STATE OF MICHIGAN

COURT OF APPEALS

BRANDI CRAWFORD, Plaintiff-Appellant,	UNPUBLISHED October 12, 2017
v	No. 334172 Court of Claims
WESLEY PRIEM, Defendant-Appellee.	LC No. 15-000220-MZ

Before: SHAPIRO, P.J., and HOEKSTRA and M. J. KELLY, JJ.

PER CURIAM.

Plaintiff, Brandi Crawford, appeals by right the trial court's order dismissing her claim of gross negligence against defendant, Wesley Priem,[1] under MCR 2.116(C)(7). Priem argued that he was entitled to governmental immunity under the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. The trial court agreed, concluding that Crawford's claim failed because Priem did not owe her a legal duty and Priem's alleged gross negligence was not "the proximate cause" of Crawford's injury as required by MCL 691.1407(2)(c). For the reasons stated in this opinion, we affirm.

I. BASIC FACTS

In August 2012, Crawford purchased a house from the City of Kalamazoo. Because the house was built before 1940, shortly after moving into the house with her family, she applied with the Lead Safe Homes Program (LSHP), which conducted lead testing on the property and determined that it contained many lead hazards. Crawford's family underwent lead testing and her minor son tested positive for lead. In February 2013, Crawford and her family temporarily moved out of the house. It is undisputed that the City of Kalamazoo failed to comply with the mandated lead-paint disclosures. And, in April 2013, after lead was discovered on Crawford's property, the City entered into a settlement agreement with her.

[1] Priem is employed by the Michigan Department of Health and Human Services—formally the Michigan Department of Community Health—as the manager of the Healthy Homes Section.

Shortly after, Crawford withdrew from the LSHP because she believed that she no longer remained eligible for the program. Using a portion of the settlement proceeds, she temporarily moved out of the house and hired a lead abatement contractor, Midwest Training Services/Midwest Environmental Services/Midwest Builders (Midwest), to abate the lead hazards in the interior and exterior of the house. Crawford testified that Michael Fehler, an employee with Midwest, told her that she would receive a clearance after the home was done so that she would know that it was safe.

On May 23, 2013, in response to a tip or complaint, James Copeland, an industrial hygienist employed by the Southeastern Michigan Health Association (SEMHA), conducted an unannounced compliance inspection of Midwest's work at Crawford's property.[2] Copeland testified that during the inspection he went throughout the home and took photographs, and he stated that he found unsafe work practices. Subsequently, the investigation was transferred from Copeland to Sonya Adams. And, based on the evidence gathered by Copeland and Adams, the Healthy Homes Section issued a number of citations—signed by Priem—against Midwest.

On June 18, 2013—after Copeland inspected the property but before Priem issued the citations against Midwest—Crawford received a "final clearance" report prepared by AAA Lead Inspections, Inc. (AAA). The AAA final clearance was addressed to Fehler and Midwest, and it stated in part:

> Enclosed is a copy of the laboratory results from the clearance sampling I performed at [Crawford's house] on June 17, 2013. The evaluation was conducted in order to establish a final clearance on all renovation work performed on the residence.
>
> A visual inspection accompanied the dust wipe sampling for the clearance evaluation and appears that the proper measures were taken with the work performed and cleanup was conducted in an appropriate manner. . . .
>
> * * *
>
> *On completion of the final clearance evaluation, all of the samples and the visual inspection of the interior and exterior pass clearance*. This clearance letter represents the work performed at this time, and does not cover any additional renovation work or paint disturbance performed at the residence. [Emphasis added.]

