STATE OF MICHIGAN
IN THE SUPREME COURT

DELAINA PATTERSON, as Personal Representative for the Estate of SHERRILL TURNER, deceased, and ROBERT TURNER, a minor, Individually, by his Next Friend, DELAINA PATTERSON,

Plaintiffs-Appellees,

vs.

SHERRY NICHOLS,

Defendant-Appellant,

and

TERRI SUTTON,

Defendant.

Supreme Court No. 142441

COA Docket No. 296198

Wayne County Circuit Court
Case No. 08-111034-NO
Hon. John A. Murphy

PLAINTIFFS-APPELLEES' BRIEF ON APPEAL

****ORAL ARGUMENT REQUESTED****

PROOF OF SERVICE

Submitted by:

GEOFFREY N. FIEGER (P30441)
JAMES J. HARRINGTON (P65351)
HEATHER A. GLAZER (P54952)
Fieger, Fieger, Kenney, Giroux & Danzig, P.C.
Attorneys for Plaintiffs-Appellees
19390 W. 10 Mile Road
Southfield, Michigan 48075
(248) 355-5555

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Counter-Statement of Jurisdiction

This Court has jurisdiction over this matter pursuant to MCR 7.301(A)(2). On May 25, 2011, this Court entered an order granting Defendant Nichols' application for leave to appeal the December 7, 2010 judgment of the Court of Appeals and directed the parties to include among the issues to be briefed: (1) whether the defendant had a duty to the decedent; (2) if so, whether the defendant's conduct can be viewed as the proximate cause of the decedent's death; (3) whether the defendant's conduct can be viewed as "so reckless as to demonstrate a substantial lack of concern for whether an injury results"; (4) whether a claim for intentional infliction of emotional distress is cognizable under the circumstances of this case; (5) if so, whether the defendant's conduct can be viewed as "extreme and outrageous"; (6) the degree of recklessness sufficient to meet the standard required to establish intentional infliction of emotional distress; (7) whether the defendant showed that she acted in good faith; and (8) whether the defendant was performing ministerial acts, as opposed to discretionary acts.

Counter-Statement of Questions Presented

I. **Whether the Court of Appeals Erred in Rejecting Defendant Nichols' Argument that She Was Not Grossly Negligent Where:**

(1) **Defendant Nichols Was Employed as a 911 Operator and, as a 911 Operator, it Was Her Duty to Reasonably Expedite the Involvement of Police and/or EMS in Response to Situations Identified by Callers;**

(2) **The Facts Viewed in the Light Most Favorable to Plaintiffs Reveal that Defendant Nichols Was Provided with Information Sufficient to Put Her on Notice That Ms. Turner Was Suffering from an Emergency Medical Condition That Required Immediate Medical Attention, But Defendant Nichols Failed to Ascertain the Nature of the Call or Treat it as an Emergency, Willfully and Deliberately Ignored the Young Child's Pleas for Help, Logged the Call in as a Prank Call, and Failed to Dispatch Police or an EMS Unit to the Turner Home; and**

(3) **A Criminal Jury Has Already Concluded that Defendant Nichols was Guilty of Willful Neglect of Duty for Her Knowing and Purposeful Deviation from the Established Protocol and Disregard of the Totality of the Circumstances in Evaluating the 911 Call from Robert Turner.**

Plaintiffs-Appellees answer, "No."

Defendant-Appellant Nichols answers, "Yes."

The trial court would answer, "No."

II. **Whether the Court of Appeals Erred in Concluding That There Is a Genuine Issue of Material Fact Whether Defendant Nichols' Gross Negligence Was the One Most Immediate, Efficient, and Direct Cause Preceding Mrs. Turner's Death Where Plaintiff's Experts Opined That Mrs. Turner Languished for Hours Before She Died and, More Likely Than Not, She Would Have Survived the Underlying Cardiac Event If Timely Medical Assistance Had Been Provided.**

Plaintiffs-Appellees answer, "No."

Defendant-Appellant Nichols answers, "Yes."

The trial court would answer, "No."

IV. **Whether the Court of Appeals Erred in Concluding that Defendant Nichols is Not Entitled to Qualified Immunity for the Intentional Tort Claim Under *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567 (1984) and MCL 691.1407(3) Where the Challenged Acts Were Completed in the Course of Her Employment as an Emergency Services Operator, Where There is a Jury-Submissble Question of Fact Concerning Her Lack of Good Faith in Her Treatment of Robert Turner During the 911 calls, and Where Her Acts as an ESO were Ministerial.**

Plaintiffs-Appellees answer, "No."

Defendant-Appellant Nichols answers, "Yes."

The trial court would answer, "No."

V. **Whether the Court of Appeals Erred in Affirming the Trial Court's Denial of Defendant Nichols' Motion for Summary Disposition With Regard to Plaintiff's Claim for Intentional Infliction of Emotional Distress When, Viewing the Evidence in a Light Most Favorable to the Plaintiff, Defendant's Conduct Was Extreme and Outrageous, Intentionally and/or Reckless Committed for the Purpose of Harassing Robert Turner and, as the Direct and Proximate Result Thereof, Plaintiff Suffered Extreme Emotional Injuries, Mental Anguish, Sleep Disturbances and Post-Traumatic Stress Disorder.**

Plaintiffs-Appellees answer, "No."

Defendant-Appellant answers, "Yes."

The trial court would answer, "No."

Introduction

This action arises out of the deplorable and egregious conduct of Detroit Emergency Service Operators ("ESO"), Sharon Nichols and Terry Sutton, who, despite assurances otherwise, failed to summon emergency medical assistance for Sherill Turner, who was passed out on the floor of her home for several hours while her five-year-old son, Robert Turner, pleaded for help. Contrary to well established protocol and their duties as ESOs, Defendants failed to verify the validity of the phone calls, failed to ascertain the actual circumstances, and failed to request an Emergency Response Unit. Instead, Defendants responded to Robert Turner's emergency calls to 911with callousness and threatened the young boy with police involvement.

When the police arrived on the scene nearly 3 ½ hours after Robert's first call to 911, they found Mrs. Turner unresponsive. When EMS arrived approximately 20 minutes later, Mrs. Turner was declared dead at the scene. Notably, when the medical examiner arrived on the scene shortly thereafter (four hours after Robert's first call to 911), he noted that Mrs. Turner was warm to the touch with no rigor present, which indicated that her death had been not long before his arrival.

Defendants' actions/inactions in handling young Robert Turner's calls to 911 resulted in suspensions. In addition, both Defendants were criminally charged with Willful Neglect of Duty in violation of MCL 750.478. Ultimately, a jury found Defendant Nichols guilty and she was sentenced. As a result of her criminal conviction, Defendant Nichols was fired by the City of Detroit.

Plaintiffs brought this action against Defendant Nichols and Sutton, alleging gross negligence and intentional infliction of emotional distress. Defendants each moved for summary disposition, which the trial court denied and the Court of Appeals affirmed. Defendant Nichols sought leave to

appeal from this Court, arguing that she did not owe a duty[1] to Mrs. Turner, that her conduct did not amount to gross negligence,[2] and that her conduct was not the proximate cause of Mrs. Turner's death. Defendant Nichols further maintained that she was entitled to governmental immunity with regard to Robert Turner's claim for intentional infliction of emotional distress because she acted in good faith and the challenged act was discretionary.[3] This Court granted leave.

Contrary to Defendant Nichols' bold assertions, she clearly owed a duty to summon assistance for Mrs. Turner. Moreover, since a criminal jury has already concluded that Defendant Nichols was guilty of willful neglect of duty for her knowing and purposeful deviation from the established protocol and disregard of the totality of the circumstances in evaluating the 911 call from Robert Turner, there can be no dispute that Defendant Nichols' actions and/or inactions amounted

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[1] Defendant Nichols simply argued, in two brief sentences, that she did not owe a duty to Mrs. Turner or Robert. She failed to raise any facts, law or arguments in support of her position. An issue is not properly preserved for appellate review if it is not raised before the trial court. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95 (2005). Michigan appellate courts have repeatedly declined to consider arguments not raised before the trial court. See *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234 (1993); *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 117 (2003). The Court of Appeals did not address Defendant Nichols' unpreserved argument that she did not owe a duty and this Court should decline as well.

[2] While Defendant Nichols asserted in her motion that her actions did not amount to gross negligence, she failed to raise any facts, law or arguments in support of her position; rather, her argument was confined to whether her actions and/or inactions were "the" proximate cause of Mrs. Turner's death. Therefore, Plaintiff maintains that this issue is not preserved for appellate review and this Court should decline to review the issue with regard to the claims against Defendant Nichols. *Booth*, 444 Mich at 234; *Polkton*, 265 Mich App at 95; *Higgins Lake Prop Owners Ass'n*, 255 Mich App at 117. The Court of Appeals did not address Defendant Nichols' unpreserved argument that her conduct did not amount to gross negligence and this Court should decline as well.

[3] Defendant Nichols did not raise this argument before the trial court; rather, she simply argued that there was no genuine issue of material fact that her conduct did not amount to intentional infliction of emotional distress and that she was entitled to summary disposition pursuant to MCR 2.116(C)(10). Therefore, Plaintiff maintains that this issue is not preserved for appellate review and this Court should decline to review the issue with regard to the claims against Defendant Nichols. *Booth*, 444 Mich at 234; *Polkton*, 265 Mich App at 95; *Higgins Lake Prop Owners Ass'n*, 255 Mich App at 117.

to gross negligence, i.e., conduct so reckless as to demonstrate a substantial lack of concern for whether an injury resulted. This question of fact has already been actually litigated and determined by a valid and final judgment and Defendant Nichols had a full and fair opportunity to litigate this issue. Accordingly; therefore, the doctrine of collateral estoppel should preclude her from relitigating the issue in this matter.

However, in the event that this Court concludes that collateral estoppel does not apply, Plaintiffs assert that, accepting Plaintiffs' allegations as true and construing them in a light most favorable to Plaintiffs, a reasonable juror could conclude that Defendant Nichols' conduct was so reckless that it demonstrated a substantial lack of concern for whether injury would result. The facts, viewed in the light most favorable to Plaintiffs, reveal that Defendant Nichols failed to ascertain the nature of the call or treat it as an emergency; that she willfully and deliberately ignored the young child's pleas for help, that she labeled the call as a prank, and that she failed to dispatch police or an EMS unit to the scene.

A reasonable juror could further conclude that Defendant Nichols' gross negligence was the one most immediate, efficient, and direct cause preceding Mrs. Turner's death. It is undisputed that Defendant Nichols did not dispatch police or an EMS unit to the Turner household and that the EMS did not arrive on scene until more than 3 ½ hours after Nichols answered Robert Turner's call to 911. The medical examiner indicated that Mrs. Turner's body was warm to the touch and that rigor had not set in when he arrived on the scene more than four hours after Robert's first call was placed to 911. There is no evidence that Mrs. Turner's death was immediate or was certain to occur. In fact, there is evidence that Mrs. Turner languished for hours before she died and, more likely than not, she could have survived the underlying cardiac event. Consistent with the Court's analysis in *Stoll v Laubengayer,* 174 Mich 701, 706; 140 NW 532 (1913), a reasonable juror could conclude that the

immediate cause of Mrs. Turner's death was the lack of any medical attention for her underlying cardiac condition. But for Defendant Nichols' failure to treat Robert's call as an emergency and wilfully and deliberately ignoring Robert Turner's pleas for help (which was subsequent to the underlying cardiac event and therefore proximate to the injury) Mrs. Turner would not have died.

Additionally, Defendant Nichols has failed to meet her burden to establish that she is entitled to governmental immunity for Robert's claim of intentional infliction of emotional distress. Viewing the evidence in the light most favorable to Plaintiffs, there is a justiciable question of fact whether Defendant Nichols acted in good faith in her handling of Robert's 911 call. Defendant Nichols willfully deviated from the established protocol when she handled Robert's 911 call, which lasted only 43 seconds. She did not ask questions in compliance with the established interview procedure, she failed to treat the call as an emergency, and she failed to handle the call courteously and professionally. Furthermore, Defendant's acts as an ESO were ministerial. ESO's are required to obtain pertinent information regarding calls that are made to 911 in Detroit and input the relevant information into a computer system maintained by the Detroit Police Department. There is no discretion involved in the ESO's treatment of the caller or in acquiring the information. Clearly, there is no immunity afforded for such ministerial acts, especially when the evidence viewed in the light most favorable to the Plaintiff could lead a reasonable juror to conclude that the Defendant performed such ministerial acts in a reckless manner.

Finally, given the facts and circumstances in this matter, the Court of Appeals did not err in affirming the trial court's denial of Defendant Nichols' motion for summary disposition with regard to Robert Turner's claim for intentional infliction of emotional distress. There are jury-submissible questions of fact concerning whether Defendant Nichols' statements and conduct during the 911 call were extreme and outrageous and whether Defendant Nichols acted recklessly in her treatment of

young Robert during the 911 call.

Counter-Statement of Facts

A. Five-Year-Old Robert Called 911 at 5:59 p.m. and 9:02 p.m. Trying to Summon Help For His Mother.

On or about February 20, 2006, minor Plaintiff, Robert Turner, was at 1950 Spruce, Street Apartment 3, in Detroit, Michigan with his mother, Sherrill Turner. Shortly before 5:59 pm that evening, Robert noticed that his mother had fallen, was unresponsive and needed help. At approximately **5:59 p.m.**, Robert called 911 to summon emergency medical assistance for his mother, who was still alive. Robert was connected with and spoke to Defendant, Sherry Nichols, and informed her that his mother had passed out:

ESO Nichols: Emergency 911, where is the problem?

Robert: **My mom has passed out**.

ESO Nichols: You over at Spruce?

Robert: Huh?

ESO Nichols: You on Spruce?

Robert: My mom . . .

ESO Nichols: Where's Mr. Turner at?

Robert: Right here.

ESO Nichols: Let me speak to him.

Robert: **She's not gonna talk**.

ESO Nichols: Okay, well I'm gonna send the police to your house and find out what's going on with you.

ESO Nichols: 1950 Spruce Apt. 3

Called Ended: 0:43 seconds

[911 Call Transcripts, Appellant's Appendix, p. 28a[4] (emphasis added).]

In contravention of established protocol, Defendant Nichols failed to verify the validity of the telephone call, failed to treat it as an emergency, and failed to request an Emergency Response Unit. Instead, she willfully and deliberately ignored the young child's pleas for help and terminated the call after a mere 43 seconds. Despite the fact that she told Robert that she was sending the police, Defendant Nichols did not dispatch a police unit and simply logged the call in as a prank call and closed the call record.

When help failed to arrive, Robert called 911 a second time, at approximately **9:02 p.m.,** in an attempt to summon emergency medical treatment for his mother. During his second call, Robert spoke with Defendant Sutton and informed her that his mother had passed out:

ESO Sutton: Emergency 911, where is the problem?

Robert: **My mom has passed out**.

ESO Sutton: 1950 Spruce. Is that the Robert Turner residence?

Robert: Yeah.

ESO Sutton: Where the grown-up at?

Robert: In her room. My mom . . .

ESO Sutton: Let me speak to her. Let me speak to her before I send the police over there.

Robert: **She passed out**.

ESO Sutton: Huh?

Robert: **She's not gonna talk**.

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[4] Plaintiffs urge this Court to listen to the audio CD of the 911 calls, which was filed with the trial court and the Court of Appeals.

ESO Sutton: Okay. Well, you know what then? She's gonna talk to the police. Okay. She's gonna talk to the police because I'm sending them over there.

Robert: She's still not gonna talk.

ESO Sutton: I don't care. You shouldn't be playing on the phone. [pause] Now put her on the phone before I send the police out there to knock on the door and you gonna be in trouble.

Robert: Argh!!!

Call Ended: 1:16 seconds

[Appellant's Appendix, p. 32a (emphasis added).]

The police arrived on the scene at approximately **9:20 p.m.** and found Ms. Turner unresponsive. EMS was dispatched to the home at that time. When EMS arrived at approximately **9:40 p.m.**, Ms. Turner was declared dead at the scene. Thereafter, Medical Examiner Investigator Vernon Humes arrived at the scene. Of significant importance, MEI Humes made the following finding at **9:59 pm**:

> MEI Humes to scene where decedent is found lying supine on bedroom floor, **she is warm to the touch with no rigor present** and clad only in a T-Shirt, decedent's five year old son called police who thought he was playing on phone, when they arrived at residence they discovered decedent on floor. [Excerpts from Wayne County M.E. Records, Appellees' Appendix, p. 49b, (emphasis added).]

Francisco Diaz, M.D. of the Wayne County Medical Examiner's Officer performed the autopsy of Mrs. Turner. Dr. Diaz testified that he relied on the MEI findings, since MEIs are trained to determine if rigor mortis has set in as well as temperature of the body. (Deposition of Dr. Diaz, p. 8, Appellees' Appendix, p. 4b). Dr. Diaz indicated in his report that Sherrill Turner's death was due to dilated cardiomyopathy, which is simply an enlarged heart (Dep of Diaz, p. 9, Appellees' Appendix p. 5b). While dilated cardiomyopathy was the cause of Mrs. Turner's death, is was not the mechanism of death. Based on what Dr. Diaz saw upon examination, he felt that the mechanism of

death was suggestive of a cardiac insufficiency, which meant that, more likely than not, Mrs. Turner lingered for a period of time before she expired (Dep of Diaz, pp. 16-18, 21, Appellees' Appendix pp. 6b-7b, 8b). Given the fact that rigor mortis sets in within two hours of death, and four hours after Robert's first call to 911 no rigor had set in and Ms. Turner was warm to the touch, Dr. Diaz opined that Ms. Turner had not been dead for a significant period of time. (Dep of Diaz, pp. 23-25, Appellees' Appendix, pp. 8b-9b).

In addition, Plaintiff's expert, Werner Spitz, M.D., a forensic pathologist, testified within a reasonable degree of medical certainty that Ms. Turner was not dead when Robert made his first call to 911 at 5:59 p.m. and, more likely than not, had the appropriate response been provided, Mrs. Turner could have been saved. (Deposition of Dr. Spitz, pp. 26, 41-42, 47-48, Appellees' Appendix, pp. 12b, 13b, 14b).

B. Defendant Nichols Was Suspended, Found Guilty of Wilful Neglect of Duty, and, Ultimately, Fired for Her Gross Negligence in the Performance of Her Duties.

Defendant Nichols' actions/inactions resulted in a suspension for violations of the following section of General Order 78-11:

(1) Section 21, Neglect of Duty;

(2) Section 8, Contact with Citizens, Subsection 8.4, All Possible Consideration, and

(3) Section 8, Contact with Citizens, Subsection 8.9, Professionalism and Objectivity.

[See Inter Office Memorandum, Appellees' Appendix, p. 16b]

Specifically, General Order 78-11, Section 21, Neglect of Duty, provides as follows:

> An employee shall not intentionally fail to take action as required by department rules, regulations, orders or procedures which are applicable to his duties and responsibilities. [Prosecutor's Memorandum, Training Bulletins and General Orders, Appellees' Appendix, p. 31b].

General Order 78-11, Section 8, Contact with Citizens, Subsection 8.4, All Possible Consideration, states:

> All employees shall give all possible consideration to citizens seeking information or assistance or desiring to make any report whether in person or by telephone. [Appellees' Appendix, p. 28b].

General Order 78-11, Section 8, Contact with Citizens, Subsection 8.9, Professionalism and Objectivity, states:

> An employee shall, when questioning a citizen, do so in a polite and professional manner, taking into consideration all circumstances and remaining completely objective towards all persons. [Appellees' Appendix, p. 29b].

In addition, Defendant Nichols was criminally charged with Willful Neglect of Duty in violation of MCL 750.478, which provides as follows:

> When any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every willful neglect to perform such duty, where no special provision shall have been made for the punishment of such delinquency, constitutes a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00.

The Misdemeanor Warrant indicates that Defendant Nichols

> willfully neglected to perform her duty, to wit: she purposefully and knowingly deviated from the established protocol and disregarded the totality of the circumstances in evaluating the 911 call from Robert Turner. She misled Robert Turner into believing she was dispatching the police to his home; contrary to MCL 750.478. [Appellees' Appendix, p. 1b]

In bringing the charges, the Wayne County Prosecutor's office determined that Defendant Nichols violated Training Bulletin 78-2 E9-1-1 "Interview Procedure," which details the information that must be ascertained from a caller. The prosecutor stated:

> Of note in this situation is that neither ESO listened to little Robert Turner's words to them. He clearly stated that his mom had "passed out" at the outset of both calls thereby relaying the "WHAT" information, which should have at least signaled to a ESO that his call could not be summarily dismissed as a prank call or a child playing on the phone. [Appellees' Appendix, p. 19b.]

