STATE OF MICHIGAN

COURT OF APPEALS

LORRAINE HAYES,

Plaintiff-Appellant,

v

KIMBERLY LANGFORD,

Defendant-Appellee.

UNPUBLISHED
December 9, 2008

No. 280049
Wayne Circuit Court
LC No. 06-610484-NO

Before: Jansen, P.J., and O'Connell and Owens, JJ.

PER CURIAM.

Plaintiff appeals by right the circuit court's order granting defendant's second motion for summary disposition and dismissing plaintiff's remaining claim of intentional infliction of emotional distress. Plaintiff also appeals the circuit court's earlier order granting summary disposition for defendant on plaintiff's claim of gross negligence. We affirm in part, reverse in part, and remand for further proceedings on plaintiff's claim of intentional infliction of emotional distress.

I

Plaintiff was present in her home at 4554 Field Street, Detroit, at approximately 9:00 p.m. on January 12, 2005, when her "acquaintance"[1] Adrian King became verbally and physically abusive. Shortly after 9:00 p.m., King "pulled out a gun and shot [plaintiff] multiple times." Plaintiff used her cellular phone to call 911 at approximately 9:28 p.m. Plaintiff spoke with 911 operator Kimberly Langford (hereinafter "defendant"). Plaintiff told defendant that she had been shot and that she needed emergency medical attention. Defendant repeatedly insulted plaintiff, berated plaintiff, asked whether plaintiff was a "mental patient," and threatened plaintiff with legal repercussions for making a false 911 call. When no emergency responders arrived at her home, plaintiff again called 911 at approximately 9:53 p.m. Plaintiff again spoke to defendant, and defendant again insulted plaintiff, berated plaintiff, and asked whether plaintiff was a "mental patient." Emergency responders did not finally arrive at plaintiff's home until sometime

[1] King was either plaintiff's boyfriend or ex-boyfriend. It is not entirely clear from the record.

after 10:10 p.m. Plaintiff suffered neurological injuries and paralysis, as well as alleged psychiatric injuries and posttraumatic stress syndrome.

After further discovery, it was learned that despite having doubts about the genuineness and authenticity of plaintiff's calls, defendant had input the proper information into the 911 computer system and the police had been timely dispatched to the area of plaintiff's home. However, the police left the area before locating plaintiff's residence because they were reportedly unable to locate plaintiff's address. It was also learned through discovery that the police and emergency responders had subsequently returned to the area of plaintiff's residence only after plaintiff's son, who lived in Minnesota, independently contacted the Detroit police on his mother's behalf.

Plaintiff sued, setting forth a claim of gross negligence based on both her physical and alleged emotional injuries. She also set forth a claim of intentional infliction of emotional distress. In lieu of answering, defendant filed her first motion for summary disposition, challenging plaintiff's gross negligence claim. The circuit court granted summary disposition for defendant, ruling that the gross negligence claim was barred by the doctrine of governmental immunity. Defendant then filed a second motion for summary disposition, challenging the remaining intentional infliction of emotional distress claim. The circuit court granted summary disposition for defendant on this remaining claim, ruling that defendant's conduct during the two 911 calls, albeit inappropriate, had not been sufficiently extreme and outrageous to justify recovery.

II

Plaintiff argues that the circuit court erred by granting summary disposition in favor of defendant on that portion of her gross negligence claim that related to her physical injuries. We disagree.

A

Defendant's first motion for summary disposition was brought pursuant to MCR 2.116(C)(7) and (C)(8). We review de novo a circuit court's ruling on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition is properly granted under MCR 2.116(C)(7) when a claim is barred by governmental immunity. *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). "To survive such a motion, the plaintiff must allege facts justifying the application of an exception to governmental immunity." *Id.* In reviewing a (C)(7) motion, we consider the affidavits, depositions, admissions, and other documentary evidence to determine whether the defendant was in fact entitled to immunity as a matter of law. *Tarlea v Crabtree*, 263 Mich App 80, 87; 687 NW2d 333 (2004). We view the evidence in a light most favorable to the nonmoving party, and make all legitimate inferences in favor of the nonmoving party as well. *Jackson v Saginaw Co*, 458 Mich 141, 142; 580 NW2d 870 (1998).