Crawford testified that she moved back into the home within a couple days of receiving the AAA clearance report. She testified that work was still being conducted on the property, but said that she was told the lead abatement was finished. She stated that she then started noticing paint chips on the property's exterior. Further, when she questioned Fehler about the state

[2] Copeland testified that as an industrial hygienist his main focus "is to conduct inspections for compliance for lead-based paint regulations." His direct supervisor is Priem.

compliance officer's inspection, Fehler apparently told her that there had not been an inspection. Crawford testified that after that point, she started to question "everything from" Fehler, but that she continued to reside at the home because she did not have more money to move back to the hotel she had temporarily been residing at. Furthermore, she testified that she did not believe the AAA report was suspicious or that there was a lingering lead problem because "everyone said that it was fine." In particular, Crawford recounted that she showed the AAA report to the state compliance officer and that he stated he did not see anything wrong with it.

Based on the case events list generated by the Healthy Home Section, it appears that Crawford and Copeland discussed whether Midwest was following safety protocols. The notes provide in relevant part:

> Ms. Crawford contacted [Copeland]. After some discussion, Ms. Crawford stated that her and her son moved back in to the house on June 17, 2013, after Mike Fehler informed her that everything was cleaned up. Ms. Crawford further stated that Midwest was still working on the siding. [Copeland] asked if they were using plastic sheeting on the ground where they were siding. Ms. Crawford confirmed that they were using plastic and then asked what they were suppose [sic] to do with the plastic when they were done. [Copeland] informed Ms. Crawford that the plastic and debris should be wrapped and taped or bagged and put into the dumpster. The dumpster should be covered at the end of the day. Ms. Crawford stated that she has never seen the dumpster covered. Ms. Crawford then asked what other things should be done and stated that they put old wood in the dumpster unwrapped. [Copeland] informed Ms. Crawford that in order to do this, plastic should line the dumpster, runners should be placed from the work area to the dumpster and all around the dumpster to catch falling debris and then the dumpster should be covered at the end of the day. Ms. Crawford them [sic] asked if the contractors should wear booties or something when they come in the house. [Copeland] informed Ms. Crawford that some measures were required to prevent tracking of debris, whether it's the use of booties, plastic runners, tack pads or some other effective procedure to prevent tracking. [Copeland] asked Ms. Crawford if she had to cross the caution tape to get into the house. Ms. Crawford stated that the caution tape was not always up and she had to tell some people to leave the yard because the tape was not there. Ms. Crawford further stated that she had to cross the perimeter where the tape was to get inside the house and has put the caution tape back up herself.

Moreover, on August 31, 2013, Crawford emailed Copeland:

> I was wondering how the meeting went Wednesday. I found more pictures that my husband took of them not following the lead rules. . . .
>
> These pictures show why I have lead paint chips all over my yard now. I will testify, so keep in [sic] that in mind. They should have used plastic underneath the lead painted wood. I am very upset by all of this. . . .

However, Copeland testified that he did not notify Crawford that he found unsafe work practices. Further, Crawford testified that "the state compliance guy" told her that Midwest was under investigation, but that he would not tell her what the investigation was for because the file was still open.[3]

In any event, on September 6, 2013, AAA Lead Inspections sent an addendum to the lead clearance at Crawford's property to Fehler and Midwest. The letter indicated that there was a "misprint" on the original clearance report and that only an interior clearance was conducted on June 17, 2013. The letter again stated that the "interior work was done and the dust wipe results indicate that the cleaning passes the clearance criteria established by HUD and the EPA." Thereafter, on September 12, 2013, AAA sent a clearance letter to Crawford stating that a visual inspection of the house's exterior was conducted on September 10, 2013. The letter emphasized that the exterior did not pass clearance. Finally, on September 16, 2013, AAA sent another letter to Crawford, this time identifying "concerns with paint stabilization work," but nevertheless concluding that "all of the samples pass the clearance criteria except the window trough on the front porch."