The prosecutor's office further determined that Defendant Nichols violated Training Bulletin 74-3-R-B "Telephone Deportment", which states "Our purpose is to serve the public. Answer promptly – **treat each call as an emergency**." (Appellees' Appendix, p. 19b(emphasis added). In particular, the prosecutor concluded:

> ESO Nichols willfully deviated from established protocol when she took Robert's 911 call lasting only 43 seconds. Nichols did not adhere to the pattern of questions designed to evaluate a call and she did not treat the call as an emergency. She disregarded Robert's first statement in response to her question "what is the problem?" when Robert answered, "My mom has passed out." Finally Nichols did not listen to her caller or pay attention to the totality of the circumstances of the individual situation before her. Namely, a young child calling 911 saying his mom was passed out, and in response to ESO request to talk to mom, Robert's response was "she is not gonna talk." She assumed information and lost empathy for her caller.
>
> Nichols is guilty of willful neglect of duty under MCL 750.478 because she willfully and deliberately did nothing. She did not ask questions in compliance with Training Bulletin 78-2. She did not treat the call as an emergency in violation of the established protocol contained in Training Bulletin 74-3-R-B. She did not properly evaluate the call in accordance with Training Bulletin 98-1. Finally Nichols had notice that a conscious, intentional decision not to follow protocol could result in liability. [Appellees' Appendix, p. 21b.]

The prosecutor recommended that ESOs Sutton and Nichols both be charged with neglect of duty under MCL 750.478, opining:

> Neither ESO followed the pattern of questioning established by protocol. Neither ESO treated the call as an emergency. Both Nichols and Sutton discounted Robert's clear statement that his mom was passed out because he was a young child. Neither ESO considered that when Robert said that his mom was not going to talk that there may be a problem. They did not assess the call and the totality of the circumstances in accordance with established department protocols. They made uninformed assumptions, lost empathy for their caller and [caused] irreparable harm to this little boy. Sutton and Nichols knew the proper procedures and consciously and deliberately decided not to follow them. They also had notice that failure to follow protocol could result in liability. There is overwhelming evidence supporting this charge. [Appellees' Appendix, p. 22b.]

Ultimately, a jury found Defendant Nichols guilty of Wilful Neglect of Duty in violation of MCL 750.478. She was sentenced to one year of probations and fifteen (15) days of community

service. As a result of the criminal conviction, Defendant Nichols was fired from her position as an ESO, with the following explanation given by the City of Detroit:

> **For the following reason(s): Gross negligence in the Performance of Duties on February 20, 2006 and Violation of General Order 78-11, Sections 8.4 "All Possible Consideration" and Section 8 "Contact With Citizens"** [Notice of Discharge Form, Appellees' Appendix, p. 51b (emphasis added).]

C. Procedural History

On April 30, 2008, Plaintiff commenced this action against Defendants, alleging gross negligence on behalf of Sherrill Turner and intentional infliction of emotional distress on behalf of young Mr. Turner. On May 8, 2008, Defendant Sutton accepted Plaintiffs' facts and allegations as true and moved for summary disposition pursuant to MCR 2.116(C)(7) and (8), asserting that she is entitled to governmental immunity pursuant to MCL 691.1407(2) with regard to the claims brought on behalf of the Estate of Sherrill Turner. First, Defendant Sutton ludicrously claimed that, despite her job as a 911 operator, she did not owe the Turners a duty to provide any assistance and, therefore, her failure to summon aid did not amount to gross negligence. Defendant Sutton further maintained that neither the failure to summon aid nor her egregious insults were the proximate cause of Mrs. Turner's death. Finally, Defendant Sutton argued that her acquittal in the criminal trial on the charge of "willful neglect of duty" barred any finding of gross negligence on res judicata grounds.

The trial court rejected Defendant Sutton's arguments, concluding that Defendant Sutton did owe a duty to summon emergency medical assistance for Mrs. Turner, that there was a question of fact whether Defendant Sutton's conduct amounted to gross negligence and that there was a question of fact whether Defendant Sutton's conduct was the proximate cause of Mrs. Turner's death.

Defendant Sutton filed a Claim of Appeal with regard to that Order.[5]

Thereafter, Defendant Sutton moved for summary disposition with regard to Count II of Plaintiff's Complaint (Intentional Infliction of Emotional Distress), asserting that she was entitled to governmental immunity pursuant to MCL 691.1407(2) because she did not commit an intentional tort. Defendant Sutton further argued that Plaintiffs could not establish that Defendant Sutton intentionally inflicted emotional distress upon Robert Turner because she did not intend to cause Robert Turner any distress.

The trial court rejected Defendant Sutton's arguments, concluding that there was a genuine issue of material fact as to Robert's claim for intentional infliction of emotional distress. Following supplemental briefing with regard to the application of *Odom v Wayne County, et al,* 482 Mich 459 (2008), the trial court further held that Defendant Sutton was not entitled to qualified immunity for the intentional tort claim under *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567 (1984) and MCL 691.1407(3) because her acts were ministerial in nature. Defendant Sutton appealed that order as well.[6]

Subsequently, Defendant Nichols moved for summary disposition. Defendant Nichols asserted that her actions were not grossly negligent, but she failed to raise any facts, law or arguments in support of her position. Instead, her argument was confined to whether her actions and/or inactions were "the" proximate cause of Mrs. Turner's death. Defendant Nichols also argued,

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[5] The trial court's September 29, 2008 order was the subject of Sutton's appeal in Court of Appeals Docket No. 288375, which was consolidated with Nichols' appeal, and it is pending before this Court in Docket No. 142438.

[6] The trial court's March 9, 2009 order was the subject of Sutton's appeal in Court of Appeals Docket No. 291287, which was consolidated with Defendant Nichols' appeal, and it is pending before this Court in Docket No. 142438.

in two brief sentences, that she did not owe a duty to Mrs. Turner or Robert. In a supplemental motion, Defendant Nichols asserted that there was no genuine issue of material fact that her conduct did not amount to intentional infliction of emotional distress that she was entitled to summary disposition pursuant to MCR 2.116(C)(10). The trial court rejected all of Defendant Nichols' arguments, adopting the same basis as both of its rulings with regard to Defendant Sutton's motions. Defendant Nichols appealed the trial court's order.

In a December 7, 2010 unpublished opinion, the Court of Appeals affirmed the denial of both Defendants' motions for summary disposition. *Turner v Nichols*, unpublished per curiam opinion of the Court of Appeals, issued December 7, 2010 (Docket Nos. 288375, 291287, 296198) (Appellant's Appendix, pp. 4a-12a). With regard to Plaintiffs' gross negligence claim, the Court of Appeals concluded that there was evidence from which a reasonable jury could conclude that Defendants' gross negligence was the one most immediate, efficient, and direct cause of death and, therefore, the trial court did not err in denying Defendants' motions for summary disposition on the gross negligence claim. Turning to *Robinson v Detroit,* 462 Mich 439; 613 NW2d 307 (2000) and *Stoll v Laubengayer*, 174 Mich 701; 140 NW 532 (1913) for guidance, the Court of Appeals concluded:

> We conclude that there is a genuine issue of material fact whether the grossly negligent conduct of defendants was the proximate cause – the one most immediate, efficient, and direct cause – of the decedent's death. Although it is unclear at this point what caused the decedent's initial medical emergency, it appears to be cardiac-related. However, there is no evidence which indicates that the decedent's death was either immediate, i.e., that she was deceased at the time her son called 911, or was certain to occur. In fact, there is evidence to the contrary. According to records of the Wayne County Medical Examiner, when officers arrived – three hours after the initial call to 911 – the decedent was "warm to the touch with no rigor present."
>
> [A] question of fact clearly exists regarding whether the underlying medical event or defendants' failure to provide the requested medical assistance was "the proximate cause," i.e., the one most immediate, efficient, and direct cause of decedent's death.

> In other words, there is no evidence that the underlying medical event would have certainly killed decedent, i.e., there was no chance of survival, or that the decedent would not have survived even with proper and timely medical assistance. Accordingly, there appears to be evidence from which a reasonable jury could conclude that defendants' gross negligence was the one most immediate, efficient, and direct cause of death. [Appellant's Appendix, p. 8a.]

The Court of Appeals further held that Defendants were not immune from liability for Robert Turner's claim of intentional infliction of emotional distress because (1) a reasonable juror could find that Defendants' conduct amounted to recklessness, which is sufficient to demonstrate lack of good faith under *Odom v Wayne Co*, 482 Mich 459; 760 NW2d 217 (2008), and (2) Defendants acts were ministerial, not discretionary. Finally, the Court of Appeals concluded that, assuming that Defendants are not entitled to governmental immunity, the trial court did not err in denying Defendants' motions for summary disposition on Robert's claim for intentional infliction of emotional distress because a reasonable juror could find that the Defendants' conduct was extreme and outrageous and that Defendants acted recklessly. Specifically, the Court of Appeals concluded:

> Here, the circumstances surrounding defendants' conduct indicate that a reasonable juror could find the conduct to be extreme and outrageous. The mere words spoken, if spoken in another context or to another listener, might well be considered, "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." Given, however, defendants' positions as 911 operators, and the fact that their words were directed against a child, who they had been told was seeking emergency medical assistance for his unconscious mother (even if they did not believe it), this case may well be "one 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!'" Because a reasonable juror might find that defendants' conduct was extreme and outrageous under this standard, the trial court was correct in holding that summary disposition is not appropriate on this element.
>
> Additionally, as discussed, a reasonable juror could find that defendants acted recklessly. A reasonable juror could find that defendants were aware of the risk that their conduct would cause emotional distress to Robert, and acted in disregard of that risk. The trial court therefore did not err in finding that there was a triable issue of fact with respect to recklessness. [Appellant's Appendix, p. 12a.]

Thereafter, Defendant Nichols filed an application for leave to appeal with this Court. On

May 25, 2011, this Court entered an order granting Defendant Nichols' application and directed the parties to include among the issues to be briefed: (1) whether the defendant had a duty to the decedent; (2) if so, whether the defendant's conduct can be viewed as the proximate cause of the decedent's death; (3) whether the defendant's conduct can be viewed as "so reckless as to demonstrate a substantial lack of concern for whether an injury results"; (4) whether a claim for intentional infliction of emotional distress is cognizable under the circumstances of this case; (5) if so, whether the defendant's conduct can be viewed as "extreme and outrageous"; (6) the degree of recklessness sufficient to meet the standard required to establish intentional infliction of emotional distress; (7) whether the defendant showed that she acted in good faith; and (8) whether the defendant was performing ministerial acts, as opposed to discretionary acts.

Law and Argument

I. Counter-Statement of Standard of Review

This Court reviews decisions regarding summary disposition de novo. *Maskery v Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003).

Defendant Nichols sought summary disposition pursuant to MCR 2.116(C)(7), (C)(8) and (C)(10). When a motion is filed pursuant to MCR 2.116(C)(7), the Court must consider not only the pleadings, but also any affidavits, depositions, admissions, or documentary evidence that are filed or submitted by the parties. MCR 2.116(G)(5). The Court must accept all well-pleaded allegations as true and construe them in a light most favorable to the nonmoving party. *Spikes v Banks*, 231 Mich App 341, 346; 586 NW2d 106 (1998). The Court must also consider the documentary evidence in a light most favorable to the nonmoving party. *Herman v Detroit*, 261 Mich App 141, 143-144; 680 NW2d 71 (2004).

The test for a motion under MCR 2.116(C)(8), or failure to state a claim upon which relief

can be granted, tests only the legal sufficiency of the claim, not whether there is any factual support for the claim. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Huff v Ford Motor Co*, 127 Mich App 287; 338 NW2d 387 (1983). All factual allegations of the claim are taken to be true along with any reasonable inferences or conclusions which may fairly be drawn from the facts alleged. *Kinnunen v Bohlinger*, 128 Mich App 635; 341 NW2d 167 (1983). Unless the claim is so clearly unenforceable as a matter of law that no factual development can possibly justify a right to recovery, a motion brought under MCR 2.116(C)(8) should be denied. *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001).

A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). A party moving for summary disposition under MCR 2.116(C)(10) must specifically identify the undisputed factual issues and support its position with documentary evidence. MCR 2.116(G)(3)(b) and (4); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). If the moving party fails to properly support its motion for summary disposition, the nonmoving party has no duty to respond and the trial court should deny the motion. MCR 2.116(G)(4); see also *Meyer v Center Line*, 242 Mich App 560, 575; 619 NW2d 182 (2000) (concluding that the trial court erred when it granted an improperly supported motion for summary disposition under MCR 2.116(C)(10)).

When reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a court must examine the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. MCR 2.116(G)(5); *Maiden*, 461 Mich at 120; *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996); *Downey*, 227 Mich App at 626; see also *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455 & n 2; 597 NW2d

28 (1999). A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). The Michigan appellate courts are liberal in finding that a genuine issue does exist. *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008).

Courts "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). "[W]here the truth of a material factual assertion of a moving party is contingent upon credibility, summary disposition should not be granted." *Foreman v Foreman*, 266 Mich App 132, 135-136; 701 NW2d 167 (2005).

It is well established in case law, as well as pursuant to constitutional law, that the right to have issues of fact tried to, and decided by, a jury is guaranteed. US Const Amend Art VII; Const. 1963, art. 1, § 14; *Romero v King*, 368 Mich 45, 49;117 NW2d 119 (1962). In the early judicial history of the state, it was held that when facts are disputed, or when they are not even disputed, but different minds might honestly draw different conclusions from them, the case must be left to the jury for its determination. *Detroit Milwaukee RR v VanSteinburg*, 17 Mich 99 (1868). More than a century ago, the United States Supreme Court concisely articulated the foundation for the principle that a witness's credibility always remains subject to a jury's consideration:

> The jury were the judges of the credibility of the witnesses . . ., and in weighing their testimony had the right to determine how much dependence was to be placed upon it. There are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through the questioning of counsel, by which a jury are to be guided in determining the weight and credibility of his testimony. That part of every case . . . belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men; and so long as we have jury trials they should not be disturbed in their possession of it, except in a case of manifest and extreme abuse of their function. [*Aetna Life Ins Co v Ward*, 140 US 76, 88; 11 S Ct 720; 35 L Ed 371 (1891).]

II. The Court of Appeals Did Not Err in Rejecting Defendant Nichols' Argument That She Was Not Grossly Negligent Where:

(1) **Defendant Nichols Was Employed as a 911 Operator and, as a 911 Operator, it Was Her Duty to Reasonably Expedite the Involvement of Police and/or EMS in Response to Situations Identified by Callers;**

(2) **The Facts Viewed in the Light Most Favorable to Plaintiffs Reveal That Defendant Nichols Was Provided with Information Sufficient to Put Her on Notice That Mrs. Turner Was Suffering from an Emergency Medical Condition That Required Immediate Medical Attention, But Defendant Nichols Failed to Ascertain the Nature of the Call or Treat it as an Emergency, Willfully and Deliberately Ignored the Young Child's Pleas for Help, Logged the Call in as a Prank Call, and Failed to Dispatch Police or an EMS Unit to the Turner Home; and**

(3) **A Jury has Already Concluded that Defendant Nichols was Guilty of Willful Neglect of Duty for Her Knowing and Purposeful Deviation from the Established Protocol and Disregard of the Totality of the Circumstances in Evaluating the 911 Call from Robert Turner.**

Defendant Nichols contends that she is entitled to qualified immunity for Plaintiffs' claim of gross negligence pursuant to MCL 691.1407(2). MCL 691.1407 provides, in relevant part, as follows:

> (2) 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.

(3) Subsection (2) does not alter the law of intentional torts as it existed before July 7, 1986.

A. Defendant Nichols Owed a Duty to Reasonably Expedite the Involvement of Police and/or EMS in Response to Robert Turner's Call.

Defendant Nichols ludicrously claims that, despite her job as a 911 operator, she did not owe a duty to provide any assistance to Robert Turner or his mother and, therefore, her failure to summon aid did not amount to gross negligence. Indeed, this Court directed the parties to address this issue; however, Plaintiffs maintain that this issue is not preserved for appellate review. While Defendant Nichols asserted in her motion for summary disposition that she did not owe a duty (in two short sentences) and that her actions did not amount to gross negligence, she failed to raise any facts, law or arguments in support of her position; rather, her argument was confined to whether her actions and/or inactions were "the" proximate cause of Mrs. Turner's death. An issue is not properly preserved for appellate review if it is not raised before the trial court. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95 (2005). Michigan appellate courts have repeatedly declined to consider arguments not raised before the trial court. See *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234 (1993); *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 117 (2003). The Court of Appeals did not address Defendant Nichols' unpreserved argument that she did not owe a duty of care and this Court should decline as well.

However, in the event that this Court decides to review this issue, Plaintiffs maintains that, as an Emergency Services Operator, Defendant Nic certainly owed a duty to reasonably expedite the involvement of the police and/or EMS in response to emergency situations identified by 911 callers. "Duty" is a legally recognized obligation " 'to conform to a particular standard of conduct to protect others against an unreasonable risk of harm.' " *Burnett v Bruner,* 247 Mich App 365, 368 (2001); *Chivas v Koehler,* 182 Mich App 467, 475 (1990). In determining whether a duty exists, courts may

contemplate the following policy considerations: the foreseeability of the harm, the degree of certainty of injury, the closeness of the connection between the conduct and the injury, the moral blame attached to the conduct, the policy of preventing future harm, and the burdens and consequences of imposing a duty and the resulting liability for breach. *Buczkowski v McKay,* 441 Mich 96, 101 (1992); *Colangelo v Tau Kappa Epsilon Fraternity,* 205 Mich App 129, 132 (1994). There is a well-established duty impose[d] on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others." *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967); see also *Lyshak v City of Detroit*, 351 Mich 230, 239; 88 NW2d 596 (1957).

Indeed, generally, there is no duty that obligates one person to aid or protect another, absent a special relationship. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 498-499 (1988); 2 Restatement Torts, 2d, §314, p 116 and §314A, p 118. In order to determine whether a "special relationship" giving rise to a legal duty to act does exist in a particular case, the Court of Appeals has held that it is necessary to

> balance the societal interests involved, the severity of the risk, the burden upon the defendant, the likelihood of occurrence, and the relationship between the parties. . . . Other factors which may give rise to a duty include the foreseeability of the [harm], the defendant's ability to comply with the proposed duty, the victim's inability to protect himself from the [harm], the costs of providing protection, and whether the plaintiff had bestowed some economic benefit on the defendant. [*Roberts v Pinkins*, 171 Mich App 648, 652-653 (1988).]

In this case, Defendant Nichols was employed as an ESO. As an ESO, Defendant Nichols was obligated to follow established protocol and procedures. As recognized by the City of Detroit Police Department in disciplining Defendant Nichols, as well as the Wayne County Prosecutor in pursuing criminal charges, Defendant Nichols owed a duty to ask questions, treat the call as an emergency and properly evaluate the call to avoid irreparable harm.

Defendant Nichols relies on the case of *White v Humbert*, 206 Mich App 459 (1994), *rev'd on other grounds*, 453 Mich 308 (1995) to argue that there is no special relationship between a 911 operator and a decedent. However, the "special relationship" test in *White* was unique to the judicially created public duty doctrine. The *White* Court relied on the special relationship test set forth in *Harrison v Director of Dept of Corrections,* 194 Mich App 446, 456-57; 487 NW2d 799 (1992), which provided, in general, that a special relationship was present if (1) there was privity between the police and the victim that set the victim apart from the general public and (2) there were express assurances of protection that lead to reliance by the victim. As recognized by the *Harrison* Court, "the first prong requires 'some form of privity' between the governmental agency or official and the victim that sets the victim apart from the general public, whereby the victim becomes a 'reasonably foreseeable plaintiff.' " *Harrison*, 194 Mich App at 458-59.[7]

Since *White,* this Court has narrowly limited the application of the public duty doctrine to police officers who are alleged to have failed to provide protection from the criminal acts of third parties, recognizing that the grant of such broad, common-law immunity to all governmental employees would be inconsistent with the governmental tort liability act. See *Beaudrie v Henderson,* 465 Mich 124, 134, 139; 631 NW2d 308 (2001). Thus, the narrow special relationship test set forth in *White* is in applicable to the case at bar, which undisputedly does not involve the public duty doctrine.