The issue of proximate cause generally presents a question of fact for the jury. *Helmus v Dep't of Transportation*, 238 Mich App 250, 256; 604 NW2d 793 (1999). However, when the facts bearing on proximate cause are not disputed and reasonable minds could not differ, the

issue presents a question of law for the court. See *Robinson v Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000).

B

Governmental employees acting within the scope of their employment are immune from tort liability unless their conduct amounted to gross negligence. MCL 691.1407(2); *Poppen v Tovey*, 256 Mich App 351, 356; 664 NW2d 269 (2003). Gross negligence is statutorily defined as "conduct so reckless as to demonstrate a substantial lack of concern of whether an injury results." MCL 691.1407(7)(a); *Oliver v Smith*, 269 Mich App 560, 565; 715 NW2d 314 (2006).

For the purposes of her first motion for summary disposition, defendant conceded that her conduct during plaintiff's two 911 calls amounted to gross negligence. However, even when a government employee has been grossly negligent, that employee remains immune from tort liability unless his or her gross negligence was "the proximate cause of the injury or damage." MCL 691.1407(2)(c). As used in MCL 691.1407, "the phrase 'the proximate cause' contemplates *one* cause." *Robinson*, *supra* at 462 (emphasis in original). Thus, the proximate cause for purposes of governmental immunity is "[t]he one most immediate, efficient, and direct cause" preceding the injury or damage. *Id.*

The circuit court properly determined that defendant's grossly negligent conduct was not "[t]he one most immediate, efficient, and direct cause" preceding plaintiff's physical injuries. The unrefuted evidence in this case ultimately established that defendant properly input plaintiff's complaint and address into the 911 computer system, that police and emergency responders were timely dispatched to plaintiff's residence, but that the police failed to locate 4554 Field Street and left the area before finding plaintiff's home. This unrefuted evidence showed that the police—and not defendant—were responsible for the significant delay in reaching plaintiff's home and in providing medical attention to plaintiff. Indeed, a Detroit Police Department Activity Log for January 12, 2005, showed that police officers were dispatched to plaintiff's address at about 9:40 p.m., but that the officers failed to locate plaintiff's address after searching the area. The Activity Log showed that the officers did not again attempt to locate 4554 Field Street until 10:15 p.m., only after plaintiff's son had directly called the Detroit Police Department from Minnesota to report his mother's condition.

This evidence established that defendant input the proper information into the 911 system and properly dispatched the police to plaintiff's address in Detroit. It was the police—and not defendant—who failed to find the proper address and who then left the area when they could not locate plaintiff's home. The unrebutted documentary evidence established that defendant had relayed all necessary information to the police. The delay in responding to plaintiff's residence was not attributable to defendant but was instead attributable to the police. "The one most immediate, efficient, and direct cause" preceding plaintiff's physical injuries was either the shooting, itself, or the police officers' failure to timely locate plaintiff's residence. *Robinson*, *supra* at 462. There was quite simply no jury-submissible question of fact concerning whether defendant's actions were "the proximate cause" of plaintiff's physical injuries. MCL 691.1407(2)(c). Because defendant's actions were not *the* proximate cause of plaintiff's physical injuries, the circuit court properly granted summary disposition in favor of defendant on plaintiff's gross negligence claim as it related to plaintiff's physical injuries. MCR 2.116(C)(7).

III

Plaintiff also argues that the circuit court erred by granting summary disposition in favor of defendant on that portion of her gross negligence claim that related to her alleged emotional and mental injuries. Again, we disagree.

A

As noted previously, defendant's first motion for summary disposition was brought pursuant to MCR 2.116(C)(7) and (C)(8). We review de novo a circuit court's ruling on a motion for summary disposition. *Spiek, supra* at 337. A motion under MCR 2.116(C)(8) tests the legal sufficiency of the claim based on the pleadings alone, and should be granted only if no factual development could possibly justify recovery. *Beaudrie v Henderson*, 465 Mich 124, 129-130; 631 NW2d 308 (2001). The pleadings alone are considered and all well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmoving party. *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 417; 668 NW2d 199 (2003).