On October 26, 2013, Crawford emailed Adams—the investigator who replaced Copeland—and stated:

> The reason I am so concerned with getting my file is I want to know specifically what you violated Midwest Training for doing wrong on my abatement. I am very concerned and noticed with my own eyes they were using unsafe work practices. Their employees were negligent in performing my abatement and them along with the clearance company they hired put my family at risk. My son had an elevated lead level when this started and I don't think anyone was taking this seriously. I am not sure if you guys have a copy so I will attach. When [Copeland] called me and told me they were under investigation and he was taking his own pictures that got me to notice my own things as well. After I received the clearance I was assured the abatement was done right by having a cleared project. Clearances are not provided until Lead abatement projects are complete. After I received it I did let the company go before they finished the rest of their work not related to lead in their contract. The purpose for the job was lead abatement. Their suggestions is [sic] what added other projects to it. I was very hurt and upset that this company did not follow laws or abatement procedures that they were trained in. I was also upset to find out a clearance was not done properly.
>
> My son's health is most important to me. I need to know what other precautions to take so that is why I need specifics on what wasn't done properly. I was also wondering if you could refer me to someone who does scratch testing to see if encapsulation was used of it that was noted in their record keeping that I

[3] In particular, on September 3, 2013, Copeland emailed Crawford that "[a]s the investigation is open, I cannot comment on the investigation."

> am sure you asked for. My family's health and safety is most important to me and I am hoping you and your department can cooperate with me to protect that.

Eventually, on December 5, 2013, Adams sent Crawford an email with the requested Midwest-case information, including detailed information on each citation that was issued to Midwest. Thereafter, on December 18, 2013, Crawford received a lead risk assessment from Analytical Testing & Consulting Services, Inc. that indicated that there were several locations in the home that "were found to contain lead paint above the current standard and found to be a current lead hazard[.]"

On October 27, 2015, Crawford filed her first amended complaint, alleging that Priem was grossly negligent based on his failure to warn her that the abatement was not being properly completed and that he was not entitled to governmental immunity. Priem moved for summary disposition, asserting that he owed no duty to Crawford. He also asserted that he was not grossly negligent, that his conduct was not "the proximate cause" of Crawford's injuries, and that Crawford's notice of intent was defective under MCL 600.6431. The trial court summarily dismissed the complaint after determining that Priem did not owe Crawford a common law or statutory duty to warn her about the unsafe work practices and that Priem was not the proximate cause of Crawford's injuries.[4]

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). Summary disposition under MR 2.116(C)(7) is appropriate "where the claim is barred by immunity." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

> When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them. If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact. If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court. However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate. [*Dextrom v Wexford Co*, 287 Mich App 406, 428-429; 789 NW2d 211 (2010).]

[4] The trial court did not address Priem's argument that Crawford's complaint failed to satisfy the notice requirements in MCL 600.6431, nor has that issue been raised on appeal. Accordingly, we will not address that argument further.

In addition, we review de novo the proper scope and application of Michigan's common law. *Grandberry-Lovette v Garascia*, 303 Mich App 566, 572-573, 844 NW2d 178 (2014), abrogated on other grounds by *Lowrey v LMPS Y LMPJ, Inc* 500 Mich 10 n 1; 890 NW2d 344 (2016). Finally, whether a defendant owes a plaintiff a duty is a question of law that this Court reviews de novo. *In re Certified Question From the Fourteenth Dist Court of Appeals of Texas*, 479 Mich 498, 504; 740 NW2d 206 (2007).