Defendant Nichols acknowledges that the public duty doctrine is not at issue in the case at

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[7] Subsequently, in *White v Humbert*, 453 Mich 308 (1995), this Court defined the limits of the special-relationship exception to the public duty doctrine, as applied to police officers, concluding that the most appropriate special-relationship test for examining the relationship between police officers and private individuals is the test articulated by the New York Court of Appeals in *Cuffy v City of New York*, 505 NE2d 937 (1987).

bar, but maintains that she is relying on the *White* decision simply to establish that the facts of the instant case do not fall within the "special relationship" exception. Defendant Nichols asserts that since Robert was the one who placed the phone call (as opposed to his unconscious mother who obviously could not talk on the phone herself), there was no *direct* contact with Mrs. Turner or any *direct* assurances provided to Mrs. Turner and, therefore, she did not owe *any* duty to the Turners.

Defendant Nichols' argument is misplaced. First, as set forth above, the special relationship test discussed in *White* is unique to the public duty doctrine. Notwithstanding, unlike the facts in *White* (where the contact with 911 was through uninvolved individuals), there was certainly privity between Defendant Nichols and Mrs. Turner. Since Mrs. Turner was unconscious and unable to speak, her five-year-old son called on her behalf and sought emergency assistance. Further, Defendant Nichols told Robert that the police were on their way. Nevertheless, Defendant Nichols failed to dispatch a police unit and simply logged the call in as a prank call and closed the call record. Robert waited for three hours for help to arrive, but it did not come as Defendant Nichols had told him it would. Instead, Robert called 911 a second time and, again, ask for help for his mother, whom he clearly stated in both calls was "passed out" and "not gonna talk."

The situation identified by Robert Turner – that his mother was passed out – was sufficient to give rise to a special relationship between Defendant Nichols and Plaintiffs, which imposed a duty upon Defendant Nichols to reasonably expedite the involvement of police and/or EMS. Mrs. Turner was a reasonably foreseeable plaintiff who clearly had the inability to help herself (since she was "passed out"). Defendant Nichols certainly had the capability of following the ESO protocols and reasonably expediting the involvement of police and/or EMS, which could have been accomplished with minimal cost. Balancing the societal interests involved (ease of access to obtain police and/or EMS assistance in emergency situations), the severity of the risk (serious injury or death if assistance

is unreasonably delayed), the burden upon the defendant (she was hired, trained, and paid to perform this duty), and the likelihood of occurrence (Mrs. Turner was a foreseeable plaintiff), a "special relationship" giving rise to a legal duty to act exists in this case. *Roberts*, 171 Mich App at 652-653.

B. Defendant Nichols is Estopped From Arguing that Her Conduct Did Not Amount to Gross Negligence.

Pursuant to this Court's May 25, 2011 Order, Defendant Nichols argues that, even if she owed a duty, her conduct did not amount to gross negligence. While Defendant Nichols asserted in her motion for summary disposition that her actions did not amount to gross negligence, she failed to raise any facts, law or arguments in support of her position; rather, her argument was confined to whether her actions and/or inactions were "the" proximate cause of Mrs. Turner's death. Therefore, Plaintiff maintains that this issue is not preserved for appellate review and this Court should decline to review this issue with regard to the claims against Defendant Nichols. *Booth*, 444 Mich at 234; *Polkton*, 265 Mich App at 95; *Higgins Lake Prop Owners Ass'n*, 255 Mich App at 117.

However, in the event that this Court decides to review the issue, Plaintiffs maintain that Defendant Nichols is estopped from arguing that her conduct did not amount to gross negligence because a criminal jury has already found her guilty of Willful Neglect of Duty in violation of MCL 750.478, which provides as follows:

> When any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every ***willful neglect to perform such duty***, where no special provision shall have been made for the punishment of such delinquency, constitutes a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00. [emphasis added.]

"Willful" is defined as "voluntary and intentional, but not necessarily malicious." Black's Law Dictionary, (8th ed 2004). In determining whether there was sufficient evidence to support a defendant's conviction for willful neglect of duty for failing to report inmate assault while on duty

as deputy sheriff at jail, a panel of this court[8] has looked to the statutory definition of "wilful" as provided in subsection 6(8) of the Michigan Occupational Safety and Health Act, MCL 408.1006(8), which states:

> "Wilful", for the purpose of criminal prosecutions, means the intent to do an act knowingly and purposely by an individual who, having a free will and choice, either intentionally disregards a requirement of this act, or a rule or standard promulgated pursuant to this act, or is knowingly and purposely indifferent to a requirement of this act, or a rule or standard promulgated pursuant to this act. An omission or failure to act is wilful if it is done knowingly and purposely. Wilful does not require a showing of moral turpitude, evil purpose, or criminal intent provided the individual is shown to have acted or to have failed to act knowingly and purposely. [emphasis added.]

"Neglect" is defined as:

> 1. The omission of proper attention to a person or thing, whether inadvertent, negligent, or willful; the act or condition of disregarding. 2. The failure to give proper attention, supervision, or necessities, esp. to a child, to such an extent that harm results or is likely to result. [Black's Law Dictionary, (8th ed 2004) (emphasis added).]

Contrary to Defendant Nichols' assertions, "willful neglect of duty" is not merely "simple negligence." Rather, similar to the Michigan appellate courts' definition of "gross negligence"[9], it

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[8] *People v Medlyn,* 215 Mich App 338, 344, n1 (1996).

[9] For the purpose of governmental immunity, gross negligence by an employee involves "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a); *Costa v Community Emergency Med Serv, Inc*, 475 Mich 403, 411; 716 NW2d 236 (2006). It has been characterized as a willful disregard of safety measures and a singular disregard for substantial risks. *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). In *Tarlea,* the Court of Appeals expounded on the gross negligence standard in relation to government employees:

> Gross negligence. . . suggests . . . almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risk. 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**. [*Id.* (emphasis added).]

amounts to an intentional disregard, or a knowing and purposeful indifference, of a public employee's duties. Since a criminal jury has already concluded that Defendant Nichols was guilty of willful neglect of duty for her knowing and purposeful deviation from the established protocol and disregard of the totality of the circumstances in evaluating the 911 call from Robert Turner, there can be no dispute that Defendant Nichols' actions and/or inactions amounted to gross negligence, i.e., conduct so reckless as to demonstrate a substantial lack of concern for whether an injury resulted. This question of fact has already been actually litigated and determined by a valid and final judgment and Defendant Nichols had a full and fair opportunity to litigate this issue; therefore, the doctrine of collateral estoppel should preclude her from relitigating the issue in this matter. See *Monat v State Farm Ins Co*, 469 Mich 679, 682-684, 685-686, 694-695 (2004).

C. Alternatively, There is a Genuine Issue of Material Fact Whether Defendant Nichols' Conduct Amounted to Gross Negligence.

However, in the event that this Court concludes that collateral estoppel does not apply, Plaintiffs assert that, accepting the Plaintiffs' allegations as true and construing them in a light most favorable to Plaintiffs, a reasonable juror could conclude that Defendant Nichols' conduct was so reckless that it demonstrated a substantial lack of concern for whether injury would result. The facts, viewed in the light most favorable to Plaintiffs, reveal that Defendant Nichols failed to ascertain the nature of the call or treat it as an emergency; that she willfully and deliberately ignored the young child's pleas for help, that she labeled the call as a prank, and that she failed to dispatch police or an EMS unit to the scene.

In accordance with Defendant Nichols' employment as an ESO, she was obligated to follow protocol and procedures established for the City of Detroit Police Department Communications Operations for ESOs. For example, Training Bulletin 74-3-R-B "Telephone Deportment" states that

an ESO must "treat each call as an emergency." (Appellees' Appendix, p. 33b). Additionally, Training Bulletin 78-2 E9-1-1 "Interview Procedure" details the information that must be ascertained from a caller – where, what, when, who, and how. As the training bulletin indicates, "where" is the location that the response units need to go so that, in the event the call is disconnected, the responding units have a starting point. "What" determines the type of action needed, i.e., police, fire, EMS, Michcon Gas, Edison, etc. "When" reveals the urgency of the response. "Who" identifies the actors in the situation. The training bulletin further directs the ESOs to obtain information in accordance with the "EMS Four Commandments" – age, sex, conscious, breathing. (Appellees' Appendix, pp. 36b-37b).

In this case, Defendant Nichols was provided with information sufficient to put her on notice that Mrs. Turner was suffering from an emergency medical condition that required immediate medical attention. Yet, Defendant Nichols completely disregarded the young child's first statement in response to her question "where is the problem?" when Robert answered, "My mom has passed out." Nichols further disregarded Robert's response when Nichols requested to talk to "Mr. Turner" and Robert responded, "She's not gonna talk." Instead, she willfully and deliberately ignored the young child's pleas for help and terminated the call after a mere 43 seconds.

Contrary to well established protocol and her duties as an ESO, the only information that Defendant Nichols ascertained was "where" the problem was – the Robert Turner residence at 1950 Spruce Apt. 3 – which was obviously not information provided by the young child but, rather, was the information brought up on her computer screen based on whom the phone was registered to. She simply confirmed the information on her computer screen. Defendant Nichols failed to make any attempt to ascertain "what" the nature of the problem was, ignoring Robert's statement that his "mom passed out." Nor did she make any attempt to determine "when" the problem occurred or

"who" was involved, once again ignoring Robert's statement that his "mom passed out" and was "not gonna talk." Defendant Nichols also ignored the "EMS Four Commandments" – age, sex, conscious, breathing. Robert provided information sufficient for Defendant Nichols to determine at least 3 factors – an unconscious, adult female. Nevertheless, Defendant Nichols callously disregarded this information and did not even make the effort to follow up on his statements, terminating the call after a mere 43 seconds. Despite the fact that she told Robert that she was sending the police, Defendant Nichols did not dispatch a police unit and simply logged the call in as a prank call and closed the call record. Five-year-old Robert waited for three hours for help to arrive, but it did not come. Eventually, Robert called 911 again, trying to summon emergency assistance for his mother.

Notably, Defendant Nichols was fired from her position as an ESO with the City of Detroit, with the following explanation provided by the City:

> **Gross Negligence in the Performance of Duties** on February 20, 2006 and Violation of General Order 78-11, Section 8.4 "All Possible Consideration" and Section 8 "Contact With Citizens." [Appellees' Appendix, p. 51b (emphasis added).]

Defendant Nichols attempts to escape liability by arguing that at least fifty percent of the calls taken by an ESO on a daily basis are prank calls. Defendant Nichols has failed to present any admissible evidence to support this blanket assertion.[10] This Court must reject the affidavit of Harriet Knight that Defendant Nichols relies on. Contrary to Ms. Knight's averment in her affidavit, the information she testified to was ***not*** based on personal knowledge of the facts. In fact, Ms. Knight

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[10] In support of her argument that "approximately 50%" of the 911 calls are "pranks", Nichols relies on her own deposition testimony at pages 42 and 43 her of deposition transcript. However, **none of this testimony was part of the record** before the trial court and, therefore, it is not properly part of the record on appeal. *Dora v Lesinski*, 351 Mich 579, 581; 88 NW2d 592(1958); *Singer v Hoffman Cake Co*, 281 Mich 371, 375; 275 NW 177 (1937). This Court is confined to the lower court record in conducting its review on appeal. *Sims v Sims*, 298 Mich 491, 496; 299 NW 158 (1941); *Stephenson v Golden*, 279 Mich 710, 732-733; 276 NW 849 (1937).

testified in her September 30, 2009 deposition that she had ***no idea*** what information was used to calculate that the 911 service in the City of Detroit receives 4000 calls daily. Nor could she attest to the accuracy of the information. (Deposition of Harriet Knight, pp. 26-29, 39-40, Appellees' Appendix, pp. 40b-41b, 43b). She further admitted that she has ***no documentation*** to support her claim that approximately 50% of the calls to 911 each day are prank or nuisance calls. She simply stated that this was her own estimate that was ***not based on any data*** or calls answered by other ESOs (Dep of Knight, pp. 32-38, 41-42, Appellees' Appendix, pp. 41b-43b, 44b).

Notably, ESO Knight testified that the call placed by Robert Turner was certainly an emergency call and that he was ***not*** playing on the phone (Dep of Knight, pp. 43, 48, Appellees' Appendix, pp. 44b, 45b). She further testified that when taking a 911 call, the ESO must consider it an emergency until absolutely convinced otherwise and, when in doubt, a police dispatch must be requested. (Dep of Knight, p. 31, Appellees' Appendix, p. 41b). Ms. Knight also discredited Defendant Nichols' claim that she could not hear Robert Turner, noting that whenever an ESO is having difficulty hearing the caller, all efforts should be made to tell the caller that you cannot hear them and to clarify the nature of their call, as opposed to simply dismissing it as a prank or a child playing on the phone. (Dep of Knight, pp. 45, 50, Appellees' Appendix, pp. 45b, 46b).

Viewing the facts and evidence in the light most favorable to Plaintiffs, a reasonable juror could conclude that Defendant Nichols' conduct was so reckless that it demonstrated a substantial lack of concern for whether injury would result. Accordingly, the Court of Appeals did not err in affirming the trial court's denial of Defendant Nichols' motion for summary disposition with regard to Plaintiffs' gross negligence claim.

III. The Court of Appeals Did Not Err in Concluding that There Is a Genuine Issue of Material Fact Whether Defendant Nichols' Gross Negligence Was the One Most Immediate, Efficient, and Direct Cause Preceding Mrs. Turner's Death Where Plaintiff's Experts Opined That Mrs. Turner Languished for Hours Before She Died and, More Likely Than Not, She Would Have Survived the Underlying Cardiac Event If Timely Medical Assistance Had Been Provided.

Proximate cause is a term of art that encompasses both cause in fact and legal cause. *Craig v Oakwood Hosp,* 471 Mich 67, 86-87 (2004). A plaintiff is not required to "prove that an act or omission was the *sole* catalyst for his injuries"; rather, he must simply "introduce evidence permitting the jury to conclude that the act or omission was *a* cause." *Id.* at 87 (emphasis original). "All that is necessary is that the proof amount to a reasonable likelihood of probability rather than a possibility. The evidence need not negate all other possible causes, but such evidence must exclude other reasonable hypotheses with a fair amount of certainty." *Skinner v Square D Co*, 445 Mich 153, 166 (1994) (quoting 57 Am Jur 2d, Negligence, §461, p 442).

Summary disposition is ***not appropriate*** when the plaintiff offers evidence that shows "that it is more likely than not that, but for defendant's conduct, a different result would have obtained." *Dykes v Wm Beaumont Hosp,* 246 Mich App 471, 479 n 7 (2001). In fact, it is well accepted that, generally, the jury is to decide the question of proximate cause. *Moning v Alfono,* 400 Mich 425 (1977). It is only when reasonable persons could not reach a different conclusion that proximate cause may be taken from the jury. In all other instances, causation is a question of fact for the jury to decide. *Brisbois v Fibreboard Corp.,* 429 Mich 540 (1988); *Davis v Lhim,* 124 Mich App 291 (1983), rev'd on other grounds, 430 Mich 326 (1988).

In *Robinson v City of Detroit*, 462 Mich 439, 462 (2000), this Court defined the phrase "the proximate cause" as used in Section 7 of the GTLA, concluding that to be the proximate cause of an injury, the governmental employee's gross negligence must be "the one most immediate, efficient

and direct cause" preceding the injury. This definition was first set forth in *Stoll v Laubengayer*, 174 Mich 701; 140 NW 532 (1913), which the *Robinson* Court relied on, stating that "the Legislature has nowhere abrogated this . . . ." *Robinson*, 462 Mich at 462.

The determination of cause in fact is usually an issue for the jury to determine where the evidence is disputed and where reasonable minds can differ. *Schuette v Celotex Corp*, 196 Mich App 135, 138 (1992). Moreover, "if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence." *Scott v Illinois Tool Works*, 217 Mich App 35, 40 (1996) lv den 455 Mich 861 (1997) (quoting *Kaminski v Grand Truck W R Co*, 347 Mich 417, 422 (1956)). As the more enlightened decisions establish, this is no less true under *Robinson*'s more rigid "the proximate cause" test.

In *Stoll*, a five-year-old child suffered fatal injuries after she sledded down a hill, directly into the path of defendant's wagon and team of horses, which were parked at the bottom of the hill. *Stoll*, 174 Mich at 701. The child slid under the wagon and was either run over by the wagon wheel or kicked by a horse. *Id.* The plaintiff alleged that the defendant negligently parked its wagon across the path, left it unguarded, and failed to warn the young child of the danger of coasting down the path. *Id.* The jury returned a verdict in favor of plaintiff and defendant appealed. *Id.*

On appeal the *Stoll* defendant argued, in part, that his negligence was not the proximate cause of the child's death. *Id.* at 704.The Supreme Court agreed, holding that the defendant's alleged negligent act preceded the girl's decision to slide down the hill. The Court concluded that the "immediate cause" of the injury was the child's act of voluntarily starting her sled run down the hill. *Id.* at 706. "But for this act of hers (subsequent to defendant's alleged negligent act, and therefore proximate to the injury) no accident could have occurred." *Id.* The *Stoll* Court held that, with regard

to the girl's action, "[w]hether willful or accidental, it was still proximate – the immediate, efficient, direct cause preceding the injury." *Id.* at 706.

Similarly, in *Robinson*, the plaintiffs in two different actions brought claims against the police officers involved in police pursuits that eventually resulted in crashes and subsequent injuries to the plaintiffs. The individual officers claimed that they were not "the proximate cause" of the plaintiffs' injuries. This Court agreed, holding that – consistent with *Stoll* – the "one most immediate, efficient, and direct cause of the plaintiffs' injuries was the reckless conduct of the drivers of the fleeing vehicles." *Id.* at 462. That is, but for the fleeing, no accident could have occurred.

In the instant case, viewing the evidence in the light most favorable to Plaintiffs, a reasonable juror could conclude that Defendant Nichols' gross negligence was the one most immediate, efficient, and direct cause preceding Mrs. Turner's death. It is undisputed that Defendant Nichols did not dispatch police or an EMS unit to the Turner household. It is further undisputed that the EMS did not arrive on scene until more than 3 ½ hours after Robert's first call to 911 (which Defendant Nichols answered). The medial examiner indicated that Mrs. Turner's body was warm to the touch and that rigor had not set in when he arrived on the scene, which was more than four hours after Robert's first call was placed to 911:

> MEI Humes to scene where decedent is found lying supine on bedroom floor, **she is warm to the touch with no rigor present** and clad only in a T-Shirt, decedent's five year old son called police who thought he was playing on phone, when they arrived at residence they discovered decedent on floor. [Wayne County Medical Examiner Records, Appellees' Appendix, p. 49b (emphasis added).]

Francisco Diaz, M.D. of the Wayne County Medical Examiner's Officer performed the autopsy of Mrs. Turner. Dr. Diaz relied on the MEI's findings, as MEIs are trained to determine if rigor mortis has set in as well as temperature of the body. (Dep of Dr. Diaz, p. 8, Appellees'

Appendix, p. 4b). Dr. Diaz indicated in his report that the death was due to dilated cardiomyopathy, which is simply and enlarged hear (Dep of Diaz,, p. 9, Appellees' Appendix, p. 5b). However, cardiomyopathy, was simply the cause of death, not the mechanism of death. Dr. Diaz explained that the two possibilities of the mechanism of death was either a cardiac insufficiency (congestive hear failure) or an arrhythmia. If the mechanism of death was a cardiac insufficiency, Mrs. Turner could have lingered for a period of time before she died. If the mechanism of death was due to an arrhythmia, then Mrs. Turner could have experienced several arrhythmias and then expired (Dep of Diaz, pp. 16-18, Appellees' Appendix, pp. 6b-7b).

Based on what Dr. Diaz saw upon examination, he felt that the mechanism of death was suggestive of a cardiac insufficiency, which meant that, **more likely than not, Mrs. Turner lingered for a period of time before she expired** (Dep of Diaz, pp. 16-18, 21, Appellees' Appendix, pp. 6b-7b, 8b). In support of his conclusion, Dr. Diaz testified that Ms. Turner had pulmonary edema (Dep of Diaz, p. 19, Appellees' Appendix, p. 7b). Dr. Diaz testified that the findings of pulmonary edema is supportive of the fact that Mrs. Turner languished for a significant period of time:

> Q. And so if an arrhythmia had killed Ms. Turner instantaneously, there would be no pulmonary edema, do you agree?
>
> A. If a person ans a pre-existing condition and the condition that kills that person, the immediate cause of death is a arrhythmia induced by specific disturbance, electric disturbance of the heart. **The person will die instantaneously and they will have no pulmonary edema**. For the benefit of the jury, let me put myself as an example. If I die of an arrhythmia right now, chances are I will have no edema. [Dep of Diaz, p. 22, Appellees' Appendix, p. 8b (emphasis added).]