B

Michigan recognizes a cause of action of negligent infliction of emotional distress. See *Taylor v Kurapati*, 236 Mich App 315, 360; 600 NW2d 670 (1999). To prevail on a claim of negligent infliction of emotional distress, a plaintiff must allege and prove, *inter alia*, that the mental disturbance or shock negligently inflicted by the defendant has "result[ed] in actual physical harm." *Id.*; *Wargelin v Sisters of Mercy Health Corp*, 149 Mich App 75, 81; 385 NW2d 732 (1986). In the instant case, plaintiff has neither alleged nor offered any documentary evidence to establish that the emotional disturbance and shock inflicted by defendant resulted in "actual physical harm." Thus, if the portion of plaintiff's gross negligence claim at issue here had sounded in negligent infliction of emotional distress, it would have been insufficient as a matter of law to state a claim on which relief could be granted.

But the portion of plaintiff's gross negligence claim at issue here did *not* sound in negligent infliction of emotional distress. Indeed, this Court has never "appl[ied] the tort of negligent infliction of emotional distress beyond the situation where a plaintiff witnesses negligent injury to a third person and suffers mental disturbance as a result." *Duran v Detroit News, Inc*, 200 Mich App 622, 629; 504 NW2d 715 (1993). The tort of negligent infliction of emotional distress has been uniquely limited to "bystander recovery" actions. See *Nugent v Bauermeister*, 195 Mich App 158, 159; 489 NW2d 148 (1992); see also *Wargelin, supra* at 81. The portion of plaintiff's gross negligence claim based on plaintiff's alleged emotional and mental injuries simply does not fall within the category of "bystander recovery" actions.

Instead, the portion of plaintiff's gross negligence claim at issue here can more accurately be described as a claim for negligently inflicted mental anguish. A claim for emotional damages is not necessarily limited to emotional distress, but may also encompass mental anguish. *McClain v Univ of Michigan Bd of Regents*, 256 Mich App 492, 500; 665 NW2d 484 (2003). "[M]ental anguish differs from emotional distress and is properly compensated for in damages in a tort claim upon sufficient proof." *Id*. "Mental anguish" encompasses such damages as emotional pain and suffering, fright and shock, anxiety, denial of social pleasures and enjoyment, embarrassment, humiliation or mortification, and other appropriate damages. *Id*. at 498;

Ledbetter v Brown City Sav Bank, 141 Mich App 692, 703; 368 NW2d 257 (1985); see also M Civ JI 50.02.

It remains true that a party in Michigan may not recover for negligently inflicted mental anguish unless that mental anguish was parasitic to, was caused by, or was the cause of a separate and independent injury. Recovery for a negligently inflicted mental disturbance generally requires an "'accompanying physical injury, illness or other physical consequences,'" or "'some other independent basis for tort liability . . . .'" *Henry v Dow Chemical Co*, 473 Mich 63, 79 n 9; 701 NW2d 684 (2005), quoting Prosser & Keeton, Torts (5th ed), § 54, p 361. Stated another way, in order for a plaintiff to recover damages for mental anguish, there must generally be some separate, discrete injury that either caused or resulted from the mental disturbance. See *Ledbetter*, *supra* at 703 (observing that "[m]ental anguish damages" consist of "damages for mental pain and anxiety *which naturally flow from the injury*") (emphasis added); see also *Daley v LaCroix*, 384 Mich 4, 8; 179 NW2d 390 (1970) (observing that "[r]ecovery for mental disturbance caused by [a] defendant's negligence, but without accompanying physical injury or physical consequences or any independent basis for tort liability, has been generally denied").

We acknowledge that recovery for mental anguish is permitted when a "plaintiff's mental or emotional reactions were a necessary element in the chain of causation" of a separate injury, or when the resultant mental anguish is "parasitic" to a "negligently inflict[ed] . . . immediate physical injury.'" *Id.* at 8; see also *McClain*, *supra* at 498. However, in the case at bar, plaintiff has presented no evidence of a non-mental, independent injury caused by or resulting from defendant's allegedly negligent conduct. Because plaintiff's alleged mental anguish was not parasitic to, was not caused by, and was not the cause of a separate and independent injury, plaintiff's claim for negligently inflicted mental anguish was insufficient as a matter of law to justify recovery. See *Henry*, *supra* at 79 n 9. The circuit court properly granted summary disposition in favor of defendant on plaintiff's claim of gross negligence as it related to plaintiff's alleged emotional and mental injuries. MCR 2.116(C)(8).

IV

Plaintiff argues that the circuit court erred by granting summary disposition in favor of defendant on her claim of intentional infliction of emotional distress. We agree.