B. ANALYSIS

In order for Priem to be held liable for negligence, Crawford had to establish that he owed her a legal duty. *Roberts v Salmi*, 308 Mich App 605, 613; 866 NW2d 460 (2014); see also *Dykema v Gus Macker Enterprises, Inc*, 196 Mich App 6, 8; 492 NW2d 472 (1992) ("In order to assert negligence, a plaintiff must establish the existence of a duty owed by the defendant to the plaintiff."). "Duty is a legally recognized obligation to conform to a particular standard of conduct toward another." *Ross v Glaser*, 220 Mich App 183, 186; 559 NW2d 331 (1996). "Under Michigan common law, generally there is no duty for one person to aid or protect another, absent a special relationship based on control." *Chelik v Capitol Transport*, 313 Mich App 83, 91; 880 NW2d 350 (2015); see also *Bell & Hudson, PC v Buhl Realty Co*, 185 Mich App 714, 717; 462 NW2d 851, 853 (1990). Special relationships are generally those relationships in which "one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself." *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988). These special relationships include those between a common carrier and passengers, an innkeeper and guests, and an employer and employees. *Id*. "The duty to protect is imposed upon the person in control because he is in the best position to provide a place of safety." *Dykema*, 196 Mich App at 9. Several factors are considered when deciding whether a special relationship exists: "the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented." *Hill v Sears, Roebuck and Co*, 492 Mich 651, 661; 822 NW2d 190 (2012) (citation and quotation marks omitted). A court first considers the relationship between the parties and the foreseeability of the harm. *Id*. If either of these two factors is missing, there is no legal duty and the court need not consider the remaining factors. *Id*.

Here, Crawford is a homeowner who hired a lead abatement contractor who was investigated by the state while working on her property. Priem is the manager of the Healthy Homes Section of DHHS, i.e., the manager of the state agency investigating Midwest. There is no evidence that Crawford entrusted herself to the control and protection of Priem "with a consequent loss of control to protect" herself. See *Williams*, 429 Mich at 499. In addition, Priem was uninvolved in the purchase of the home, the discovery of lead in the home, Crawford's decision to hire Midwest, Crawford's decision to move back into the home after receiving a clearance from AAA stating that the interior and exterior of her home were safe, and Crawford's decision to stay in the home after personally observing that Midwest was using unsafe work practices. Therefore, on this record, the relationship between the parties is only tangential with no particular or notable interactions. There is, accordingly, no special relationship upon which to impose a common law duty to warn upon Priem.

In addition, Priem did not have a statutory duty to warn Crawford that Midwest was using unsafe work practices during its lead abatement on her property. Crawford contends that the duty arises from MCL 333.2251, which provides in part:

> (1) Upon a determination that an imminent danger to the health or lives of individuals exists in this state, *the director immediately shall inform the individuals affected by the imminent danger* and issue an order that shall be delivered to a person authorized to avoid, correct, or remove the imminent danger or be posted at or near the imminent danger. The order shall incorporate the director's findings and require immediate action necessary to avoid, correct, or remove the imminent danger. The order may specify action to be taken or prohibit the presence of individuals in locations or under conditions where the imminent danger exists, except individuals whose presence is necessary to avoid, correct, or remove the imminent danger. [emphasis added.]

This section, however, is inapplicable in this case. First, this statute imposes a duty to warn the director of DHHS, not on Priem, the manager of the Healthy Homes Section. Second, there is no evidence that there was determination that Crawford's health or life was in "imminent danger." The statute defines "imminent danger" as "a condition or practice exists that could reasonably be expected to cause death, disease, or serious physical harm immediately or before the imminence of the danger can be eliminated through enforcement procedures otherwise provided." MCL 333.2251(5)(b). If there was evidence that Priem knew that there was still lead in the house after Crawford moved back in, then he would have been aware of an imminent danger to Crawford's health. However, Crawford only moved back into the house after receiving a lead clearance report prepared by AAA that stated that the interior and exterior of the house had passed a lead clearance, and there is no evidence in the record that Priem knew or should have known that the lead clearance was improperly performed. Consequently, even if Priem had a duty under this statute (which he does not), there was no determination of imminent danger upon which to trigger that duty.

Because Priem did not have a statutory or common law or statutory duty to warn Crawford about the unsafe work practices, the trial court did not err by dismissing Crawford's complaint on this basis.

