STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF STEPHEN GREENE, by DOROTHY GREENE, Personal Representative,

Plaintiff-Appellee,

v

JOSHUA CHOROBA,

Defendant-Appellant,

and

RACHEL ROWELL,

Defendant.

UNPUBLISHED
May 20, 2021

No. 353109
Wayne Circuit Court
LC No. 19-002332-NO

Before: K. F. KELLY, P.J., and SERVITTO and LETICA, JJ.

PER CURIAM.

Defendant, Joshua Choroba, appeals as of right the trial court's order denying the parties' respective motions for summary disposition. We affirm.

In the early morning hours of March 2, 2018, decedent Stephen Greene was a patient at Heartland Health Care Center (Heartland) in Canton Charter Township. At approximately 5:00 a.m., a certified nursing assistant making his rounds discovered that Greene had no pulse or blood pressure. Greene was suffering a heart attack, and 911 calls were placed to get help for him; many of the 911 calls were unanswered by 911 operators.

Choroba, a public safety officer, was the only person in the dispatch room where 911 calls from Canton Charter Township are answered at the time the calls regarding Greene were placed. Choroba testified that he was not answering the calls because he could not hear the 911 line ringing. Someone had turned the volume all the way down on the speakers that alert dispatchers to an incoming 911 call. He denied being the one to turn down the volume, but he did not check the volume when logging-in as required by departmental policy.

The 911 call center has four work stations with computers that must be logged into, oriented in a circle in the center of the room. Defendant Rachel Rowell, also a public safety officer, had been in the dispatch room prior to Choroba and had worked at the same station Choroba later logged in to. When she returned to the dispatch room from another part of the facility, she saw Choroba with his feet on his desk, watching Facebook videos on his phone. Rowell then saw a light flashing on her computer screen indicating there was an incoming 911 call. Rowell answered the call, which was from Heartland; she dispatched firefighters and had Choroba dispatch police to Heartland. Choroba then noticed a queue of missed 911 calls on his work station computer and began calling back the numbers, discovering most of them were from Heartland employees calling about Greene. Choroba did not notice the visual prompts on his computer screen that 911 calls were coming in or the prompt alerting him to the missed calls piling up.

Rowell testified in her deposition that she did not turn down the volume on 911 calls that night. However, a Michigan State Police investigation into the incident led to Rowell's being charged and pleading no contest to willful neglect of duty by a public officer or employee, MCL 750.748.

This was not the first time Canton had problems with 911 operators turning off the volume on the 911 lines, and a supervisor had previously sent all 911 operators an email instructing them to ensure the volume was audible at the beginning of each shift. Prior to this instance, Choroba had also been disciplined for failing to log into the department's text to 911 system, which allows residents to text their emergencies to 911, and letting a call go unanswered for over three hours.

Plaintiff's complaint alleges that Rowell turned off the volume on the 911 ringers, and that Choroba and Rowell failed to perform their duties as 911 operators. Rowell settled with plaintiff for $6,900,000 in an agreement that includes a covenant that plaintiff will not try to collect from Rowell personally. Plaintiff thereafter filed a motion for summary disposition against Choroba on the issue of whether Choroba was grossly negligent in his actions the night Greene died. Choroba responded to the motion and filed a cross-motion for summary disposition arguing that he was not grossly negligent and that, at most, the claims against him demonstrated ordinary negligence—a claim on which he was protected by governmental immunity as a matter of law. The trial court denied both motions. The trial court stayed further proceedings pending the outcome of this appeal.

This Court reviews de novo a trial court's decision to deny summary disposition. *Bowden v Gannaway*, 310 Mich App 499, 503; 871 NW2d 893 (2015). Choroba brought his summary disposition motion under MCR 2.116(C)(7), (8), and (10). The trial court did not specify under what rule it denied Choroba's motion, but it appears the court relied on evidence from the record in its decision. The trial court's ruling was therefore premised upon MCR 2.116(C)(7) or (10) because a motion under MCR 2.116(C)(8) is based upon the pleadings alone. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). A motion for summary disposition claiming governmental immunity may be properly brought under MCR 2.116(C)(7). *Seldon v Suburban Mobility Auth for Regional Transp*, 297 Mich App 427, 432; 824 NW2d 318 (2012). A motion for summary disposition based on governmental immunity may also be brought under MCR 2.116(C)(10). See *MacDonald v Ottawa Co*, ___ Mich App ___; ___ NW2d ___ (2020), (Docket No. 350989); slip op at 2-5 (analyzing the defendant's governmental immunity claim under MCR 2.116(C)(10)).