A

Defendant's second motion for summary disposition was brought pursuant to MCR 2.116(C)(7) and (C)(10). We review de novo a circuit court's ruling on a motion for summary disposition. *Spiek*, *supra* at 337. Summary disposition is properly granted under MCR 2.116(C)(7) when a claim is barred by governmental immunity. *Fane*, *supra* at 74. In contrast, a motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing a motion for summary disposition brought pursuant to subrule (C)(10), the pleadings, affidavits, depositions, admissions, and other admissible evidence must be considered in a light most favorable to the nonmoving party. *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007). Summary disposition is properly granted under (C)(10) when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

B

"As is often noted, our Supreme Court has not officially recognized the tort of intentional infliction of emotional distress." *VanVorous v Burmeister*, 262 Mich App 467, 481; 687 NW2d 132 (2004). However, this does not mean that the tort is not recognized in Michigan. This Court has accepted intentional infliction of emotional distress as a viable tort for more than twenty years. See *Rosenberg v Rosenberg Bros Special Account*, 134 Mich App 342, 350; 351 NW2d 563 (1984). Indeed, "this Court has adopted the definition of intentional infliction of emotional distress found in 1 Restatement Torts, 2d, § 46, p 71, which provides that '[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.'" *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 625; 403 NW2d 830 (1986).

"To establish a prima facie claim of intentional infliction of emotional distress, the plaintiff must present evidence of (1) the defendant's extreme and outrageous conduct, (2) the defendant's intent or recklessness, (3) causation, and (4) the severe emotional distress of the plaintiff." *Walsh v Taylor*, 263 Mich App 618, 634; 689 NW2d 506 (2004). The threshold for showing extreme and outrageous conduct is high. *Roberts v Automobile-Owners Ins Co*, 422 Mich 594, 603; 374 NW2d 905 (1985). The initial determination of whether the defendant's conduct could be reasonably deemed extreme and outrageous is for the trial court. *Sawabini v Desenberg*, 143 Mich App 373, 383; 372 NW2d 559 (1985). But "[w]here reasonable minds may differ, whether a defendant's conduct is so extreme and outrageous as to impose liability is a question for the jury." *Lewis v LeGrow*, 258 Mich App 175, 197; 670 NW2d 675 (2003); see also *Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335, 343; 497 NW2d 585 (1993).

Liability for intentional infliction of emotional distress attaches only when a plaintiff can demonstrate that the defendant's conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Id.* at 342. A defendant is not liable for "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Doe v Mills*, 212 Mich App 73, 91; 536 NW2d 824 (1995). Recovery is generally limited to instances "in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" *Id*.

As an initial matter, we note that intentional infliction of emotional distress is an intentional tort. *Graham v Ford*, 237 Mich App 670, 674; 604 NW2d 713 (1999). In general, governmental immunity does not protect government employees against liability for intentional torts.[2] *Lavey v Mills*, 248 Mich App 244, 257; 639 NW2d 261 (2001); *Sudul v Hamtramck*, 221 Mich App 455, 458; 562 NW2d 478 (1997). Accordingly, plaintiff's claim of intentional

[2] There is an exception to this general rule. See *VanVorous*, *supra* at 480 (observing that governmental immunity *does* apply "if the acts that are purportedly intentional torts were justified"). However, there was quite simply no justification for the conduct of defendant at issue in this case, and this exception is therefore inapplicable.

infliction of emotional distress was not subject to dismissal pursuant to MCR 2.116(C)(7) on the ground of governmental immunity.

In addition, it is not dispositive that defendant may not have actually intended to cause plaintiff's alleged emotional distress in this case. For purposes of the tort of intentional infliction of emotional distress, recklessness is equally as actionable as truly intentional conduct. *Walsh*, *supra* at 634; *Graham*, *supra* at 674; *Haverbush v Powelson*, 217 Mich App 228, 234; 551 NW2d 206 (1996). Even accepting as true defendant's sworn statement that she did not actually intend to cause plaintiff's emotional trauma, there still remained a jury-submissible question of fact concerning whether defendant acted recklessly in her treatment of plaintiff during the 911 calls.