Given the fact that rigor mortis sets in within two hours of death and four hours after Robert's first call to 911 rigor had not yet set in and Mrs. Turner was still warm to the touch, Dr. Diaz opined

that Mrs. Turner had not been dead for a significant period of time when she was pronounced dead at the scene. (Dep of Diaz, pp. 12, 14, 23-25, Appellees' Appendix, pp. 5b, 6b, 8b-9b). In other words, more likely than not, Mrs. Turner was alive when Robert spoke to Defendant Nichols at 5:59 p.m.

In addition, Plaintiff's expert Werner Spitz, M.D., a forensic pathologist, testified that, within a reasonable degree of medical certainty, Mrs. Turner was not dead when the first call made to 911 at 5:59 p.m. and, more likely than not, had the appropriate response been provided, Mrs. Turner could have been saved. (Dep of Dr. Spitz, pp. 26, 41-42, 47-48, Appellees' Appendix, pp. 12b, 13b, 14b).

Viewing the evidence in the light most favorable to Plaintiffs, a reasonable juror could conclude that Defendant Nichols' gross negligence was the one most immediate, efficient, and direct cause preceding Mrs. Turner's death. There is no evidence that Mrs. Turner's death was immediate or was certain to occur. In fact, there is evidence that Mrs. Turner languished for hours before she died and, more likely than not, she could have survived the underlying cardiac event. Consistent with the Court's analysis in *Stoll*, a reasonable juror could conclude that the immediate cause of Mrs. Turner's death was the lack of any medical attention for her underlying cardiac condition. But for Defendant Nichols' failure to treat Robert's call as an emergency and wilfully and deliberately ignoring Robert Turner's pleas for help (which was subsequent to the underlying cardiac event and therefore proximate to the injury) Mrs. Turner would not have died.

In support of her arguments, Defendant Nichols relies on *Dean v Childs,* 262 Mich App 48; 684 NW2d 894 (2004), *rev'd in part,* 474 Mich 914 (2005). First, since the Court of Appeals ruled in favor the plaintiffs in *Dean,* Plaintiffs herein presume that Defendant Nichols intends to rely on this Court's November 5, 2005 Order, wherein this Court held, in lieu of granting the Defendant

firefighter's application for leave to appeal, that the Court of Appeals' judgment should be reversed in part, for the reasons stated in Judge Griffin's dissenting opinion. Nevertheless, *Dean* is clearly factually distinguishable from the case at bar and does not warrant reversal of the Court of Appeals' decision in this matter.

While Plaintiffs do not agree with the outcome of *Dean,* Plaintiffs note that, according to Judge Griffin's dissent, which this Court adopted, the plaintiffs in *Dean* did not present evidence from which a jury could conclude that, more likely than not, but for the defendant's actions and/or inactions, the children would not have died. Judge Griffin criticized the evidence presented by the plaintiffs and concluded that the facts of the case beared similarities to *Kruger v White Lake Twp*, 250 Mich App 622; 648 NW2d 660 (2002), where the 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 after she was hit by a car following her escape from a police holding cell. Specifically, the *Kruger* Court held that there were several other more direct causes of the decedent's injuries than the 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." *Id.* at 627. The *Kruger* Court concluded that any gross negligence on defendant officers' part was too remote to be "the" proximate cause of the decedent's injuries. *Id.*

Conversely, in the instant matter, other than the underlying medical event and Defendants' gross negligence, there is no other act or circumstance that could be the one most immediate, efficient, and direct cause of Mrs. Turner's death. A question of fact clearly exists regarding whether the underlying medical event or Defendants' failure to provide the requested medical assistance was "the proximate cause," i.e., the one most immediate, efficient, and direct cause of Mrs. Turner's death. Accordingly, the Court of Appeals did not err in affirming the trial court's denial of Defendant

Nichols' motion for summary disposition.

IV. The Court of Appeals Did Not Err in Concluding that Defendant is Not Entitled to Qualified Immunity for the Intentional Tort Claim Under *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567 (1984) and MCL 691.1407(3) Where the Challenged Acts Were Completed in the Course of Her Employment as an Emergency Services Operator, Where There is a Jury-Submissble Question of Fact Concerning Her Lack of Good Faith in Her Treatment of Plaintiff During the 911 Calls, and Where Defendant's Acts as an ESO were Ministerial.

Defendant Nichols further contends that she is entitled to qualified immunity for the intentional tort claim under *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567 (1984) and MCL 691.1407(3). The immunity provided by MCL 691.1407 does not apply to the intentional torts of individual government employees. *Odom v Wayne County,* 482 Mich 459, 470 (2008). It is undisputed that intentional infliction of emotional distress is an intentional tort. *Graham v Ford*, 237 Mich App 670, 674 (1993).

As recognized by this Court in *Odom*, the common law test for intentional tort liability is the test which was set forth in *Ross* as follows:

> Lower level officials, employees, and agents are immune from tort liability only when they are
>
> 1) acting during the course of their employment and acting, or reasonably believe they are acting, within the scope of their authority;
>
> 2) acting in good faith; and
>
> 3) performing discretionary, as opposed to ministerial acts. [*Ross*, 420 Mich at 633-34.]

A. There Are Jury-Submissible Questions of Fact Concerning Defendant's Lack of Good Faith in Her Treatment of Robert Turner During the 911 calls.

As this Court recognized in *Odom*, in order to be immune from liability for intentional torts under MCL 691.1407(2), the governmental employee must establish that he or she was acting in

"good faith." *Id.* at 473-75. While this element was not specifically defined in *Ross*, the *Odom* Court held that lack of good faith can be described as: "malicious intent, capricious action or corrupt conduct," "willful and corrupt misconduct," "malice or wantonness or a reckless indifference to the common dictates of humanity," "an intent to harm or, if not that, such indifference to whether harm will result as to be the equivalent of a willingness that it does," "conduct or a failure to act that was intended to harm the plaintiff," or "conduct or a failure to act that shows such indifference to whether harm will result as to be equal to a willingness that harm will result." *Id.* at 474-75. The *Odom* Court also noted that Prosser on Torts states, "[O]fficial immunity should not become a cloak for . . . otherwise outrageous conduct. . ." *Id.* at 474.

Contrary to Defendant Nichols' assertions, there is certainly a dispute whether her actions were undertaken in good faith and whether she acted recklessly in her treatment of Robert during the 911 call. First, as discussed above, a criminal jury has already convicted Defendant Nichols of wilful neglect of duty in violation of MCL 750.478, which amounts to an intentional disregard, or a knowing and purposeful indifference, of a public employee's duties. Plaintiffs maintain that this conviction establishes that Defendant Nichols did not act in good faith in her treatment of Robert during the 911 call. Nevertheless, even if this Court does not conclude that Defendant Nichols' lack of good faith was conclusively established by her criminal conviction, viewing the evidence in the light most favorable to Plaintiffs, there is a justiciable question of fact with regard to whether Defendant Nichols' actions and/or inactions amounted to a reckless indifference to whether emotional distress would result from her treatment of Robert during the 911 call, which would establish her lack of good faith.

Defendant Nichols' lack of good faith is demonstrated by her complete failure to adhere to her mandated duties as an ESO. Those duties include, "Professionalism and Objectivity" pursuant

to General Order 78-11, Subsection 8.9, which requires ESOs to question citizens "in a polite and professional manner, taking into consideration all circumstances and remaining completely objective towards all persons. (Appellees' Appendix, p. 29b). Additionally, Training Bulletin 74-3-R-B, Telephone Deportment, emphasizes that "[i]t is imperative that the Emergency Services Operator (E.S.O.) handle the call courteously and efficiently." (Appellees' Appendix, p. 32b). The Training Bulletin further warns that the ESO "should never convey a tone of sarcasm or impatience when speaking to any citizen." (Appellees' Appendix, p. 32b) (emphasis in original)). The Training Bulletin establishes that each call must be handled with courtesy and efficiency, and warns against negative voice tones and manner of presentation. (Appellees' Appendix, pp. 32b-33b).

Specifically, the Training Bulletin dictates that an ESO's words or voice inflections must not reflect irritation, disgust or sarcasm; rather, each call must be treated as an emergency and handled as follows:

1. Place yourself in the caller's position – fear, panic
2. Obtain all pertinent information
3. Relay information to the proper agency
4. Speak clearly
5. Speak directly into the mouthpiece
6. Do not waste time repeating unnecessary information
7. Observe telephone courtesy
8. Remain calm, competent; use a decisive voice
9. Courtesy usually does not antagonize the caller
10. Treat people as you would expect to be treated
11. Explain transfers and holds; explain to the caller why he may be put on hold, or to whom he is being transferred
12. Terminate calls positively and courteously

[Appellees' Appendix, p. 33b].

Further, Training Bulletin 78-2, "Interview Procedure", details the information that must be ascertained from a caller – where, what, when, who, and how. (Appellees' Appendix, pp. 36b-37b). As the training bulletin indicates, "where" is the location that the response units need to go so that,

in the event the call is disconnected, the responding units have a starting point. "What" determines the type of action needed, i.e., police, fire, EMS, Michcon Gas, Edison, etc. "When" reveals the urgency of the response. "Who" identifies the actors in the situation. The training bulletin further directs the ESOs to obtain information in accordance with the "EMS Four Commandments" – age, sex, conscious, breathing. (Appellees' Appendix, p. 37b).

Here, Defendant Nichols willfully deviated from the established protocol when she handled Robert's 911 call, which lasted only 43 seconds. She did not ask questions in compliance with the "Interview Procedure" set forth in Training Bulletin 78-2. She also violated the established protocol contained in Training Bulletin 74-3-R-B by failing to treat the call as an emergency and failing to handle the call courteously and professionally. Nor did she properly evaluate the call in accordance with Training Bulletin 98-1. Viewing the evidence in the light most favorable to Plaintiffs, there is a justiciable question of fact whether Defendant Nichols acted in good faith in her handling of Robert's 911 call.[11]

As this Court noted in *Odom,* the *Ross* decision did not specifically define the "good faith" element. Nevertheless, the *Odom* decision provided a variety of accepted descriptions for a lack of

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[11] In its analysis of the "good faith" issue, the Court of Appeals focused on the Defendants' conduct collectively, and their treatment of Robert's calls as pranks, discussing their failure to send assistance in response to a 911 call that indicted a need for medical assistance. Plaintiffs maintain that the Court's focus on these particular actions, as opposed to Defendants' words and conduct towards Robert during the phone call, does not change the outcome of the "good faith" analysis. As Plaintiffs argued to the trial court and the Court of Appeals, there is no discretion involved in an ESO's treatment of a 911 caller or in acquiring the necessary information. In fact, the Court of Appeals recognized that the Defendants were mandated, by department policy, to interact with 911 callers professionally and considerately. Defendant Nichols willfully deviated from the established protocol when she handled Robert's 911 call. She failed to treat him in a polite or professional manner or obtain his necessary information. The young boy told Nichols that his mother was passed out and could not come to the phone to talk. Nevertheless, Nichols ignored the young boy's call and simply labeled it as a prank. Under the facts and circumstances, there is a justiciable question of fact whether Defendant Nichols acted in good faith in her handling of Robert's 911 call.

good faith, including wanton or reckless conduct as recognized by the Court of Appeals in the instant matter. Specifically, the Court of Appeals defined recklessness as follows:

> Recklessness **may** be shown by showing that "any reasonable person would know emotional distress would result" from a defendant's conduct. *Haverbush v Powelson*, 217 Mich App 228, 236-237; 551 NW2d 206 (1996). *Haverbush* held that such a showing is sufficient, not necessary, to show recklessness. *Id.* at 237. Black's Law Dictionary defines recklessness as "[c]onduct whereby the actor does not desire harmful consequence but nonetheless foresees the possibility and consciously takes the risk." Black's Law Dictionary (8th ed). [Appellant's Appendix, p. 10a (emphasis added).]

Here, the facts establish that Defendant Nichols willfully deviated from the established protocol when she handled Robert's 911 call. She failed to treat him in a polite or professional manner or obtain his necessary information. The young boy told Nichols that his mother was passed out and could not come to the phone to talk. Nevertheless, Nichols ignored the young boy's call and simply labeled it as a prank. When all of the facts are taken into consideration, including the reasonable inferences arising therefrom, in a light most favorable to Plaintiffs, Defendant Nichols' actions embodied an indifference as to whether emotional harm would result to young Robert. Accordingly, the Court of Appeals did not err in concluding that Defendant Nichols had not met her burden in establishing that she acted in good faith.

B. Defendant's Acts as an ESO were Ministerial.

Contrary to Defendant Nichols' assertions, her acts as an ESO were ministerial, as opposed to discretionary, and, therefore, she is not entitled to qualified immunity. As set forth in *Ross* and recognized by the *Odom* Court, ministerial acts "constitute merely an obedience to orders or the performance of a duty in which the individual has little or no choice." *Odom*, 482 Mich at 476. The *Odom* Court noted that police officer performs many ministerial acts daily, "such as completing activity logs and police reports or following the procedures for booking an arrested person." *Id.*

Similarly, ESO's are required to obtain pertinent information regarding calls that are made to 911 in Detroit and input the relevant information into a computer system maintained by the Detroit Police Department. There is no discretion involved in the ESO's treatment of the caller or in acquiring the information.

At the time Robert Turner called and reported the emergency, Defendant Nichols had no discretion in treating him in a polite and professional manner or obtaining information from him. When the emergency call came in, by policy and procedures of the Detroit Police Department, she was required to remain objective, obtain his information and send emergency help. She did not do that. She ignored the boy's call and labeled it as a prank.

Detroit's General Order 78-11, which discusses conduct that is required to be taken by the ESO during contact with citizens, is also evidence that the conduct against Robert Turner was ministerial in nature. Through General Order 78-11, sub chapter 8, the City of Detroit Police Department has commanded that the ESO's follow certain procedures. For example, Subsection 8.4, All Possible Consideration, provides as follows:

> All employees **shall** give all possible consideration to citizens seeking information or assistance or desiring to make any report whether in person or by telephone. [Appellees' Appendix, p. 28b (emphasis added).].

In addition, Subsection 8.9, Professionalism and Objectivity, provides as follows:

> An employee **shall**, when questioning a citizen, do so in a polite and professional manner, taking into consideration all circumstances and remaining completely objective towards all persons. [Appellees' Appendix, p. 29b (emphasis added).].

Similarly, Section 21, ("Neglect of Duty"), states that an employee **shall not** intentionally fail to take action as required by department rules, regulations, orders or procedures which are applicable to his duties and responsibilities. (Appellees' Appendix, p. 31b).

Furthermore, Training Bulletin 78-2 E9-1-1 ("Interview Procedure") details the information

that an ESO must ascertain from a caller. (Appellees' Appendix, pp. 36b-37b). Also relevant are Training Bulletin 74-3-R-B "Telephone Deportment" and Training Bulletin 98-1, "Emergency Call-Taker Liability and Discretion". (Appellees' Appendix, pp. 23b-27b, 32b-35b). Notably, the prosecutor concluded that Defendant Nichols did not ask questions in compliance with Training Bulletin 78-2, did not treat the call as an emergency in violation of the established protocol contained in Training Bulletin 74-3-R-B and did not properly evaluate the call in accordance with Training Bulletin 98-1. These were not discretionary acts, but, rather, procedures that Defendant Nichols was required to follow as an ESO.

The use of the word "shall" in these orders and bulletins makes it clear that an ESO cannot stray from these duties, which renders the conduct ministerial in nature. There is no discretion for these acts. Clearly, there is no immunity afforded under *Ross* or *Odom* for such ministerial acts, especially when the evidence viewed in the light most favorable to the Plaintiffs could lead a reasonable juror to conclude that the Defendant Nichols performed such ministerial acts in a reckless manner. Accordingly, the Court of Appeals did not err in affirming the trial court's denial of Defendant Nichols' motion for summary disposition on the basis of governmental immunity.

V. The Court of Appeals Did Not Err in Affirming the Trial Court's Denial of Defendant Nichols' Motion for Summary Disposition with Regard to Plaintiff's Claim for Intentional Infliction of Emotional Distress When, Viewing the Evidence in a Light Most Favorable to the Plaintiff, the Defendant's Conduct Was Extreme and Outrageous, Intentionally and/or Reckless Committed for the Purpose of Harassing Robert Turner and, as the Direct and Proximate Result Thereof, Plaintiff Suffered Extreme Emotional Injuries, Mental Anguish, Sleep Disturbances and Post-Traumatic Stress Disorder.

Intentional infliction of emotional distress is a separate cause of action which is not necessarily parasitic to another cause of action as an aggravating element of damages. *Holmes v Allstate Ins Co*, 119 Mich App 710, 714 (1982); *Ross v Burns*, 612 F2d 271 (6th Cir 1980). While

this Court has not officially recognized the tort of intentional infliction of emotional distress, panels of the Court of Appeals have recognized the tort for more than forty years. See *Early Detection Center, PC v New York Life Ins Co,* 157 Mich App 618, 625 (1986); *Rosenberg v Rosenberg Brothers Special Account,* 134 Mich App 342, 350 (1984), *Holmes,* 119 Mich App at 714; *Ledsinger v Burmeister,* 114 Mich App 12, 17 (1982); *Warren v June's Mobile Home Village & Sales, Inc*, 66 Mich App 386, 390 (1976); *Frishett v State Farm Mutual Automobile Ins Co*, 3 Mich App 688, 692 (1966).

The Michigan Court of Appeals has explicitly adopted the definition of intentional infliction of emotional distress found in the Restatement Torts, 2d, § 46, pp 71-72, which provides as follows:

> One 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. [See *Early Detection Center, PC,* 157 Mich App at 625; *Rosenberg,* 134 Mich App at 350; *Holmes,* 119 Mich App at 714; *Ledsinger*, 114 Mich App at 17; *Warren*, 66 Mich App at 390; *Frishett*, 3 Mich App at 692.]

In accordance with the Restatement of Torts, Michigan Courts have found four essential elements to a claim for intentional infliction of emotional distress: (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. *Roberts v Automobile-Owners Ins Co,* 422 Mich 594, 603 (1985); *Lewis v LeGrow*, 258 Mich App 175, 196 (2003) (quoting *Graham*, 237 Mich App at 674). Liability attaches when a plaintiff can demonstrate that the defendant's conduct is "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.* As recognized by this Court in *Roberts*, the test to determine whether a person's conduct was extreme and outrageous is whether "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.* at 603 (quoting Restatement Torts, 2d, § 46, comment d, pp 72-73.)

The second element of "intent or recklessness" may be proved by either showing that a defendant specifically intended to cause a plaintiff emotional distress or that a defendant's conduct was so reckless that "'any reasonable person would know emotional distress would result.'" *Lewis,* 258 Mich App at 196-97 (quoting *Haverbush v Powelson*, 217 Mich App 228, 234 (1996)).

Indeed, the Comments to the Restatement Torts, 2d, § 46 state that liability "does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." However, that is certainly not the case in this matter. Notably, the Restatement Torts, 2d, § 46, comment *d* , provides the following illustrations were liability has been found in favor of a plaintiff on a claim for intentional infliction of emotional distress:

1. As a practical joke, A falsely tells B that her husband has been badly injured in an accident, and is in the hospital with both legs broken. B suffers severe emotional distress. A is subject to liability to B for her emotional distress. If it causes nervous shock and resulting illness, A is subject to liability to B for her illness.

2. A, the president of an association of rubbish collectors, summons B to a meeting of the association, and in the presence of an intimidating group of associates tells B that B has been collecting rubbish in territory which the association regards as exclusively allocated to one of its members. A demands that B pay over the proceeds of his rubbish collection, and tells B that if he does not do so the association will beat him up, destroy his truck, and put him out of business. B is badly frightened, and suffers severe emotional distress. A is subject to liability to B for his emotional distress, and if it results in illness, A is also subject to liability to B for his illness.

3. A is invited to a swimming party at an exclusive resort. B gives her a bathing suit which he knows will dissolve in water. It does dissolve while she is swimming, leaving her naked in the presence of men and women whom she has just met. A suffers extreme embarrassment, shame, and humiliation. B is subject to liability to A for her emotional distress.