Summary disposition under MCR 2.116(C)(7) is appropriate when the movant is entitled to governmental immunity as a matter of law. MCR 2.116(C)(7). "The applicability of governmental immunity and the statutory exceptions to immunity are also reviewed de novo on appeal." *Moraccini v Sterling Heights*, 296 Mich App 387, 391; 822 NW2d 799 (2012), citing *Snead v John Carlo, Inc*, 294 Mich App 343, 354; 813 NW2d 294 (2011). "The moving party may submit affidavits, depositions, admissions, or other documentary evidence in support of the motion if substantively admissible." *Moraccini*, 296 Mich App at 391. When considering a motion under MCR 2.116(C)(7), "a trial court should examine all documentary evidence submitted by the parties, accept all well-pleaded allegations as true, and construe all evidence and pleadings in the light most favorable to the nonmoving party." *McLain v Lansing Fire Dep't*, 309 Mich App 335, 340; 869 NW2d 645 (2015).

"In ruling on a motion for summary disposition under MCR 2.116(C)(10), 'a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party.' " *Oliver v Smith*, 290 Mich App 678, 683; 810 NW2d 57 (2010), quoting *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). "If the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a claim is barred by immunity is a question for the court to decide as a matter of law." *Poppen v Tovey*, 256 Mich App 351, 354; 664 NW2d 269 (2003). However, if there are material facts in dispute, "the court may not resolve factual disputes or determine credibility in ruling on a summary disposition motion." *Burkhardt v Bailey*, 260 Mich App 636, 647; 680 NW2d 453 (2004).

Choroba argues that the trial court erred when it denied his motion for summary disposition on the issue of whether he was grossly negligent and ruled there is a question of fact regarding whether he is protected by governmental immunity. We disagree.

The governmental tort liability act, MCL 691.1407 *et seq*., provides that public employees are immune from tort actions, with a few exceptions including gross negligence. Under the statute, a government employee has governmental immunity when the following conditions 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. [MCL 691.1407(2).]

It is not disputed that Choroba was working as a government employee in the discharge of a governmental function, so the only issue for review is whether he was grossly negligent.

"Gross negligence" is "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a). Gross negligence "has been characterized as a willful disregard of safety measures and a singular disregard for substantial risks." *Oliver*, 290 Mich App at 685. This Court has explained of the gross negligence standard that "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 v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004).

Choroba cites *Tarlea* for the proposition that an allegation that more precautions should have been taken is insufficient to create a question of fact regarding gross negligence. In *Tarlea*, the plaintiff teenager collapsed after running football conditioning drills. The plaintiff was diagnosed with, among other things, heat stroke and an infection, and died a week after his collapse. *Tarlea*, 263 Mich App at 84-87. This Court held that there was no question of fact regarding whether the defendants were grossly negligent because the drills were optional and players could take breaks and get water whenever they wanted, showing the defendants did not lack concern for their players' safety. *Id*. at 90 n 12. Regarding the suggestion more precautions could have been taken, the Court wrote:

> Simply alleging that an actor could have done more is insufficient under Michigan law, because, with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result. However, saying that a defendant could have taken additional precautions is insufficient to find ordinary negligence, much less recklessness. Even the most exacting standard of conduct, the negligence standard, does not require one to exhaust every conceivable precaution to be considered not negligent. [*Id*. at 90.]

This is not a case like *Tarlea* where, perhaps, the defendants could have done a little more to prevent injury. Rather, in this case, plaintiff presented evidence that Choroba was simply not performing his most basic job function as a 911 operator—answering 911 calls.

In the instant matter, the department had notified all 911 operators a month before the night Greene died to not turn down the volume on the 911 lines to an inaudible level and to check the volume at the beginning of each shift. Choroba did not check the volume of the speaker at the station where he was working, as required by departmental policy. And Choroba had previously been disciplined for failing to properly log into his work station and allowing a text to 911 to go unanswered for hours. According to Rowell, Choroba had his feet on his desk and was watching videos on Facebook while calls from Heartland were coming in. Choroba admitted he was on his phone while he was missing Heartland's calls. There is a visual prompt on the 911 work station computer screens when there is an incoming 911 call, but Choroba did not see the visual prompts because he was looking at his phone.

True, there is no evidence in the record that Choroba turned off the volume on the 911 speakers that night. According to Choroba's testimony, after going on a ride-along earlier that night, he took over his 911 station from Rowell and did not check the volume. And the email which had recently been sent to all 911 operators only referred to the problem of people turning down or off the 911 speakers, and it did not reference the departmental policy of checking speakers at the beginning of each shift. Nevertheless, from the evidence in the record, a reasonable jury could find Choroba, based on his actions that night, simply did not care about the safety or welfare of those who might be calling 911 and was thus liable for gross negligence. A reasonable jury could also find that his actions constituted nothing more than ordinary negligence. Therefore, a

question of material fact exists as to whether Choroba was grossly negligent and the trial court did not err in denying Choroba's motion.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Deborah A. Servitto
/s/ Anica Letica