We also find that there were jury-submissible questions of fact concerning whether defendant's statements and conduct during the two 911 calls were extreme and outrageous. *Lewis*, *supra* at 197. The circuit court granted summary disposition in favor of defendant because it believed that "no matter how outrageous, no matter how insulting, no matter how offensive, mere words are insufficient to support a claim of intentional infliction of emotional distress . . . ." But the circuit court's statement in this regard was not entirely accurate. It is true that "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities" are insufficient to create liability for intentional infliction of emotional distress. *Doe*, *supra* at 91. However, the extreme and outrageous character of a defendant's conduct may arise from the defendant's abuse of his or her position, which gives the defendant power to affect the plaintiff's interests. 1 Restatement Torts, 2d, § 46, comment *e*, p 74. Moreover, the extreme and outrageous character of a defendant's conduct may arise from the defendant's knowledge that the plaintiff "is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity." 1 Restatement Torts, 2d, § 46, comment *f*, p 75. At a minimum, there remained genuine issues of material fact in this case concerning whether defendant abused her position as a 911 operator to insult and berate plaintiff and to threaten plaintiff with possible legal repercussions for making a false 911 call. We conclude that there also remained a genuine issue of material fact concerning whether defendant disregarded any peculiar susceptibility to emotional distress which may have been created by plaintiff's despair and immediately life-threatening medical condition at the time the 911 calls were placed. In light of defendant's position of authority as a 911 operator, and considering defendant's actual knowledge of plaintiff's life-threatening medical condition, we must conclude that defendant's comments, remarks, and indignations likely would have aroused an average person's resentment against defendant, and would have led at least some reasonable individuals to exclaim, "Outrageous!" *Doe*, *supra* at 91.

Lastly, we conclude that there remained a genuine issue of material fact concerning whether defendant's reckless or intentional conduct actually caused plaintiff to suffer severe emotional distress. The affidavit of plaintiff's expert, Dr. Shiener, stated that defendant had suffered posttraumatic stress syndrome, cognitive disorders, and psychiatric illness. Shiener went on to aver that plaintiff "is suffering from and will continue to suffer from a serious psychiatric illness directly caused by the Defendant, Kimberly Langford who interrogated, threatened, and rebuffed [plaintiff] during the 911 phone calls," and that "[t]he conduct of the Defendant, Kimberly Langford, was the cause of [plaintiff's] psychiatric illness." Defendant

presented no contradictory evidence whatsoever to challenge or rebut the expert opinions offered in Dr. Shiener's affidavit.

In short, there remained several genuine factual disputes related to plaintiff's claim of intentional infliction of emotional distress that could not properly be decided in the context of defendant's motion for summary disposition. The circuit court erred by granting summary disposition in favor of defendant on this claim.

V

In light of our analysis above, we decline to address the remaining arguments raised by plaintiff on appeal.

Affirmed in part, reversed in part, and remanded for further proceedings on plaintiff's claim of intentional infliction of emotional distress. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Donald S. Owens

STATE OF MICHIGAN

COURT OF APPEALS

LORRAINE HAYES,

Plaintiff-Appellant,

v

KIMBERLY LANGFORD,

Defendant-Appellee.

UNPUBLISHED
December 9, 2008

No. 280049
Wayne Circuit Court
LC No. 06-610484-NO

Before: Jansen, P.J., and O'Connell and Owens, JJ.

O'CONNELL, J. (*concurring in part and dissenting in part*).

I concur with the resolution of the issues contained in parts I, II, and III of the majority opinion. I respectively dissent as to part IV. I would affirm the trial court's excellent decision in its entirety.

Assuming, without deciding, that Michigan recognizes the tort of intentional infliction of emotional distress, see *VanVorous v Burmeister*, 262 Mich App 467, 481; 687 NW2d 132 (2004), I concur with the trial court that plaintiff has failed to establish this offense.

In Michigan, it is clear that "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities" are insufficient to create liability for intentional infliction of emotional distress. *Doe v Mills*, 212 Mich App 73, 91; 536 NW2d 824 (1995). It is also equally true that the plaintiff must suffer bodily harm from the defendant's actions, and the proximate cause of the bodily harm must be the defendant's actions.[1]

[1] "[T]his Court has adopted the definition of intentional infliction of emotional distress found in 1 Restatement Torts, 2d, § 46, p 71, which provides that '[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.'" *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 625; 403 NW2d 830 (1986).