Additionally, even if Priem owed a duty to Crawford, he is still entitled to summary disposition because in order to overcome governmental immunity, Crawford must establish that Priem was grossly negligent and that his gross negligence was the proximate cause of her injuries. *Tarlea v Crabtree*, 263 Mich App 80, 89; 687 NW2d 333 (2004); MCL 691.1407(2). On this record, she cannot establish either gross negligence or causation.

The GTLA defines "gross negligence" as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a). Gross negligence has also "been characterized as a willful disregard of safety measures and a singular disregard for substantial risks." *Oliver v Smith*, 290 Mich App 678, 685; 810 NW2d 57 (2010). "[E]vidence of ordinary negligence does not create a material question of fact concerning gross negligence." *Maiden*, 461 Mich at, 122-123.

Assuming *arguendo* that Priem had a duty to warn Crawford that Midwest was using unsafe work practices, the trial court did not err by dismissing her complaint. The record does not reflect that Priem knew that Crawford's home had unsafe lead levels. Instead, Crawford provided a copy of the AAA lead clearance to Copeland, who indicated that he saw no reason to distrust the clearance report. Considering that there is no evidence that Priem (or his agency) should have suspected that the clearance was inaccurate, it therefore appears that, although Priem was aware that unsafe work practices were being used, there is no evidence with regard to whether he was aware of the lead hazards had been abated or not.[5] Stated differently, just because Priem knew that Midwest was using unsafe work practices did not mean that Midwest was guaranteed to fail to abate the lead hazards. And, given that there was a supposedly independent lead clearance indicating that the home was safe, it appears that the assumption that the home was lead safe was not unreasonable. In the absence of actual or constructive knowledge that the home was still contaminated by lead after AAA issued its clearance and Crawford moved back into the home, there is no basis to conclude that Priem engaged in conduct so reckless as to demonstrated a substantial lack of concern for whether an injury results. See MCL 691.1407(8)(a).

Moreover, Crawford cannot establish that Priem's conduct was "the proximate cause" of her injuries. In order to determine whether a defendant's conduct is "the proximate cause" of a plaintiff's injury or damages, this Court must engage in a two-step analysis. *Ray v Swagger*, ___ Mich ___, ___; ___ NW2d ___ (2017) (Docket No. 152723); slip op at 7-8. First, we must determine whether the defendant's conduct "was a cause in fact of the plaintiff's injuries . . . ." *Id*. at ___; slip op at 8 (citation and quotation marks omitted). Factual causation "requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred." *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). If a defendant's conduct is not a cause in fact of the plaintiff's injuries, then the plaintiff's case should be dismissed for lack of factual causation. *Ray*, ___ Mich at ___; slip op at 8 ("If factual causation cannot be established, then proximate cause, that is, legal causation, is no longer a relevant issue."

If, however, a defendant's conduct is a factual cause of the plaintiff's injuries, then we must determine whether the defendant's conduct was also the proximate or legal cause of the injuries. *Id*. at ___; slip op at 7-8. Such a determination requires the reviewing court to "assess

[5] There is evidence that Copeland was aware that a lead abatement contractor should not be hiring the lead clearance company. Specifically, Copeland testified that a lead abatement contractor is not supposed to have a relationship with the lead clearance company and that it would be against regulations for Midwest to arrange the lead clearance for a property where it was abating lead hazards. Furthermore, the AAA lead clearance report was addressed to Fehler and Midwest, not Crawford, which supports an inference that AAA was hired by Midwest. However, the mere fact that the report was shown to an employee who was supervised by Priem does not automatically lead to an inference that Priem knew and disregarded a substantial risk that the home was still contaminated by lead. Rather, evidence that Priem may have been aware that the clearance report may have been improperly *procured* is, at best, only evidence of ordinary negligence under the facts of this case.