Whether a defendant's acts were sufficiently outrageous depends upon the context in which the defendant committed them. *Rosenberg*, 134 Mich App at 353. The extreme and outrageous

character of the conduct may arise from the position of the actor or a relationship to the distressed party. *Ledsinger*, 114 Mich App at 19. For example, it may occur through an abuse of a relationship which puts the defendant in a position of actual or apparent authority over a plaintiff or gives a defendant power to affect a plaintiff's interest. *Warren*, 66 Mich App at 391 (1976). Police officers, school authorities, landlords, and collecting creditors have been held liable for extreme abuse of their position. Restatement Torts, 2d, § 46, Comment *e*.

In *Ledsinger,* the Court found that racial epithets in the course of throwing the plaintiff out of the defendant's retail store could be considered to be extreme and outrageous conduct under the circumstances. *Ledsinger,* 114 Mich App at 17-21. Similarly, in *Rosenberg,* the Court found that allegations of twenty-six instances of misconduct when the defendant exerted his position over the widowed plaintiff to "browbeat" her into selling her business interests in her husband's estate could be sufficiently outrageous to state a claim. *Rosenberg*, 134 Mich App at 350-53.

The following are illustrations from the Restatement of Torts, 2d, § 46, of circumstances were liability has been found in favor of a plaintiff on a claim for intentional infliction of emotional distress:

> 5. A, a private detective, calls on B and represents himself to be a police officer. He threatens to arrest B on a charge of espionage unless B surrenders letters of a third person which are in her possession. B suffers severe emotional distress and resulting illness. A is subject to liability to B for both.
>
> 6. A, the principal of a high school, summons B, a schoolgirl, to his office, and abruptly accuses her of immoral conduct with various men. A bullies B for an hour, and threatens her with prison and with public disgrace for herself and her parents unless she confesses. B suffers severe emotional distress, and resulting illness. A is subject to liability to B for both.
>
> 7. A, a creditor, seeking to collect a debt from B, sends B a series of letters in lurid envelopes bearing a picture of lightning about to strike, in which A repeatedly threatens suit without bringing it, reviles B as a deadbeat, a dishonest man, and a criminal, and threatens to garnish his wages, to bother

> his employer so much that B will be discharged, and to "tie B up tight as a drum" if he does not pay. B suffers severe emotional distress. A is subject to liability to B. [The Restatement Torts, 2d, § 46, Comment *e*.]

The Restatement Torts, 2d, § 46, Comment *f*, further states that liability may arise simply under the facts and circumstances of the case, such as here, where the Plaintiff was faced with an extreme trauma:

> The extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity. The conduct may become heartless, flagrant, and outrageous when the actor proceeds in the face of such knowledge, where it would not be so if he did not know. . . .
>
> **Illustrations:**
>
> 9. A, an eccentric and mentally deficient old maid, has the delusion that a pot of gold is buried in her back yard, and is always digging for it. Knowing this, B buries a pot with other contents in her yard, and when A digs it up causes her to be escorted in triumph to the city hall, where the pot is opened under circumstances of public humiliation to A. A suffers severe emotional disturbance and resulting illness. B is subject to liability to A for both.
>
> 10. A knows that B, a Pennsylvania Dutch farmer, is extremely superstitious, and believes in witchcraft. In order to force B to sell A his farm, A goes through the ritual of putting a "hex" on the farm, causing B to believe that it is bewitched so that crops will not grow on it. B suffers severe emotional distress and resulting illness. A is subject to liability to B for both.
>
> 11. A, who knows that B is pregnant, intentionally shoots before the eyes of B a pet dog, to which A knows that B is greatly attached. B suffers severe emotional distress, which results in a miscarriage. A is subject to liability to B for the distress and for the miscarriage.

Generally, it is "the trial court's duty to determine whether a defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." *Lewis,* 258 Mich App at 197. However, "[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." *Id.*

A. There Are Jury-Submissible Questions of Fact Concerning Whether Defendant's Statements and Conduct During the Two 911 Calls Were Extreme and Outrageous.

In this case, all that is needed to be reviewed to understand that the standard has been met is to listen to the 911 phone call. Defendant Nichols' voice inflections and accusations are chilling and indefensible. Viewing the evidence in a light most favorable to the Plaintiffs, reasonable jurors could find that recitation of the facts of the case to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!" In addition, while summary judgment is not appropriate in cases involving intent, credibility, or state of mind, *Tumbarella v Kroger Co*, 85 Mich App 482, 492 (1978), reasonable jurors could find that a reasonable person would conclude that Plaintiff would suffer emotional distress from Defendant's callous, dismissive and abusive behavior.

Findings of fact and weighing credibility are roles reserved for the trier of fact. Indeed, 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 (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*, 258 Mich App 197; see also *Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335, 343 (1993). Given the facts and circumstances in this matter, Court of Appeals did not err in concluding that there were jury-submissible questions of fact concerning whether Defendant's statements and conduct during the 911 call were extreme and outrageous.

A panel of the Court of Appeals (Jansen, P.J., O'Connell and Owens, JJ) was faced with a similar question in *Hayes v Langford*, unpublished per curiam opinion of the Court of Appeals, issued December 9, 2008 (Docket No 280049), wherein the majority concluded that there was a jury-

submissible question on the issue of intentional infliction of emotional distress where the Detroit 911 operator callously ignored the plaintiff's desperate pleas for medical assistance and, instead, bombarded her with verbal insults and rude accusations as she laid on the floor of her home suffering from multiple gunshot wounds to the temple, right hip and right side, stating as follows:

> 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 particular 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 the 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!" [Appellants' Appendix, p. 62a (citations omitted).]

B. There Are Jury-Submissible Questions of Fact Concerning Whether Defendant Acted Recklessly in Her Treatment of Robert Turner During the 911 call.

Defendant Nichols argues that, even if her tone is interpreted as rude or her comments threatening, she did not intend to harm Robert Turner. It is not dispositive that Defendant Nichols may not actually intended to cause Robert Turner'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 v Taylor*, 263 Mich App 618, 634 (2004); *Graham*, 237 Mich App at 674; *Haverbush,* 217 Mich App at 234.

As set forth in the Restatement of Torts, 2d, § 46, "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" or "from the defendant's knowledge that the plaintiff is 'peculiarly susceptible to emotional distress, by reason of some physical or mental

condition or peculiarity.'"

On March 2, 2007, Gerald Shiener, M.D. conducted a psychiatric evaluation of Robert Turner. Robert spoke of his frustration in calling 911 and spending three hours alone with his mother, without any help. Dr. Shiener opined that Robert suffers from post-traumatic stress disorder, which has manifested itself in a variety of manners. Dr. Shiener stated, in pertinent part, as follows:

> He called 911 and attempted to get help "as I was taught", and had two frustrating encounters with 911 operators who refused to accept his call, asked to speak to an adult, and threatened him with punishment for making a prank call.
>
> The patient spent a period of several hours alone in the house with his mother during her period of unconscious and death, and since that time has had difficulty separating. He has been depressed, withdrawn, having sleep disturbances – troubling dreams with a theme of threat or wish-fulfillment, decrease in appetite. The death of a parent under any circumstance is stressful. ***Under these circumstances of conflict with his powerlessness in helping his mother make the experience traumatic in a significant manner.*** The patient's reaction is determined by the intensity of this trauma.
>
> Robert Turner is suffering from not only the loss of his mother and the bereavement that that entails, but his ability to overcome that loss and grieve it in a normal manner. It is complicated by the circumstances under which she died – specifically his attempts to get help and being frustrated in those attempts bring about feelings of guilt . . .
>
> Robert Turner has been profoundly affected by his mother's death in a complicated way, and his reaction arises to the level of a psychiatric illness. ***This death will affect him for the rest of his life,*** it will effect more so then the death of his mother under more conventional or typical circumstances. ***The complication of him attempting to get her help, and being frustrated in his attempts to do so, have set him up for a lifelong impairment that will impair his ability to make attachments, trust adults, trust authority figures, and as for help. He will be plagued by lifelong feelings of guilt.*** [3/2/07 Report from Dr. Shiener].

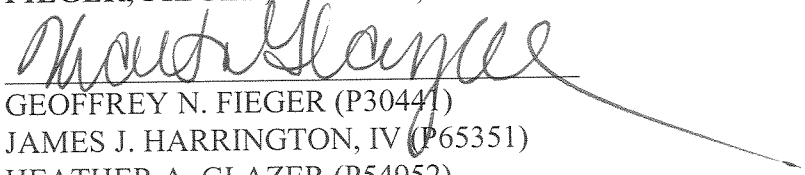
Viewing the facts in the light most favorable to Plaintiff, the Court of Appeals did not err in concluding that there remains a jury-submissible question of fact concerning whether Defendant Nichols acted recklessly in her treatment of Robert Turner during the 911 call.

Conclusion

WHEREFORE, Plaintiffs respectfully requests that this Honorable Court affirm the Court of Appeals' decision and remand this matter to the trial court for further proceedings.

Respectfully submitted,

FIEGER, FIEGER, KENNEY, GIROUX & DANZIG, P.C.



GEOFFREY N. FIEGER (P30441)
JAMES J. HARRINGTON, IV (P65351)
HEATHER A. GLAZER (P54952)
Attorneys for Plaintiffs-Appellees
19390 West Ten Mile Road
Southfield, Michigan 48075
(248) 355-5555

Dated: August 24, 2011

IN THE SUPREME COURT

APPEAL FROM MICHIGAN COURT OF APPEALS

AND FROM WAYNE COUNTY CIRCUIT COURT – JUDGE JOHN A. MURPHY

DELAINA PATTERSON, as Personal Representative of the Estate of SHERRILL TURNER, deceased and ROBERT TURNER, A minor, individually, by his Next Friend, DELAINA PATTERSON,

Plaintiff-Appellee,

Vs. Docket no: 142438

TERRI SUTTON, et al,

Defendant-Appellant

_____/

BRIEF ON APPEAL – APPELLANT
ORAL ARGUMENT REQUESTED

MARK S. MACKLEY (P38847)
Attorney for Appellant
Cothorn & Mackley, P.C.
535 Griswold, Suite 530
Detroit, MI 48226
(313) 964-7600

DATED: July 27, 2011.

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INDEX OF AUTHORITIES

LOCAL AUTHORITIES

STATEMENT OF JURISDICTION

The Michigan Supreme Court has jurisdiction over this matter pursuant to its Order Granting Defendant-Appellant Terri Sutton's Application for Leave to Appeal dated May 25, 2011.

STATEMENT OF QUESTIONS PRESENTED

DID DENY DEFENDANT-APPELLANT TERRI SUTTON OWE SHERRILL TURNER A DUTY OF CARE AS TO HER NEGLIGENCE CLAIMS BROUGHT PURSUANT TO MCL 691.1407(2) WHEN DEFENDANT-APPELLANT TERRI SUTTON NEVER MET OR SPOKE TO PLAINTIFF-DECEDENT?

THE TRIAL COURT ANSWERED: "Yes"

THE COURT OF APPEALS ANSWERED: "Yes"

PLAINTIFF-APPELLEE ANSWERED: "Yes"

DEFENDANT-APPELLANT ANSWERED: "No"

COULD REASONABLE MINDS DIFFER THAT THE ACTIONS OF DEFENDANT-APPELLANT TERRI SUTTON IN HER DISPATCH OF THE POLICE TO THE TURNER HOME INSTEAD OF MEDICAL ASSISTANCE, WAS THE PROXIMATE CAUSE OF SHERRILL TURNER'S DEATH?

THE TRIAL COURT ANSWERED: "Yes"

THE COURT OF APPEALS ANSWERED: "Yes"

PLAINTIFF-APPELLEE ANSWERED: "Yes"

DEFENDANT-APPELLANT ANSWERED: "No"

COULD REASONABLE MINDS DIFFER THAT THE ACTIONS OF DEFENDANT-APPELLANT TERRI SUTTON IN HER DISPATCH OF POLICE INSTEAD OF MEDICAL ASSISTANCE ON FEBRUARY 20, 2006 CONSTITUTED GROSS NEGLIGENCE?

THE TRIAL COURT ANSWERED: "Yes"

THE COURT OF APPEALS ANSWERED: "Yes"

PLAINTIFF-APPELLEE ANSWERED: "Yes"

DEFENDANT-APPELLANT ANSWERED: "No"

DOES PLAINTIFF-APPELLEE ROBERT TURNER HAVE A VIABLE CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS UNDER THE CIRCUMSTANCES OF THIS CASE?

THE TRIAL COURT ANSWERED: "Yes"

THE COURT OF APPEALS ANSWERED: "Yes"

PLAINTIFF-APPELLEE ANSWERED: "Yes"

DEFENDANT-APPELLANT ANSWERED: "No"

COULD REASONABLE MINDS DIFFER THAT THE CONDUCT OF DEFENDANT-APPELLANT TERRI SUTTON IN HER ENCOUNTER WITH PLAINTIFF-APPELLEE ROBERT TURNER ON FEBRUARY 20, 2006, RISE TO THE LEVEL OF BEING EXTREME OR OUTRAGEOUS?

THE TRIAL COURT ANSWERED: "Yes"

THE COURT OF APPEALS ANSWERED: "Yes"

PLAINTIFF-APPELLEE ANSWERED: "Yes"

DEFENDANT-APPELLANT ANSWERED: "No"

COULD REASONABLE MINDS DIFFER THAT THE CONDUCT OF DEFENDANT-APPELLANT TERRI SUTTON IN HER ENCOUNTER WITH PLAINTIFF-APPELLEE ROBERT TURNER ON FEBRUARY 20, 2006, WHEN SHE SENT POLICE TO THE TURNER HOME WAS NOT RECKLESS?

THE TRIAL COURT ANSWERED: "Yes"

THE COURT OF APPEALS ANSWERED: "Yes"

PLAINTIFF-APPELLEE ANSWERED: "Yes"

DEFENDANT-APPELLANT ANSWERED: "No"

COULD REASONABLE MINDS DIFFER THAT DEFENDANT-APPELLANT TERRI SUTTON DEALT WITH PLAINTIFF-APPELLEE ROBERT TURNER IN GOOD FAITH IN HER ENCOUNTER WITH HIM ON FEBRUARY 20, 2006?

THE TRIAL COURT ANSWERED:	"Yes"
THE COURT OF APPEALS ANSWERED:	"Yes"
PLAINTIFF-APPELLEE ANSWERED:	"Yes"
DEFENDANT-APPELLANT ANSWERED:	"No"

WERE THE ACTIONS OF DEFENDANT-APPELLANT TERRI SUTTON IN HER ENCOUNTER WITH PLAINTIFF-APPELLEE ROBERT TURNER ON FEBRUARY 20, 2006, DISCRETIONARY AS OPPOSED TO MINISTERIAL?

THE TRIAL COURT ANSWERED:	"No"
THE COURT OF APPEALS ANSWERED:	"No"
PLAINTIFF-APPELLEE ANSWERED:	"No"
DEFENDANT-APPELLANT ANSWERED:	"Yes"

STATEMENT OF FACTS

Procedural Facts

On April 30, 2008 Delaina Patterson, on behalf of the Estate of Sherrill Turner and as Next Friend of Robert Turner, a minor, filed a Complaint in the Wayne County Circuit Court alleging gross negligence and intentional infliction of emotional distress against two City of Detroit Emergency Service Operators – Defendants/Appellants Terri Sutton and Sherry Nichols.

The appellate issues raised by Terri Sutton in this appeal arise from two separate Motions for Summary Disposition filed on her behalf in the Wayne County Circuit Court.

The original Motion for Summary Disposition was filed on May 8, 2008 and addressed the issues of; (a) the lack of duty owed by Terri Sutton to the decedent, and (b) that the actions of Terri Sutton could not be ***the*** proximate cause of Ms. Turner's death.

Oral argument on the original Motion for Summary Disposition was heard on July 25, 2008. On September 4, 2008, the trial court issued its Opinion Denying Defendant Sutton's Motion for Summary Disposition.

On September 17, 2008, Defendant/Appellant Sutton filed a Motion for Reconsideration with the trial court, which was denied in an Order entered on September 29, 2008. Defendant/Appellant filed a timely Claim of Appeal with the Michigan Court of Appeals on October 20, 2008.

The second Motion for Summary Disposition filed on behalf of Terri Sutton was filed on October 15, 2008, addressing the issue of gross negligence and the claims of intentional infliction of emotional distress (IIED) brought on behalf of minor Robert Turner. Although oral argument was heard on that motion on January 13, 2009, the Court decided that, in

light of this court's recent Opinion in Odom, to have another look at the briefs in light of Odom and invited further briefs from counsel.

The court issued its oral opinion denying Defendant/Appellant Sutton's Motion for Summary Disposition as to the Plaintiff's IIED claims on February 13, 2009. The Court placed its reasoning on the record regarding its denial of Defendant's Motion for Summary Disposition as to Count II. In essence, the Court found that the functions of the operators as emergency service operators handling a call were ministerial and compared their actions to a couple of police cases, *Watson v Qualls, 46 Mich App 753 (1985), and Pelee v City of Detroit, 144 Mich App 324 (1985).* Based on these cases, the trial Court determined that in almost identical factual circumstances opposite findings of ministerial versus discretionary were determined.[1] Without ever stating its reasoning specifically as to the conduct of the operators in question, the Court concluded, because some acts have both discretionary and ministerial elements, that the conduct of the operators in this case was ministerial in nature. An Order consistent with the Court's ruling was entered on March 9, 2009. The second Claim of Appeal on behalf of Defendant/Appellant Sutton was timely filed on March 30, 2009. The Michigan Court of Appeals consolidated the pair of appeals filed on behalf Terri Sutton with the appeal filed on behalf of Sherry Nichols. Oral argument was heard by the Court of Appeals on October 5, 2010.

The opinion appealed from here was issued by the Court of Appeals on December 7, 2010. Defendant/Appellant Sutton submitted her Application for Leave to Appeal to the Michigan Supreme Court on January 19, 2011. This Court granted Terri Sutton's Application for Leave to Appeal in an Order issued on May 25, 2011.

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[1] Appendix 82A

Substantive Facts

The facts of this case are virtually uncontested. Defendant/Appellant Terri Sutton is employed with the City of Detroit as an Emergency Services Operator ("ESO"). Her co-defendant, Sherry Nichols is also employed as an ESO.

On February 20, 2006, at about 5:58 p.m., Co-Defendant/Appellant Sherry Nichols was working her shift as an ESO when she received a call from five year old Robert Turner. Robert reported that his mother had passed out. Ms. Nichols asked to talk to an adult. Based on the dialogue, Ms. Nichols believed that the call was a prank and hung up. Based on the transcript of the call, at no time did Nichols speak with Sherrill Turner as she was apparently unconscious.

ESO Nichols:	Emergency 991, where is the problem?
Robert:	My mom passed out.
ESO Nichols:	You over at Spruce?
Robert:	Huh?
ESO Nichols:	You on Spruce?
Robert:	My mom...
ESO Nichols:	Where's Mrs. Turner at?
Robert:	Right here.
ESO Nichols:	Let me speak to her.
Robert:	She's not gonna talk.
ESO Nichols:	Okay, well I'm gonna set the police to your house and find out what's going on with you.
ESO Nichols:	1950 Spruce, Apt. 3

No assistance was sent to the Turner residence by Ms. Nichols as a result of this first call.

At about 9:02 pm, Defendant/Appellant Terri Sutton had begun her shift and received the ***second*** call from young Robert Turner. *Ms. Sutton had no knowledge of the previous call placed by Robert Turner.* Ms. Sutton did not speak with Sherrill Turner at any time during the call. The second conversation is transcribed as follows:

ESO Sutton:	Emergency 911, where is the problem?
Robert:	My mom has passed out.
ESO Sutton:	1950 Spruce. Is that the Robert Turner residence?
Robert:	Yeah.
ESO Sutton:	Where are the grown-up at?
Robert:	In her room. My mom....
ESO Sutton:	Let me speak to her. Let me speak to her before I send the police over there.
Robert:	She passed out.
ESO Sutton:	Huh?
Robert:	She's not gonna talk.
ESO Sutton:	Okay. Well you know what then? She's gonna talk to the police. Okay. She's gonna talk to the police because I'm sending them over there.
Robert:	She's still not gonna talk.
ESO Sutton:	I don't care. You shouldn't be playing on the phone. [pause] Now put her on the phone before I send the police out there to knock on the door and you gonna be in trouble.
Robert:	Argh!!!