First, I do not believe that defendant's conduct was extreme or outrageous under the circumstances presented in this case. Defendant noted that when she worked as a 911 operator, she was expected not only to dispatch emergency personnel, but also to screen calls for pranksters and identify individuals who did not need immediate assistance in order to ensure that emergency personnel were dispatched first to areas of greatest and most immediate need. The audio recording of the 911 tape indicates that when plaintiff first called 911, she spoke to defendant in low, measured tones and did not convey panic or urgency in her voice, although the content of her statement, namely, that she had been shot in the head and was dying, might anticipate a more panicked and frenzied presentation of this information. Considering the nature of the information that plaintiff conveyed to defendant and the measured way in which she conveyed it, defendant did not act in an extreme or outrageous manner when she questioned plaintiff in a manner designed to determine whether plaintiff was actually injured, was lying, or was presenting information that she thought was true but that was factually inaccurate.

Further, plaintiff later admitted that she lied to defendant during the first 911 call. She acknowledged that after King shot her, and immediately before she called 911, she begged King to call for help or to give her a cellular telephone so she could do so, and she promised King that she would not reveal that he had shot her. She then lied to defendant during the call, claiming that her husband, not King, shot her in the head, and she did not provide detailed or consistent information regarding where she was hurt or the nature of the recent shooting. Considering that defendant was attempting to elicit information from an admittedly evasive caller and to determine the veracity of plaintiff's statements, neither the words defendant said nor the tone with which she said them raise her conduct during this call to a level that is extreme and outrageous.

If defendant had failed to dispatch emergency personnel to assist plaintiff, plaintiff might be able to claim that defendant's conduct was extreme and outrageous. However, the uncontroverted evidence indicates that defendant promptly dispatched emergency personnel to the address provided by plaintiff and that the call was given highest priority. Defendant performed the job she was hired to do—she promptly dispatched emergency personnel to assist plaintiff, and she continued to screen plaintiff's call to determine the nature of the situation. Plaintiff fails to present any evidence to indicate that defendant's conduct was extreme and outrageous.

Next, plaintiff fails to present evidence indicating that defendant's conduct caused plaintiff's subsequent emotional distress. Hayes never directly stated that defendant caused her emotional distress by berating her; instead, the evidence presented indicates that her feelings of emotional distress arose from the helplessness that she felt when she waited for emergency assistance. Further, although plaintiff submitted two affidavits and accompanying reports by Dr. Gerald A. Shiener, a clinical psychiatrist, to support her claim, his reports indicate that the delay in treatment was the primary cause of plaintiff's emotional distress. In fact, Shiener stated in his November 9, 2006, report,

> [Plaintiff's] productions and concerns are focused on her efforts to get help rather on [sic] the circumstances of the shooting. For this reason I would consider that the cause of her psychiatric illness is the frustration that she had in obtaining help, and the prolonged period of powerlessness and impotence and terror that she experienced while attempting to obtain help.

In his June 22, 2007, report, written after plaintiff's gross negligence claim was dismissed, Shiener stated,

> Her Posttraumatic Stress Disorder arises out of the experience of lying helpless on the floor, attempting to get help from Emergency Medical Services and being unable to do so . . . .

Although these statements could conceivably be used to establish that the police's failure to locate defendant's home was a proximate cause of her emotional distress because their alleged inaction caused plaintiff to wait for help for a significant period of time, defendant did not do anything to contribute to this failure to find plaintiff's home. Defendant's actions did not cause plaintiff to wait for emergency assistance and, therefore, are not a cause of the emotional trauma that plaintiff allegedly suffered as a result. Shiener's affidavits are self-serving and do not accurately reflect the information gathered in his reports, the statements by Hayes included in the record, or the factual circumstances surrounding the call.[2] Under these circumstances, I conclude that plaintiff failed to establish that defendant's conduct was a proximate cause of her emotional distress.

I would affirm the decision of the trial court.

/s/ Peter D. O'Connell

[2] In particular, it is surprising that Shiener fails to address another likely source of plaintiff's emotional distress, namely, that she was shot by her boyfriend and is now paralyzed. It would be surprising if this were not the proximate cause of plaintiff's present emotional distress.

Order

Michigan Supreme Court
Lansing, Michigan

July 7, 2009

Marilyn Kelly,
Chief Justice

138100

Michael F. Cavanagh
Elizabeth A. Weaver
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway,
Justices

LORRAINE HAYES,
Plaintiff-Appellee,

v

SC: 138100
COA: 280049
Wayne CC: 06-610484-NO

KIMBERLY LANGFORD,
Defendant-Appellant.
_____/

On order of the Court, the application for leave to appeal the December 9, 2008 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

MARKMAN, J. (*dissenting*).