foreseeability and the legal responsibility of the relevant actors to determine whether the conduct of a government actor, or some other person, was 'the proximate cause,' that is . . . 'the one most immediate, efficient, and direct cause' of the plaintiff's injuries." *Id*. at ___; slip op at 2. In assessing legal causation, i.e., proximate cause, the reviewing court must take care not to consider "nonhuman and natural forces, such as a fire," as the proximate cause of a plaintiff's injuries because "only a human actor's breach of a duty can be a proximate cause." *Id*. at ___; slip op at 16.[6] Further, the reviewing court must assess "the legal responsibility of the actors involved." *Id*. at ___; slip op at 15-16. In other words, before an individual can be considered a proximate cause, there must first be a "determination that the actor was negligent—that is, that the actor breached a duty." *Id*. at ___; slip op at 18. If there are multiple negligent parties, then the reviewing court must determine which negligent party's conduct was "*the* proximate cause." *Id*. at ___; slip op at 20. If, based on the evidence presented, reasonable minds could differ on the question of which actor's negligent conduct was the proximate cause of the plaintiff's injuries, then the trial court should not grant summary disposition on the basis that the plaintiff failed to establish "the proximate cause" of his or her injuries. *Id*. at ___; slip op at 20.

Here, Priem's action was the failure to warn Crawford that Midwest had used unsafe work practices. Based on the timeline of events, Copeland started investigating Midwest while Crawford was residing at a hotel. While the investigation was pending, Crawford received a clearance report from AAA stating that the interior and exterior of her home were essentially free of lead hazards. Relying on that report, Crawford moved back into the home. While at the home, she was contacted by Copeland, who notified her that Midwest was under investigation but refused to discuss the details of the investigation. Nevertheless, based on Crawford's testimony and other documentary evidence available in the lower court record, it is clear that Crawford became suspicious that Midwest was using unsafe work practices. In fact, in one correspondence, she indicated that she saw unsafe work practices with her own eyes. This leads to the reasonable inference that even if she was warned that Midwest was using unsafe work practices—something she personally observed—she would not have moved out of the home because she believed the home was lead-free based on the AAA report. In other words, Priem's decision to not warn her about the unsafe work practices had no effect on her injury because her decision to stay was based on a clearance report that Priem was completely uninvolved in. He did not hire AAA, he did not inspect its work, and based on the record before this Court he had no reason to suspect that the report was inaccurate. Further, although Priem may have had reason to suspect that the AAA report was improperly procured, that does not allow for an inference that he also knew the content of the clearance report was inaccurate and that there was still lead in the home. Because there is no factual causation, this Court need not reach the issue of whether Priem's action was "the proximate cause," i.e., the legal cause, of Crawford's

[6] Nonhuman and natural forces are still relevant to the extent that they "bear on the question of foreseeability, in that they may constitute superseding causes that relieve the actor of liability if the intervening force was not reasonably foreseeable." *Ray*, ___ Mich at ___; slip op at 16.

injuries. However, we note that because Priem did not owe a legal duty to Crawford, his conduct cannot be a proximate cause of Crawford's injuries. See *Ray*, ___ Mich at ___; slip op at 18.[7]

Affirmed. Priem, as the prevailing party, may tax costs. MCR 7.219(A).

/s/ Joel P. Hoekstra
/s/ Michael J. Kelly

[7] Crawford also argues on appeal that, as a matter of law, if an actor commits gross negligence, his actions automatically constitute "the proximate cause" of a plaintiff's injuries in cases where there are multiple causes of the plaintiff's injuries. However, even assuming *arguendo* that Crawford's argument has merit, given that there is no evidence of gross negligence, we decline to address the issue. Crawford further asserts that "the proximate cause" standard has been supplanted by the tort reform act. However, given that there are cases requiring a reviewing court to determine whether an actor's conduct is "the proximate cause" of a plaintiff's injuries in order to overcome governmental immunity, see, e.g., *Ray*, ___ Mich at ___, and given that we are bound by those decisions, see MCR 7.215(C) and *People v Strickland*, 293 Mich App 393, 402; 810 NW2d 660 (2011), we will not consider the merits of her argument.