Despite being suspicious of the nature of the call (she thought the child had been left home alone somehow[2]) and that this was a matter of a child playing on the phone, Terri Sutton sent the police to the Turner residence. The police arrived at the Turner residence at about 9:20 p.m. and found Sherrill Turner unresponsive and most likely deceased at that time. However, the police officers on the scene made no determination as to whether Ms. Turner was breathing or whether she had a pulse. Ms. Turner was *formally* pronounced dead by the medical examiner at about 9:59 p.m. The cause of death was dilated cardiomyopathy.[3]

During discovery in this matter, Terri Sutton was deposed by Plaintiff's counsel on August 8, 2008 and was questioned extensively about the priority coding system utilized

[2] Appendix 44A – 45A
[3] Appendix 49A

by the ESOs when they receive a 911 call.[4] From her testimony, it is clear that there is a very significant amount of discretion allowed to the operators as to the prioritizing of 911 calls according to the seriousness of the situation and the nature of the emergency. Those decisions are made almost instantaneously by the operator whenever a 911 call is received.

The Dr. Werner Spitz, Plaintiff/Appellee's expert witness, was also deposed in this matter. Dr. Spitz was deposed after the various claims of appeal were filed in this matter. However, Plaintiff/appellee's counsel in her Brief in Opposition to Sutton's Application for Leave to Appeal, makes reference to Dr. Spitz's testimony at page 22 of 10. Dr. Spitz's testimony was a part of Sherry Nichol's appeal, consolidated with the appeal filed by Terri Sutton. However, since this Court has specifically requested that the parties address the issue of proximate causation, if the Court is asking for additional evidence as to proximate causation per MCR 7.302(H)(4), then counsel offers his testimony for whatever consideration this Court chooses to give it. Despite his reluctance to admit as much, Dr. Spitz testified that he does not know whether Ms. Turner was alive at 9:02pm, the time of call received by Terri Sutton[5]. There will be no evidence in this case that Ms. Turner was alive when Robert Turner called 911 at 9:02pm.

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[4] Appendix 40A-41A
[5] Appendix 46A-48A

ARGUMENT

I. DEFENDANT-APPELLANT, TERRI SUTTON IS ENTITLED TO IMMUNITY FROM PLAINTIFF-APPELEE'S NEGLIGENCE CLAIMS AS PLAINTIFF-APPELLEE CANNOT MAKE A PRIMA FACIE CASE FOR NEGLIGENCE PURSUANT TO MCL 691.1407(2) AND MICHIGAN CASE LAW.

A. Plaintiff-Appellee's negligence claim against Defendant-Appellant, Terri Sutton fails as a matter of law because Defendant-Appellant Terri Sutton owed no duty to decedent Sherrill Turner.

The first count in plaintiffs' decedents' Complaint against Terri Sutton alleges gross negligence for her failure to send aid to the Turner house following the conversation with Robert Turner. Ms. Sutton has qualified immunity (without regard to the discretionary or ministerial nature of the conduct in question) from such claims, pursuant to MCL 691.1407 (2) if:

1) she was acting, or reasonably believed she was acting within the scope of her authority;

2) she was engaged in the exercise or discharge of a governmental function; and

3) her conduct did not amount to gross negligence that is the proximate cause of the injury or damage.

As to the gross negligence claims, this court must first evaluate whether Terri Sutton owed a duty to the plaintiff's decedent, Sherrill Turner. Whether a defendant owes a plaintiff a duty is a question of law for the court." *Beaudrie v Henderson, 465 Mich 124, 129-130 (2001).* In *Beaudrie*, the court declined the application of the public duty doctrine to all governmental employees from liability for the failure to perform or the inadequate performance of a duty owed to the public, as such a holding would be inconsistent with the

governmental tort liability act which subjects governmental employees to liability for grossly negligent conduct that is the proximate cause of a plaintiff's injury.[1]

In addition, the court stated:

> The liability of government employees, other than those who have allegedly failed to provide police protection, should be determined using traditional tort principles without regard to their status as a governmental employee. *Id.* at 134.

The element of duty as discussed in Beaudrie is further considered in the Court of Appeals case of *Rakowski v Sarb, 269 Mich App 619 (2006).* There, the court stated:

> Importantly, however, the Court in *Beaudrie* made clear that MCL 691.1407 "does not *create* a cause of action" and that a plaintiff must first establish that a governmental employee defendant owed a common-law duty to the plaintiff. *Beaudrie*, supra at 139 n. 12 (emphasis in original).

The Rakowski Court also outlined the factors that the court must consider in order to determine the imposition of a common-law duty:

> When a court determines whether to impose a common-law duty, it considers (1) the relationship of the parties, (2) the "foreseeability of the harm, [(3) the] degree of certainty of injury, [(4) the] closeness of the connection between the conduct and injury, [(5) the moral blame attached to the conduct, [(6) the] policy of preventing future harm, and [(7)] finally, the burdens and consequences and the resulting liability for breach." *Id.* at 629. (citations omitted).
>
> The inquiry is "ultimately a question of fairness" involving a "weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution. *Id.* at 629-630. (citations omitted).

In applying the above factors to the present matter, "[a]s a general rule, there is no duty that obligates one person to aid or protect another, absent a special relationship that exists between a plaintiff and a defendant." *Taylor v Laban, 241 Mich App 449, 452 (2000) (citations omitted); Krass v Joliet, Inc., 233 Mich App 661, 668 (1999) (Citations omitted).*

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[1] *Id.* at 134,139.

Notice of the plaintiff's need for assistance does not affect the application of this rule: "[t]he fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." *Restatement 2nd of Torts; §314, cited with authority, Taylor, supra, Krass, supra.* Rather, it is only the existence of a "special relationship" that gives rise to such a duty. The common types of special relationships include those between: a common carrier and its passengers; an innkeeper and its guests; a possessor of land and its invitees; and a voluntary custodian and the person in custody. *See Restatement 2nd of Torts, §314A.* None of the facts alleged by plaintiff in this case would give rise to any such relationship.

In certain circumstances, giving assurances that aid will be provided may create a special relationship giving rise to a duty to provide the aid. *See Restatement 2nd of Torts, §323.* The Court of Appeals discussed those very circumstances in a case strikingly similar to this one, *White v Humbert, 206 Mich App 459 (1994).* Humbert was a 911 operator. A neighbor of the plaintiff's decedent called 911 and reported to operator Humbert that the victim, Phoebe Obleton, was being attacked and was screaming for help. Because a low priority was assigned to the call, no police unit was dispatched until about forty minutes later. The first scout car did not arrive on the scene until about an hour after the call. When that car arrived, the neighbors told the responding officers that they had heard the decedent's screams and, through her bathroom window, had witnessed her being attacked. The officers took the witnesses' names, circled the building, but left without any effort to make contact with decedent. About three hours later, decedent's husband dialed 911 and reported that he had just stabbed his wife to death.

The Court of Appeals, in reversing the denial of Summary Disposition at the trial court, held that there was no special relationship between the decedent and operator Humbert:

> Turning first to the issue of the 911 dispatch operator, defendant Humbert, we conclude that no special relationship can be said to exist between defendant Humbert and decedent. Decedent did not place the call to 911, thus, there were no assurances by Humbert to decedent that help was on the way. In essence, the connection between decedent and Humbert is simply too attenuated to conclude that any relationship or duty would arise between the two beyond the general duty owed to Humbert to the public at large. Accordingly, we conclude that the trial court erred in denying Humbert's motion for summary disposition.[2]

This language makes it clear the reason there was no special relationship between the decedent and Humbert was that "there were no assurances by Humbert that help was on the way", even though Humbert had been made aware of Obleton's peril and was in a position to do something about it by immediately sending help. This is consistent with the general principle that "[t]he fact that the actor realizes or should realize that action on his part is necessary for another's aide or protection does not of itself impose upon him a duty to take such action." *Taylor, supra, Krass, supra.*

---

[2] Id at 462. The Court of Appeals affirmed the denial of summary judgment to the responding police officer who sought summary disposition, relying on the public duty doctrine. The defendant police officer sought and obtained leave to appeal from that portion of the decision. The Supreme Court reversed the Court of Appeals ruling as to one of the police officers, Keith D. Beasley. *White v Beasley, 453 Mich 308, rehearing denied, 453 Mich 1205 (1996),* also relying on the public duty doctrine. The Supreme Court left undisturbed the Court of Appeals ruling and analysis of the claim against Humbert, so that portion of the Court of Appeals' decision remains binding. In *Beaudrie, supra*, the Supreme Court limited application of the public duty doctrine to police officers, ruling that "for purposes of determining the liability of public employees other than police officers, we will determine a government employee's duty using the same traditional common-law duty analysis applicable to private individuals." Id at 141. The Court explicitly recognized "the general common-law rule that no individual has a duty to protect another who is endangered by a third person's conduct absent a "special relationship" either between the defendant and the victim, or the defendant and the third party who caused the injury'". Id. Patterson does not allege that Sutton is a police offer. Patterson therefore does not rely on the public duty doctrine but on the "same traditional common-law duty analysis applicable to private individuals."

Sherrill Turner never spoke with Terri Sutton (and never spoke with Sherry Nichols, either). There was no relationship whatsoever between the two, let alone any "special relationship" between them.

The next factor is the "foreseeability of the harm." However, the foreseeability of the harm is tied to the relationship between Ms. Sutton and Sherrill Turner. As this court explained in *Samson v Saginaw Professional Bldg, Inc., 393 Mich 393 (1975)* at page 406:

> ... the mere fact that an event may be foreseeable does not impose a duty on the defendant to take some kind of action accordingly.... [T]o require the actor to act, some sort of relationship must exist between the actor and the other party which the law or society views as sufficiently strong....

Just like in *White, supra*, there is no special relationship between the parties here. Ms. Turner did not place the call to 911 and there were no assurances to her that help was on the way. There is no relationship between the two "beyond the general duty" owed by Ms. Sutton "to the public at large." *Id.* at 462.

Ms. Sutton had no knowledge of the Plaintiff's decedent's medical history or any factors contributing to the dilated cardiomyopathy that was the proximate cause of Ms. Turner's death. The foreseeability of Ms. Turner's death has a much closer nexus to her inherent and fatal heart condition than the actions taken by Ms. Sutton as a result of the 9:02 pm call from Robert Turner.

As to the "degree of certainty of injury", and as occurs with most 911 cases, the "injury" had already occurred by the time Ms. Sutton received the 9:02 pm call from Robert Turner. The degree of certainty of injury here is directly related to the plaintiff's medical condition. It is pure speculation as to whether Sherrill Turner could have been revived even if Terri Sutton had dispatched an ambulance immediately following her conversation with Robert Turner at 9:02 pm. In fact, there is going to be no definitive testimony whatsoever

in this case, that Sherrill Turner was still alive at the time the second 911 call was made and fielded by Terri Sutton.

The connection between the injury and the conduct here is likewise evaluated in terms of the sequence of events here. The connection between Ms. Turner's death and the second 911 call is tenuous at best. She had already sustained a severe cardiac incident as of the second 911 call. That incident has no relationship whatsoever to the conduct of Terri Sutton. It is pure speculation that Ms. Turner was alive when the 9:02 call was made and there is even more speculative that Ms. Turner could have been revived had EMS been dispatched immediately thereafter. In any case, there is no indication just how long it might have taken the EMS unit to respond to the scene. However, that factor is not within the control of the operator.

As to any alleged moral blame attached to the "conduct", the "conduct" here is Ms. Sutton sending a police unit to the scene. By contrast, Ms. Sutton did send assistance to the scene. She did not ignore the call. Her impression from the conversation and the totality of the circumstances was that a young child had been left alone and was playing on the phone. Such events, despite obvious hindsight and the conversation between Ms. Sutton and Robert Turner, are not uncommon occurrences in the experience of an ESO. There is no moral blame on the part of Terri Sutton for what happened in this case. She fielded a call and took the action she thought appropriate.

The factor of a policy for the prevention of future harm is almost inapplicable here. Every day, human beings of all sorts make a wide variety of calls to 911. Some are for police situations, some are for medical situations and most of them have a degree of stress and

chaos to them. Unfortunately, many of the calls are prank calls. By the time an ESO received a call for a medical emergency or a police emergency, an injury has already occurred.

The "burdens and consequences" factor does not favor the imposition of a duty upon an ESO who had no relationship to the decedent.

In the absence of a duty there can be no negligence, much less gross negligence. Since Sutton owed Patterson no duty to provide assistance, her failure to do so does not amount to gross negligence, as alleged by the Plaintiff.

B. Plaintiff-Appellee's negligence claim against Defendant-Appellant Terri Sutton fails as a matter of law as the alleged negligence of Defendant-Appellant Terri Sutton was not the proximate cause of the injury to Sherrill Turner as required by MCL 691.1407(2)(C).

One of the main issues in this case, at least from the standpoint of Defendant/Appellant Terri Sutton, is that both the trial court and the Court of Appeals have failed to separate the conduct of operators Sherry Nichols and Terri Sutton into two distinct and separate incidents. The calls from Robert Turner were 3 hours apart. Most significantly, however, is the undeniable fact that the actions taken by Terri Sutton are totally and completely different from those taken by Sherry Nichols. Terri Sutton, despite her suspicion that the 9:02 pm call was the result of a child playing on the phone, sent the police to the Turner residence. The police arrived just under 20 minutes later and found Mrs. Turner unresponsive and most likely already deceased.[3]

[3] The police did not call for medical assistance from the EMS until 9:35 pm – 15 minutes after their arrival at the scene. One would think that were Ms. Turner still alive, the police would have called for EMS immediately after their arrival at 9:20 pm.

The lumping of the two calls together begins with the original Complaint in this matter. Language in paragraph 34 of the Complaint alleges that Defendants' Sherri Nichols ***"and/or"*** *(emphasis added)* [4] Terri Sutton committed acts of gross negligence as follows:

a. Failing to timely summon emergency medical treatment to Plaintiffs' decedent, SHERRILL TURNER;

b. Demonstrating conduct so reckless that it demonstrates a substantial lack of concern for whether any injury would result;

c. Intentionally causing SHERILL TURNER and her son ROBERT TURNER to suffer extreme emotional distress;

d. Improper threatening of ROBERT TURNER for requesting emergency assistance for his mother;

e. Using their authority as City of Detroit dispatchers to intentionally inflict emotional distress on minor Plaintiff, ROBERT TURNER;

f. Actively withholding and concealing information from the authorities as to timely provide medical assistance to SHERRILL TURNER;

g. Affirmatively abrogating their obligations as City of Detroit dispatchers to timely respond to Plaintiff decedent's emergency medical condition; and

h. Engaging in other acts of misconduct, gross negligence and/or intentional malfeasance which may become known prior to trial.

Likewise, in paragraph 35 of the Complaint, Plaintiffs allege that the direct and proximate result of the acts or omissions by Sherri Nichols ***"and/or"*** [5] Terri Sutton led to the death of Sherrill Turner and alleges as follows:

a. Conscious pain and suffering;

b. Reasonable medical, funeral and burial expenses;

c. Fright, shock and terror;

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[4] Appendix 32A-33A
[5] Appendix 33A

d. Loss of the love, society, companionship, and parental guidance of the decedent;

e. Loss of service of Plaintiff's decedent;

f. Future loss of income and/or earning capacity;

g. Miscellaneous economic damages, past, present and future;

h. Exemplary damages and/or punitive damages; and

i. Any and all damages allowable under the Michigan Wrongful Death Act (MCL 600.2922) and otherwise learned through the course of discovery.

Plaintiff alleges that the gross negligence of either Sherri Nichols ***and/or*** Terri Sutton was the proximate cause of the death of Sherrill Turner. However, as to Defendant-Appellant Terri Sutton, the Plaintiff must establish facts establishing that Sutton's alleged wrongdoing was ***the*** proximate cause of the death of Sherrill Turner.

MCL 691.1407 (2)(c) requires that, in order for a governmental employee to be liable for injury to another, the gross negligence of the employee must be ***"the proximate cause of the injury or damage."*** (emphasis added).

The Michigan Supreme Court has distinguished between ***a*** proximate (as an element in general negligence cases) and ***the*** proximate cause, defining the latter to mean "the one most immediate, efficient and direct cause of the injury or damage." *Robinson v City of Detroit, 462 Mich 439, 445-446; (2000).* In *Robinson*, the Plaintiffs were injured in a car crash during a police chase. This court found that the most immediate and direct cause of the Plaintiff's injuries was the reckless conduct of the persons being chased by the police. Thus, the actions of the police officers were held not to be ***the*** proximate cause of the claimed injuries.

Applying the above definition of proximate causation in these types of cases, when the actions of the two persons occur 3 hours apart and the actions taken by Terri Sutton differ distinctly from those of Sherry Nichols, ***the actions of only ONE person can be THE proximate cause of the plaintiff's injury***. Since *Robinson* case was decided in 2000, the Michigan appellate courts have had an opportunity to apply the definition of proximate causation. There are three cases that are particularly instructive in our appellate courts' analysis and application of the definition of proximate causation as stated in MCL 691.1407.

In *Costa v Community Emergency Medical Services, Inc, 263 Mich App 572 (2004) aff'd 475 Mich 403 (2006),* Plaintiff Costa suffered a head injury in a fight with another man. Defendants Farenger and Schultz were EMS technicians summoned to the scene and found Costa unconscious. Costa regained consciousness shortly after the fight. Despite being somewhat disoriented after regaining consciousness, Costa signed a form refusing medical treatment and left the scene under with assistance. Accordingly, the EMS technicians did not provide any further aid or take any other action to assist Costa. Costa went on to develop a significant head injury. Allegedly, because the technicians failed to provide further treatment, Costa's injuries became permanent.

Discussing the question whether the officer's failure to act was *the* proximate cause of Costa's injuries, the Court of Appeals noted that:

> "Further, given the undisputed evidence that Baker punched Costa in the face and knocked him down before Farenger and Schultz arrived on the scene, reasonable jurors could not have found that Farenger and Schultz's actions were the proximate cause of Costa's injuires. [Citing *Robinson, supra*] The trial court improperly denied Farenger and Schultz's motion for summary disposition based on the issue of governmental immunity." *Id. Costa, at 579."*

This Court affirmed the ruling of the Court of Appeals at 475 Mich 403 (2006).

As to the proximate cause issue, this case is very similar to the situation currently before this court. Just as in *Costa*, Sherrill Turner had a medical situation that confronted Terri Sutton via the *second* 911 call made by Robert Turner. After evaluating the call from Robert Turner, Terri Sutton believed that a police situation was occurring at the Turner home. But the independent and significant cardiac event that eventually caused Ms. Turner's untimely death had already occurred. ***The*** cause of Ms. Turner's death was her cardiac condition. The actions of Terri Sutton (even if viewed as untimely as Plaintiff contends) could not then be ***the*** proximate cause of Ms. Turner's death as required by MCL 691.1407 (2)(c) and as interpreted in the *Robinson* case.

In *Dean v Childs, 262 Mich App 48, 57-58 (2004), rev'd in part 474 Mich 914 (2005),* the plaintiff's decedents died in an arson fire. Evidence showed that Childs, who was acting as a fire chief, ordered that water be applied to the front of the burning structure, thus forcing the fire to the rear where the decedents were, and frustrating the efforts of firefighters to rescue them. The Court of Appeals, while acknowledging that the arson was ***a*** proximate cause of the deaths, held that the plaintiff's showing was sufficient to create a faction question whether Child's action in fighting the fire was nonetheless "the one most immediate, efficient and direct cause" of the deaths. The Supreme Court summarily reversed, adopting the analysis of Judge Griffin's partial dissent in the Court of Appeals opinion. Judge Griffin reasoned that *the* proximate cause of the deaths was the fire itself, not Child's actions in response to the fire. *Id, 262 Mich App at 62.*

In comparing the *Dean* case with the current claims, the crux of the matter appears to be whether the actions of the Fire Chief Childs and ESO Terri Sutton deprived the respective Plaintiffs of potential life saving measures in situations where independent

incidents had already caused the victims to be placed in life threatening situations. But in *Dean*, even if the fire had been fought by some other method or protocol, *the fire itself* was ***the*** cause of death of the unfortunate victims trapped in the burning building. Likewise, ***the*** cause of Sherrill Turner's death was her cardiac condition, not Terri Sutton's response to the 9:02 pm 911 call.