Plaintiff sued defendant, a 911-emergency operator, for gross negligence and intentional infliction of emotional distress (IIED). Defendant answered plaintiff's 911 calls after plaintiff had been shot in the head and chest by her boyfriend, and plaintiff alleged under both claims that defendant's conduct during these calls caused plaintiff emotional injury. The trial court dismissed both claims on summary disposition, but the Court of Appeals reinstated plaintiff's IIED claim. Although plaintiff undoubtedly suffered in a disastrously tragic event, the only issue is whether plaintiff has established a prima facie claim of IIED. In my opinion, she has not, and thus the trial court properly dismissed this claim. Accordingly, I respectfully dissent from this Court's order to deny leave to appeal.

To establish a prima facie case for IIED, a plaintiff must show "(1) The defendant's extreme and outrageous conduct, (2) the defendant's intent or recklessness, (3) causation, and (4) the severe emotional distress of the plaintiff." *Walsh v Taylor*, 263 Mich App 618, 634 (2004); see also *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 602 (1985). For conduct to be "extreme and outrageous conduct," it must be

> so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. A defendant is not liable for mere

> insults, indignities, threats, annoyances, petty oppressions, or other trivialities. [*Lewis v LeGrow*, 258 Mich App 175, 196 (2003) (quotation marks and citations omitted).]

This understanding of "extreme and outrageous conduct" sets a high threshold for such conduct, which is not met by mere "inconsiderate and unkind" behavior. *Roberts*, 422 Mich at 603.

The record reveals no genuine factual dispute regarding defendant's conduct, because the two calls were recorded and transcribed. Rather, defendant's questions and tone during these calls reflect her initial disbelief that plaintiff's emergency was genuine. This disbelief arose out of plaintiff's overall demeanor and the nature of the situation she described, which, in my judgment, might conceivably raise questions with any 911 operator that the call was not genuine. When plaintiff first called 911, her voice did not reflect any sense of urgency or distress. Instead, plaintiff's voice remained measured and monotone throughout the call. Additionally, defendant's second question to plaintiff was, "Are you male or female?" to which plaintiff responded, "I'm a male; I'm a female." Defendant then asked, "Which one?" and plaintiff responded, "My name is Lorraine." Plaintiff then told defendant that the person who had shot her in the "temple" was still there standing next to her. When defendant asked plaintiff to put him on the phone, plaintiff was unable to do so. This brief sequence of events, lasting approximately one minute, explains defendant's disbelief that plaintiff had really been shot.

Because of her skepticism, defendant questioned the veracity of plaintiff's emergency. The manner in which defendant questioned plaintiff may arguably have been "inconsiderate and unkind," but it was not "outrageous in character." Defendant's job required her to make sure incoming calls were genuine in order to prevent unnecessary dispatches of limited emergency services, and defendant's continued disbelief that plaintiff had truly suffered a gunshot wound to the head was not altogether unreasonable. Defendant necessarily had to inquire about what she viewed as suspicious aspects of plaintiff's circumstances. In the end, defendant initiated emergency services to the address provided by plaintiff after only a few seconds of delay.[1]

---

[1] Unfortunately, emergency services proved slow in responding, because plaintiff had called from a cell phone, which does not allow the 911 system to generate a street address, and the police had difficulty locating plaintiff's home because the addresses in her neighborhood were handwritten and difficult to read. However, a second telephone call from plaintiff several minutes later resulted in defendant informing plaintiff that emergency medical services had been deployed, while clarifying plaintiff's location.

When legislators assess appropriate punishments for persons who abuse emergency services, or who make fake calls, they would do well, in my judgment, to take into consideration the seconds of delay that are added to response times in cases such as the instant one.

Consequently, defendant's conduct, in my judgment, cannot fairly be described as "utterly intolerable in a civilized community." Indeed, we live in a society in which 911 calls are regularly made for inappropriate purposes and in which there are insufficient public resources to respond to every frivolous call, yet still be able to effectively respond to genuine emergencies. Thus, defendant's questions, even if asked in the wrong *tone*, were not under the circumstances unreasonable, much less "extreme and outrageous."

CORRIGAN and YOUNG, JJ., join the statement of MARKMAN, J.