in denying the motion for summary disposition on this basis.[6]

I would remand for dismissal of all claims.

/s/ Richard Allen Griffin

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[6] I agree with the majority that, pursuant to *Beaudrie v Henderson*, 465 Mich 124; 631 NW2d 308 (2001), defendant Childs is not afforded common-law immunity under the public duty doctrine.