Finally, in *Love v City of Detroit, 270 Mich App 563 (2006),* the plaintiff's died because they could not escape an arson fire that engulfed their home. The plaintiff claimed the individual defendants, all firefighters, were grossly negligent in failing to respond timely to the fire and to take effective action to rescue the trapped persons. The Court of Appeals followed the Supreme Court's adoption of Judge Griffin's analysis in *Dean,* to hold that the firefighters' alleged delay and failure to act were not *the* proximate cause of the deaths. The court stated at page 566:

> Similarly, in this case, decedents died from the fire that engulfed the second and third floors of their home. The fire was advanced by the time firefighters arrived at the home. Witnesses indicated that the victims could be heard screaming for help after the firefighters arrived; however, no evidence established that the firefighters could reach the victims or that, if firefighters had acted more aggressively, the victims would have been rescued. The firefighters' actions did not constitute the proximate cause of decedents' deaths. The trial court correctly granted summary disposition in favor of the individual defendants. (Citations omitted).

As in the above factual situation in *Love*, any argument that Sherrill Turner would be alive today if Terri Sutton had sent an ambulance instead of the police to the Turner home, is purely speculative. The cold, hard truth of the matter is that it is just as likely that Sherrill Turner was already deceased as a result of her cardiac condition when the second call was handled at 9:02 pm by Terri Sutton. Reasonable minds could not differ that the actions of Terri Sutton were not "the" proximate cause of Sherill Turner's death.

Plaintiff/Appellee's claims fit the pattern of the cases discussed above. The factual situations bear a distinct similarity to the case presently in dispute. In each case, the actions of the governmental employee were found **not** to be ***the*** proximate cause of the injury claimed. Even the allegations in the plaintiff's Complaint allege an alternative cause for Sherrill Turner's death. Terri Sutton's alleged failure to timely summon aid was not ***the*** proximate cause of Sherrill Turner's death, and the qualified immunity provided by MCL 691.1407(2) protects her from liability in this case.

C. Plaintiff-Appellee's negligence claim against Defendant-Appellant Terri Sutton fails as a matter of law as the conduct of Defendant-Appellant Terri Sutton in sending the police to the Turner residence on February 20, 2006, did not amount to gross negligence.

MCL 691.1407 (7) (a) defines gross negligence as: "*(c)onduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.*" Several Michigan appellate cases provide guidance as to the application of the gross negligence standard to the conduct of municipal employees.

It should first be recalled that this Court has held that evidence of ordinary negligence does not create a question of fact regarding gross negligence.[6]

There are a series of cases that are helpful in an analysis of what gross negligence is and is not.

Perhaps the most instructive case as to gross negligence is the case of *Johnson v Wayne County, 213 Mich App 143 (1995) lv den 453 Mich 913 (1996).* This case is valuable to show what gross negligence ***is,*** as opposed to what it is **not.** In this situation, the plaintiff was a juror in a particularly heinous multiple murder case. During the trial, instead of

[6] *Maiden v Rozwood*, 461 Mich 109, 122-123 (1999)

appearing in court to serve as a juror, she attended a Friend of the Court hearing for her own children. Further, instead of responding to the summons of the judge in the criminal trial, she went home. She was picked up by sheriff's deputies at her home and physically transported to the courthouse. The trial judge found her in contempt of court and sentenced her to three days in jail.

Plaintiff was then taken to a holding cell, not coincidentally, the same one occupied by one of the defendants in the murder case. When the defendant began questioning her about her views on the case, she became frightened for her safety. All of this occurred while the deputies stood outside the holding cell, watching and laughing at the plaintiff. After an hour she was moved to another cell. Upon her release from jail, she was treated for a nervous breakdown. She sued the county and the deputies. The defendants argued a lack of gross negligence and summary disposition was granted by the trial court.

However, the Court of Appeals reversed on plaintiff's claim for intentional infliction of emotional distress claim, finding a question of fact as to whether the conduct of the officers could constitute gross negligence.

> We believe that summary disposition of this claim is precluded because reasonable jurors could honestly reach different conclusions with regard to whether defendants conduct amount to gross negligence. In the present case, the deputy sheriffs and involved placed plaintiff in a holding cell with Marshall. Plaintiff had been insurer on Marshall's case for two weeks and Marshall was charged with five counts of first-degree murder in a highly publicized case in the city of Detroit. Plaintiff was in the holding cell with Marshall on two separate occasions and they were handcuffed together and taken to the Wayne County Jail where they were again placed in the same cell. While in the holding cell, plaintiff stated that deputy sheriffs looked inside the window and laughed and pointed at her.
>
> Reasonable minds could differ with regard to whether the actions of the defendants were so reckless as to demonstrate a substantial lack of concern for whether an injury results. Thus, plaintiff has presented sufficient evidence, if believed by a rational trier of fact, to show that defendants acted in a grossly negligent manner so

that they are not covered by governmental immunity. *Id.* at p. 159. (Citations omitted).

It is more than just evident that the conduct of Terri Sutton is distinguishable from that of the sheriff's deputies in the *Johnson* case. In spite of being suspicious as to the nature of the call from young Robert Turner (she believed that the child had been left home alone), Terri Sutton dispatched assistance to the Turner household. She certainly did not deliberately ignore the situation or act with any malice or lack of good faith. She sent someone to the house. By contrast, the sheriff deputies in *Johnson* purposely locked Plaintiff in the same holding cell as the man on trial for five counts of first degree murder where she had been sitting as a juror. That conduct demonstrates almost a *willingness* for harm to occur, as opposed to Terri Sutton sending the police instead of medical personnel.

In light of the other cases reviewed herein, it is absolutely inconceivable that Ms. Sutton sending someone to the scene somehow constitutes ***"gross negligence."***

Another case for this court's consideration on this issue is *Costa v Community Emergency Medical Services, Inc, supra.* Again, plaintiff Costa suffered a head injury in a fight with another man. Defendants Farenger and Schultz were EMS technicians summoned to the scene of the altercation and found Costa unconscious. Costa regained consciousness shortly after the fight. Despite being somewhat disoriented after regaining consciousness, Costa signed a form refusing medical treatment and left the scene under with assistance. Accordingly, the EMS technicians did not provide any further aid or take any other action to assist Costa. Costa went on to develop a significant head injury. Allegedly, because the technicians failed to provide further treatment, Costa's injuries became permanent. In reversing the trial court's denial of summary disposition, the court stated:

> Despite plaintiffs references in their complaint to "gross negligence" we find that the allegations here are sound only in ordinary negligence. No reasonable juror could have found that Farenger and Schultz behaved so recklessly *"as to demonstrate* a substantial lack of concern for whether an injury results." *(Id. p 579)*

In Costa, defendants *knew* there was a medical situation. They *saw* the condition of the plaintiff as he lay unconscious. The allegation of gross negligence is that, despite plaintiffs refusal of medical attention, the EMT's could have recognized that he was compromised and taken him to the hospital. Terri Sutton did not have the benefit of seeing what was going on in the Turner household. Based upon the call made by Robert Turner, she determined that something else may have been going on and sent the police to investigate.

Another case where our appellate court has found a question of fact as to whether a governmental employee committed gross negligence is *Kendricks v Rehfield, 270 Mich App 679 (2006) lv den 477 Mich 954 (2006)*. There, the plaintiff, **Cardelle** Kendricks was arrested for a felony offense that his twin brother had committed in Livonia. The police apparently thought they had arrested the Plaintiff's brother **Carnelle**. Plaintiff continuously advised police that they had arrested the wrong brother. Plaintiff was detained for ***7 months***, constantly making his claim of mistaken identity to police personnel until his identity was finally confirmed and he was released. The trial court denied summary disposition, finding a question of fact as to whether the police officers had committed gross negligence. The Court of Appeals affirmed, holding:

> The dissent asserts that "defendants were not grossly negligent in arresting plaintiff" because their mistake was reasonable. We agree that the mistake was reasonable at point of arrest, and might be inclined to agree that the delay of a day or even several days before investigating plaintiff's claim of mistaken identity could have been reasonable under the circumstances. But we cannot agree that holding plaintiff without investigating the claim for *seven months* was even remotely reasonable. This man remained incarcerated for over half a year because of this

> grievous error. We therefore agree with the trial court because we find sufficient indicia of gross negligence to create a genuine issue of material fact, and therefore find summary disposition on the ground of governmental immunity and appropriate. We believe reasonable jurors could reach the conclusion that defendants were grossly negligent.
>
> Plaintiff alleged that when he was arrested by Livonia officers he informed them that his twin brother was in fact the person they sought. The officers ignored plaintiff's claims of mistaken identity, and the plaintiff was held in jail pending trial for seven months until his claim of mistaken identity was confirmed. Defendant had access to fingerprints and photographs of both plaintiff and his brother throughout the seven months, and could have easily confirmed plaintiff's identity with this readily accessible information. Defendant's failure to investigate plaintiff's claims of mistaken identity certainly caused an egregious injury, here seven months of deprivation of freedom. The question of whether the officers' conduct demonstrated a sufficient lack of concern to constitute gross negligence is a question for the trier of fact. We therefore cannot conclude that defendants were immune from liability and were entitled to summary disposition. *Id.*at pp 682-683. (Citations omitted and emphasis in the original).

This is another case that demonstrates that, by comparison, the actions of Terri Sutton in sending police to the Turner household cannot be gross negligence. There is a stark difference between ignoring the constant pleas of incarcerated man for *seven months* and the determination of a 911 operator based upon less than *2 minutes* of dialogue. Despite her doubts about the legitimacy of the phone call made by Robert Turner, Terri Sutton at least sent the police to find out what was going on there. Robert Turner was not ignored by Terri Sutton. At best, this MAY be a case of ordinary negligence. Reasonable minds would not differ that Terri Sutton's conduct was not grossly negligent.

In the present case, the trial court clearly misapplied the gross negligence standard set forth in MCL 691.1407 (2). In its opinion dated September 4, 2008, the trial court states:

> **"We have a case in ordinary negligence: Plaintiff has to show that defendants injured Robert and his mother through their failure to act with due care."**

This is a clear misapplication of the law by the trial court. This court is well aware that the Plaintiff/Appellee is required to prove **gross negligence** pursuant to

MCL 691.1407, "conduct so reckless that demonstrates a substantial lack of concern whether an injury results."

Further, despite the trial court's apparent confusion as to who answered Robert Turner's respective calls, it is undisputed among the parties that Sherry Nichols answered the **first** 911 call from Robert Turner at 5:58 pm and Terri Sutton answered the **second** call at 9:02 pm.

It is clear in reading the Court of Appeals opinion that the appellate court made absolutely no effort to distinguish the conduct of one ESO from another in this case. Despite this, there is one crucial fact that separates the conduct of Ms. Nichols from that of Ms. Sutton: ***Terri Sutton sent to police to the Turner home.*** However, there is not one instance in the Court of Appeals' opinion where the conduct of the two ESOs is not collectively lumped into and presumed to be a single act of "gross" negligence. This alone makes the Court of Appeals opinion in this case in error as to Terri Sutton and, if allowed to stand, will result in material injustice to her.

It is readily apparent from the trial court's written opinions that it was in error as to the standard of negligence that should have been applied in this case. Add to this the court's obvious confusion as to facts that were uncontested between the parties and the only reasonable conclusion is that the court has applied facts not in the record to its analysis.

Despite clear and undisputed facts in this matter, the Court of Appeals opinion fails to distinguish the conduct of Terri Sutton from that of Sherry Nichols. Through all the factual misconceptions, however, only one question remains: in comparison to the factual

situations cited herein, *how could any reasonable person find that Terri Sutton was* ***grossly*** *negligent in sending police to a home that generated a 911 call?*

II. PLAINTIFF-APPELLEE ROBERT TURNER'S INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM AGAINST DEFENDANT-APPELLANT TERRI SUTTON FAILS AS A MATTER OF LAW AS HIS CLAIM IS NOT COGNIZABLE UNDER THE CIRCUMSTANCES OF THIS CASE BECAUSE HE CANNOT MEET THE ELEMENTS OF THE GOVERNMENTAL IMMUNITY STATUTE, MCL 691.1407(3), THE TEST SET FORTH IN *Odom v Wayne County* and *Ross v Consumers Power, on remand* AND PLAINTIFF-APPELLEE CANNOT PROVE THE ELEMENTS FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

A. Plaintiff-Appellee Robert Turner's intentional infliction of emotional distress claim fails as a matter of law because Defendant-Appellant Terri Sutton's conduct did not cause Plaintiff-Appellee Robert Turner "severe" emotional distress.

On December 30, 2008, the Michigan Supreme Court issued its ruling in the case of *Odom v Wayne County, et al, 482 Mich 459 (2008).* The *Odom* case holds that lower-level governmental employees have qualified immunity from intentional torts pursuant to the case of *Ross v Consumers Power, (on rehrg), 420 Mich 567 (1984).*

The *Odom* case holds that government employees enjoy qualified immunity for intentional torts as outlined in *Ross, supra.* The Court stated:

> "In this case, we are asked to determine when a governmental employee is immune from liability for an intentional tort. We hold that MCL 691.1407(3) of the governmental tort liability act (GTLA), which explicitly maintains "the law of intentional torts as it existed before July 7, 1986," grants immunity to governmental employees from intentional-tort liability to the extent allowed by the common law before July 7, 19876. We therefore raffirm and apply the test concerning intentional tort immunity outlined in *Ross v Consumers Power Co (on Rehearing) 420 Mich 576; 363 NW2d 641 (1984).* Under the *Ross* test, governmental employees enjoy qualified immunity for intentional torts. A governmental employees must raise governmental immunity as an affirmative defense and establish that (1) the employee's challenged acts were undertaken during the course of employment and that the employee was acting, or reasonably believed he was acting, within the scope of his authority, (2)

> the acts were undertaken in good faith, and (3) the acts were discretionary, rather than ministerial, in nature. Neither the trial court nor the Court of Appeals considered whether the governmental employee was entitled to governmental immunity under the test provided in Ross. Accordingly, we vacate the trial court's order with respect to defendant, vacate the judgment of the Court of Appeals and remand to the trial court to apply the proper test." *Odom, supra p 461.*

There is no dispute that on the date of the incident, Terri Sutton was an Emergency Service Operator for the City of Detroit and was acting in the scope of her employment as an ESO at the time of her telephone conversation with Robert Turner.

The elements of emotional infliction of emotional distress are: "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress.[7]

Plaintiff originally alleged two separate types of conduct by Sutton in support of her claim for intentional infliction of emotional distress: 1) failure to summon aid; and 2) comments made during the telephone conversation.

The first allegation fails for a total lack of evidentiary support, at least as it is made against Terri Sutton. It is clear that Terri Sutton did summon assistance to the Turner residence. She did this despite the fact that she thought that the child had been left home alone and was playing with the phone.

The second allegation is, as a matter of law, insufficient to support a claim of extreme and outrageous conduct. The text of the telephone conversation is outlined in the Statement of Facts. A clear reading of the transcribed call shows that there is no extreme and outrageous conduct and there is no demonstrable intent to cause emotional distress to anyone.

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[7] *Johnson v Wayne Co., supra.*

Plaintiff/Appellee argues that the conversation between Robert Turner and Terri Sutton contains insulting and derogatory language. The transcript clearly demonstrates that there is not one iota of insulting or derogatory language directed at Robert Turner by Terri Sutton. In any case, case law in Michigan clearly holds that mere words are insufficient to support a claim for intentional infliction of emotional distress.

As a matter of law, insults are not extreme and outrageous conduct for the purposes of intentional infliction of emotional distress. Moreover, even truly outrageous comments, including racially derogatory language, are not enough to make a claim of intentional infliction of emotional distress. The Michigan Court of Appeals sets forth in *Graham v Ford, 237 Mich App 670 (1999)* the high standard claimant must meet to be successful in a claim for intentional infliction of emotional distress:[8]

> "Liability for the intentional infliction of emotional distress has been found only where the conduct complained of has been 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 society.[9] Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.[10] It is not enough that the defendant has acted with an intent that is tortuous or even criminal, or that he intended to inflict emotional distress, or even that his conduct has been characterized by 'malice', or a degree of aggravation that would entitle the plaintiff to punitive damages for another tort.[11] In reviewing a claim for intentional infliction of emotional distress,, we must determine whether the defendant's conduct is sufficiently unreasonable as to be regarded as extreme and outrageous.[12] The test is whether '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!'[13]

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[8] *Id.* at 674-675
[9] *Doe v Mills, 212 Mich App 73, 91 (1995)*
[10] *Id.*
[11] *Roberts v Auto Owners Ins Co, 422 Mich 594,602-603 (1985)*, quoting *Restatement Torts, 2d, Section 46* comment d, pp72-73.
[12] *Doe*, supra at 92.
[13] *Roberts*, supra at 603.

As to the Plaintiff/Appellees' intentional tort claims and the qualified immunity Terri Sutton has from those claims, pursuant to the test set forth in *Odom* above, the plaintiff's claim for intentional infliction of emotional distress is not viable here for the following reasons, some of which are more extensively addressed below:

1) That by the applicable statutory definitions and case law analyses, and as a matter of law, the conduct of Terri Sutton in her encounter with Robert Turner was neither extreme nor outrageous;

2) There is no evidence that Terri Sutton intended to cause harm to Robert Turner, nor is there any evidence of recklessness on her part;

3) That by all case law interpretations and definitions of "good faith", Terri Sutton acted in good faith in her encounter with Robert Turner; and

4) Terri Sutton's assessment of the call from Robert Turner comprises a discretionary function, as opposed to being ministerial in nature.

This court has asked for Defendant/Appellant's arguments as to the above factors. In addition to the above, however, Defendant/Appellant submits that Plaintiff cannot make a prima facie case for the elements of the tort of intentional infliction of emotional distress, those being; 1) extreme and outrageous conduct, 2) intent or recklessness, 3) causation, and 4) severe emotional distress.[14]

The issues of extreme and outrageous conduct are covered in detail below. However, in addition to the first two elements of IIED, Defendant/ Appellant submits that the mild *scolding* that Terri Sutton gave to young Robert Turner is, as a matter of law, insufficient to cause the "severe" emotional distress required to prove a *prima facie* claim for intentional infliction of emotional distress.

Severe emotional distress has been described in Haverbush v Powelson, *217 Mich App 228 (1996); lv den 454 Mich 897 (1997)* at page 235:

[14] Dalley v Dykema Gossett, PLLC, *287 Mich App 296 (2010)*, at p. 321

> 1 Restatement Torts 2d, Section 46, Comment j, p 77, states that emotional distress "includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea..." However: the comment continues: **The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.** The intensity and duration of the distress factors are to be considered in determining its severity. Severe distress must be proved; but in many cases the extreme and outrageous character in the defendant's conduct is in itself important evidence that the distress has existed. *Id.* at 77-78. (Emphasis added).

In addition, we note that seeking medical treatment is not a condition precedent to satisfying the claim of severe emotional distress.[15]

However, in looking at the transcript of the conversation, the conversation itself (not the outcome) is so innocuous in its tone and so benign in its content, that to say that Terri Sutton *scolded* Robert Turner could be an overstatement. One would certainly tend to believe that young Robert Turner would be far more affected by the loss of his mother than the tone of voice used by a 911 operator.

In the cases and factual situations cited in this brief, there are several examples of conduct and language used that are far more egregious than what occurred between Terri Sutton and Robert Turner. And even in those instances, there were findings that the actions of the various defendants were not extreme and outrageous enough to give rise to severe emotional distress. How then, by objective comparison, can Terri Sutton's conduct be deemed extreme, outrageous or reckless?

[1515] *McCahill v Commercial Union Ins Co, 179 Mich App 761, 771 (1989)*

B. Plaintiff-Appellee Robert Turner's intentional infliction of emotional distress claim against Defendant-Appellant Terri Sutton fails as a matter of law because the conduct of Defendant-Appellant Terri Sutton in her encounter with Plaintiff-Appellee Robert Turner did not amount to extreme and outrageous conduct.

The plaintiff has alleged that the actions and conversation between Terri Sutton and Robert Turner evidence "extreme and outrageous" conduct on the part of Ms. Sutton. However, the Court of Appeals determined that the Plaintiff's claims are based upon what Terri Sutton **said** and not what she **did**.[16] Defendant /Appellant argues that, as a matter of law, the brief conversation that Terri Sutton had with Robert Turner does not and cannot rise to the level of being "extreme and outrageous." In an objective analysis of Terri Sutton's defense here, two things must occur. First, this court must resist the temptation or impulse to lump the actions of co-Defendant/Appellant Sherry Nichols and Terri Sutton into one continuous act. The two 911 calls were received 3 hours apart. Terri Sutton did not know that the first call had been made. Her response to the 9:02 pm call was totally different than the response made to the earlier call.

Second, the brief interaction between Terri Sutton and Robert Turner must be viewed in the context of the conversation itself – not the eventual outcome of the situation. If the Plaintiff's IIED claims are truly based upon what was said and not what was done, then the conversation itself is the only thing that matters, not the fact that Sherrill Turner passed ultimately away.

"Severe" emotional distress is required to be proved by plaintiff in a claim for intentional infliction of emotional distress. *Dalley v Dykema Gossett, PLLC, 287 Mich App*

[16] Appendix 24A

296 (2010). Quoting the *Restatement of Torts*, severe emotional distress has been described in *Haverbush v Powelson, supra* at page 235:

> 1 Restatement Torts 2d, Section 46, Comment j, p 77, states that emotional distress "includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea..." However: the comment continues: The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it. The intensity and duration of the distress factors are to be considered in determining its severity. Severe distress must be proved; but in many cases the extreme and outrageous character in the defendant's conduct is in itself important evidence that the distress has existed. (Id at 77-78).

Accordingly, we must first look at the conduct of the Terri Sutton in light of other situations that have been analyzed by our courts. Initially, we submit the case of *Linebaugh v Sheraton Michigan Corp., 198 Mich App 335 (1993); lv den, 444 Mich 942 (1994).* There, an employee of the defendant hung a sexually explicit cartoon in an area frequented by other employees. Plaintiff sued, claiming intentional infliction of emotional distress. The Court of Appeals found that the employee's conduct lacking in good taste. However, it did not rise to the level of "extreme and outrageous."

In the case of *Haverbush supra*, the Court of Appeals upheld a trial court's finding of intentional infliction of emotional distress where the Defendant engaged in a series of acts resulting from her perception of an alleged romantic situation between her and the Plaintiff. The court went through the laundry list of the Defendant's acts toward the Plaintiff in describing:

> "... over a 2 year period in which she (1) sent a barrage of letters to Haverbush, to his daughter, and to his future in-laws, in which she called him a compulsive liar, threatened his fiancée with physical harm, and threatened to tell his colleagues that he had harassed Powelson; (2) left lingerie on Haverbush's vehicles and at his residence several times; (3) left an ax and a hatchet on his vehicles, after having asked him how his fiancée would like to have an ax through her windshield; (4) told a co-worker several times that someone should old "ice" Haverbush; and (5) wrote several letters threatening to move in with him even though he was engaged and

> would soon be married. This conduct could appropriately be determined sufficiently extreme and outrageous to justify recovery for intentional infliction of emotional distress.[17]

The Court of Appeals upheld the finding that Defendant Powelson's conduct was extreme and outrageous. However, the factual distinctions between the *Haverbush* case and this one are obvious. In *Haverbush*, there is a pattern of ongoing outrageous conduct, there are threats of physical violence, and threats to publicly embarrass and humiliate Haverbush in front of his medical collegues. The brief conversation between Terri Sutton and Robert Turner amounts to her ***scolding*** him, at best.

In *Mino v Clio School District, 255 Mich App 60 (2003) lv den 469 Mich 903 (2003)*, Plaintiff sued after losing a job opportunity at a school district in Idaho claiming that he was not hired based on some defamatory statements and rumors as to past sexual misconduct. He also alleged intentional infliction of emotional distress. In upholding the trial court's granting of defendants' motions for summary disposition on the plaintiff's claims of intentional infliction of emotional distress, the Court held:

> The Circuit Court also properly granted defendants' motion for summary disposition with regard to plaintiffs' claims for intentional infliction of emotional distress against these defendants. The challenged conduct, which plaintiffs have failed to specify either in their complaint or on appeal, cannot be described as extreme or outrageous. "Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities."[18]

Next, we turn this court's attention to *Manuel v Gill, 270 Mich App 355 (2006); aff'd in part, rev'd in part 481 Mich 637 (2008)*. In *Manuel*, police were seeking information into drug trafficking. Plaintiff agreed to provide information, based upon a promise that the investigating agencies would protect his anonymity. However, an investigator revealed

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[17] Id., at 234-235.
[18] *Graham, supra* at 674.

plaintiff's identity to a third party in the course of the investigation. Plaintiff and his family filed suit alleging (among other causes of action) intentional infliction of emotional distress, claiming that the family received numerous physical threats and harassment from those targeted in the investigation. As a result of being identified as an informant in the investigation, the court found that the defendant's actions did not rise to the level of being extreme and outrageous in ruling:

> The conduct alleged in the Manuels' amended complaint cannot be considered so outrageous and extreme as to surpass all possible bounds of decency. Further, the alleged conduct cannot be regarded as atrocious or utterly intolerable in a civilized community.[19]

Another instructive case which demonstrates the kind of circumstances where claims intentional infliction of emotional distress ought to be upheld is *Lewis v LeGrow, 258 Mich App 175 (2003).* There, the defendant, during acts of consensual sex with several women, videotaped the activities, without the knowledge or consent of the women involved. None of the tapes were ever published or distributed to others. Defendant argued that the mere videotaping of plaintiffs having sex with him, without publication or distribution to others, was not so outrageous as to warrant submitting those claims to the jury. The Court of Appeals disagreed and upheld the trial court's denial of summary disposition and directed verdict and found that, at the very least, a jury could find that the defendant's acts in surreptitiously taping the sexual activities with the unsuspecting women was extreme and outrageous.

> A plaintiff can show that a defendant specifically intended to cause a plaintiff emotional distress or that a defendant's conduct was so reckless that "any reasonable person would know emotional distress would result". Defendant admitted videotaping each plaintiff having sex with him, and each plaintiff denied consenting to such videotaping. Viewing the evidence in a light most favorable to

[19] Id at 381

> the non-moving plaintiffs, the trial court did not err in denying defendant's motion for summary disposition on this issue because reasonable jurors could find that a reasonable person would conclude that plaintiffs would suffer emotional distress from defendant's secretly videotaping plaintiff having sex with him. The act of secretly videotaping plaintiffs, aside from considerations of distribution, is deceptive and a significant breach of trust. A reasonable person would conclude that such an act would cause emotional distress. *Id. at pgs 197-198.*

Another case where the appellate court has upheld a denial of defendant's motion for summary disposition of IIED claims is *Dalley v Dykema Gossett, PLLC, supra,* where defendants intentionally misrepresented to the ill Plaintiff that they had a "federal court subpoena" to gain access to his home. During the trespass into the Plaintiff's home, Defendants spent over 11 hours duplicating material from his computer. The Plaintiff made a claim for an intentional infliction of emotional distress that was dismissed by the trial court. In upholding the trial court's denial of summary disposition on the Plaintiff's IIED claim, the court stated:

> Even accepting as true the allegations in plaintiff's amended complaint, they failed to describe conduct so extreme or outrageous that it surpasses all bounds of decency in a civilized society. Assuming that Ferroli misled plaintiff about the scope of the TRO, defendant's conduct inside plaintiffs apartment simply does not amount to atrocious or extreme behavior. At worst, defendants engaged in actions that were annoying and oppressive, but these actions did not rise to the level of outrageous necessary to establish a claim for intentional infliction of emotional distress.[20] Finally, but perhaps most instructive, we find the United States Sixth Circuit Court of Appeals relying on Michigan law in a strikingly similar factual situation. In *Vreeland v Townsend, 951 F2d 1580 (1992),* the plaintiff had been drinking heavily and made a series of approximately 20 rambling calls to 911 which he later characterized as a plea for help by someone with a mental illness. The Defendant 911 operators became frustrated; insulted Vreeland using profanity and made disparaging remarks about his sexual orientation and cowardice. The Sixth Circuit Court of Appeals affirmed the dismissal of all claims stating in

[20] Id. at 321

part that the "...dispatchers conduct may have been inappropriate and unprofessional, but it does not rise to the level of intentional infliction of emotional distress.[21]

The Court of Appeals Opinion in this case determined that the Plaintiff/s IIED claims are based on what Terri Sutton ***said*** as opposed to what she ***did***.[22] **Then, just what is it in the Terri Sutton's portion of that conversation that is "extreme and outrageous?"** The conversation demonstrates that Terri Sutton thought (in good faith) that there was something going on at the Turner residence other than a medical emergency. She used very direct language with young Robert Turner. She did not insult him and she did not call him any names. She treated him like any adult would treat him if that adult thought he was playing on the phone. One would certainly be willing to bet that, even in his young life, Robert's parents and/or his family has used far more "direct" language with him than what Terri Sutton said to him on February 20, 2006.

But in the final analysis, if the operator's conduct in the *Vreeland* case did not rise to the level required to demonstrate an intentional infliction of emotional distress, how then can the language used by Terri Sutton in her brief conversation with Robert Turner rise to that level? Assuming *arguendo*, that Terri Sutton's conduct in this case could *possibly* be viewed as "inappropriate and unprofessional", reasonable minds could not differ that her conduct rises to the level of "extreme and outrageous."

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[21] Citing *Pope v Howe, 179 Mich App 91 (1989).*
[22] Appendix 24A

C. Plaintiff-Appellee Robert Turner's intentional infliction of emotional distress claim against Defendant-Appellant Terri Sutton fails as a matter of law because Defendant-Appellant Terri Sutton's conduct in her dealings with Plaintiff-Appellee Robert Turner on February 20, 2006 was not reckless.

The second element in a claim for intentional infliction of emotional distress is that the defendant intended to cause harm or the conduct was so reckless as to demonstrate and indifference as to whether harm would occur. In this case, there is absolutely no evidence that Terri Sutton intended to cause any harm to Robert Turner or Sherrill Turner. Accordingly, the focus of defendant's arguments will be on the standard required to demonstrate reckless conduct.

The definition of reckless conduct applied by Michigan appellate courts , as is followed in the case of *Echelon Homes, LLC v Carter Lumber Co., 261 Mich App 424 (2004); rev on other grounds 472 Mich 192 (2005).*

In this case, defendant made representations to plaintiff as to lien waivers that were false because the defendant did not actually deliver supplies to the stated address. The representations were apparently made with the intent that the plaintiff would rely upon them so that the defendant could get paid. In reversing the trial court's dismissal of the fraud claim is based on the defendant's reckless conduct, the court of appeals discussed the definition of reckless conduct.

> Reckless misconduct is not willful in the sense that there is actual intent to cause harm. Rather, it constitutes the functional equivalent of willfulness in that it shows and "indifference to whether harm will result as to be the equivalent of a willingness that it does." *Id.* at pp 443-444. (Citations omitted)

Based on defendant's conduct, the Court of Appeals found that there was a question of fact as to whether defendant Carter acted recklessly in his representations regarding the

lien waivers. There is a palpable "indifference as to whether harm would result" demonstrated by the defendant Carter.

In comparison, Terri Sutton, was in no way indifferent to the call made by Robert Turner. She dealt with him firmly, calmly and sent the police to the home to find out what was going on. She did not call him names or berate him. If she did not care or was indifferent about Robert Turner and what might have been happening at his home, she would have ignored the call altogether and sent no assistance whatsoever. That she sent the police demonstrated that she cared about what might have been happening with Robert Turner. However, she did not know what else was going on at the Turner home.

Another demonstration of reckless conduct is found in *Moore v City of Detroit, 252 Mich App 384 (2002); lv den 468 Mich 946 (2003).* The plaintiff was an employee was a former employee who returned to the workplace without permission and when he knew he was not supposed to be there. He became confined and in his attempts to escape the premises, fell and broke his leg. Plaintiff testified that defendant's employee saw him lying on the ground in pain – and that the employee made eye contact with him. Then, the employee locked the facility with plaintiff inside so that no one could enter, precluding even medical personnel from having access to render medical assistance. The court reversed the trial court's granting of summary disposition as to the IIED claims stating:

> According to the plaintiff's deposition, Patel saw plaintiff lying on the ground and actually established eye contact with him following the accident in which he broke his leg. Patel denies that, but a genuine issue of material fact is presented. If the fact finder determines that Patel saw plaintiff in this position and understood that he had experienced a serious injury, the fact finder could conclude that Patel's leaving plaintiff behind or his locking the facility in a manner that prevent others, including medical personnel, from assisting plaintiff was extreme and outrageous conduct. If so, the fact finder might also conclude that this conduct caused plaintiff severe emotional distress apart from the distress he had already experienced as a result of his of his physical injury, which Patel had not caused. *Id.* at p 389.

The case of *Johnson v Wayne County, supra*, also discusses recklessness. In *Johnson*, a juror in a murder case was jailed briefly with the very defendant on whose jury she was serving. In affirming the denial of summary disposition by the trial court, the Court of Appeals held:

> We believe that a rational trier of fact could find that defendants conduct was so outrageous in character and so extreme in degree that it goes beyond all bounds of common decency in a civilized society. Plaintiff has alleged that she was placed in the same holding cell with Marshall after plaintiff had been a juror on Marshall's case. This case concerns the execution-style deaths of six people in Detroit and was a highly publicized case. Marshall assertedly asked plaintiff questions about the case and badgered and intimidated her. The deputies looked through the window and started laughing. Plaintiff remained in the cell with Marshall for one hour before Marshall was removed. However, the deputies again brought marshaled back to the cell with plaintiff were they remained together again for one hour. They were then handcuffed together and taken to the Wayne County Jail. Plaintiff and Marshall were placed together in the same cell with approximately 7 other women. After being released from jail, plaintiff had to be hospitalized as a result of a mental breakdown. Further, there is testimony from the deputies that they have a policy of separating prisoners were there is a known possibility of physical harm.
>
> These facts as alleged by plaintiff are sufficient to show extreme and outrageous conduct on behalf of the defendants, that they at least acted in a reckless manner, and the defendant's actions caused plaintiff's injury. *Id.* at pp 161-162.

The three cases discussed above are illustrative as to what kind of conduct is reckless – the kind of conduct that is the equivalent of being ***willful***. In isolating the conversation between Terri Sutton and Robert Turner, where is the recklessness in her tone of voice or in the context of the conversation? In the conversation itself, where is the willingness to inflict emotional harm to him? There is none.

For the sake of discussion here, even if the plaintiff's argument is that the ***actions*** of Terri Sutton are at issue, and not just the conversation with Robert Turner. The sending of police to the home instead of medical assistance – is that lone act sufficient to constitute extreme, outrageous conduct or to demonstrate intent or reckless disregard as to whether

injury could occur? Defendant argues, based upon the cases cited herein, absolutely not. Reasonable minds could not differ on this point.

D. Plaintiff-Appellee Robert Turner's intentional infliction of emotional distress claim against Defendant-Appellant Terri Sutton fails as a matter of law because Defendant-Appellant Terri Sutton acted in good faith in her encounter with Robert Turner on February 20, 2006.

Plaintiffs argue that Ms. Sutton failed to act in good faith in her dealings with Robert Turner. However, despite her doubts about the veracity of the call from Robert Turner, she sent the police to the Turner residence. The simple fact that she mistakenly thought young Robert might have been left home alone does not in any way prove that she acted in bad faith. Despite her doubts and/or concerns about the legitimacy of the call, she sent assistance anyway.

The good-faith element of the *Ross* case is subjective in nature. It protects a defendant's honest belief and good-faith conduct with the cloak of immunity while exposing to liability a defendant who acts with malicious intent.[23]

This Court in *Odom, supra* citing *Ross*, supra further discusses the definition of good faith in stating:

> This court has described a lack of good faith as "malicious intent, capricious action or corrupt conduct or "willful and corrupt misconduct..."[24]

The court went on to say at page 475:

> In addition, this court has held that "willful and wanton misconduct is made out only if the conduct alleged shows an intent to harm or, if not that, *such indifference to whether harm will result as to be the equivalent of a willingness that it does."* Similarly, our standard civil jury instructions define "willful misconduct" as

[23] *Odom, supra*, at pages 481 and 482.
[24] Odom, supra, at p 474

> "conduct or a failure to act that shows such indifference to whether harm will result as to be equal to a willingness of harm will result." These instructions are consistent with the negation of the common-law definition of "good faith" and can be a useful guide for a trial court considering a defendant's motion for summary disposition based on individual governmental immunity. Thus, a proponent of individual immunity must establish that he acted ***without malice***. (Citations omitted and emphasis added).

The present situation is synonymous with the appellate cases where police officers apprehend suspects and make arrests. There is no evidence that Terri Sutton acted in bad faith or with any malice during her brief contact with Robert Turner. Her response to the conversation reveals a concern that Robert was home alone. Accordingly, Ms. Sutton asked to speak with an adult and told Robert that she was going to send the police to the home. This was not a threat and there was no malice in her actions. There is absolutely **NO** evidence that she wished any harm to Robert Turner. Terri Sutton followed through and sent the police to the home. Where is the bad faith in either the conversation or in her actions? We submit there is none.

There are two post-*Odom* cases, involving police officers, where the good faith requirement contained in the second leg of the *Ross* test is analyzed. First is the case of *Oliver v Smith, ____ Mich App ____ (2010)* where defendant allegedly acted in bad faith in handcuffing the uncooperative and resistant plaintiff too tightly during an arrest. Plaintiff argued that he was injured as a result of being cuffed too tightly and the evidence of the defendant's bad faith was that he was laughing while cuffing the plaintiff. That was the only evidence plaintiff raised to show bad faith. The court addressed defendant's argument as to good faith in stating:

> Plaintiff relies solely on defendant's laughter when plaintiff informed him that the handcuffs were too tight to suggest that defendant's decision in that regard may not have been made in good faith. But defendant's laughter after plaintiff's complaint could just as fairly indicate his disbelief of plaintiff, thinking that if he loosened the

> handcuffs, plaintiff might again endeavor to resist, thereby creating another dangerous situation that defendant was not willing to risk. The laughter could also indicate that defendant was flabbergasted with plaintiff after plaintiff's obstreperous behavior, and had nothing to do with his previous act of cuffing plaintiff. When looking at the situation as a whole, the officers were faced with an unruly individual who was verbally belligerent, actively disturbing a police inquiry and creating a dangerous situation for officers involved. Plaintiff was intent on physically resisting arrest and as a result, plaintiff's injuries were just as likely caused by his own repeated efforts to physically thwart officers' attempts to restrain him and regain control of the situation. *(Oliver, slip op p 6).*

Despite plaintiff's arguments, the court found no evidence of bad faith on the part of Officer Smith in his encounter with plaintiff and reversed the trial court.

The Court of Appeals has recently addressed another police situation in the case of *Norris v Lincoln Park Police Officers,__ __ Mich App ____ (2011)*. Defendant was a dog handler and utilized a police dog during the arrest of plaintiff. Plaintiff sued for injuries, claiming an intentional tort. In looking at the totality of the circumstances (a suspect that tried to evade the officers in a high speed chase, followed by his resistance to being pulled from the vehicle after several verbal commands to exit the vehicle and a physical confrontation as officers tried to extricate him from the vehicle), the Court of Appeals found that the actions of the dog handler were performed in good faith.

The court added:

> In light of the unusual and extraordinary nature of police work, it is improper to second-guess the exercise of a policeman's discretionary professional duty with the benefit of 20/20 hindsight.[25]

Let us now turn to the present matter. Again, Terri Sutton handled the **second** call from Robert Turner and what happened then must be separated from what occurred during the *first* call. The encounter between Terri Sutton is recorded and there is no dispute as to what happened in the brief conversation. Terri Sutton received the 9:02 pm

[25] *White v Beasley, supra*, 321.

call and believed that that Robert Turner had been perhaps left alone and was playing with the phone. In pure 20/20 hindsight, she was mistaken, but made her evaluation of the situation in good faith, without any malice and sent the police to the Turner residence. She did not berate Robert. She did not bully him. She did not swear at him. She spoke to him as she might to any child she thought was playing on the phone. Just because she may have scolded him because she thought he was playing on the phone does not equal bad faith or that she had any malice for Robert Turner. She sent the police to find out what was going on there. How can that be bad faith? Just as it is improper to second-guess a police officer's discretionary acts, it is improper to take the benefit of 20/20 hindsight and second-guess the actions of Terri Sutton on February 20, 2006.

E. Plaintiff-Appellee Robert Turner's intentional infliction of emotional distress claim against Defendant-Appellant Terri Sutton fails as a matter of law as the actions of Defendant-Appellant Terri Sutton during her dealings with Plaintiff-Appellee Robert Turner on February 20, 2006 were discretionary and not ministerial in nature.

The third leg in the *Ross* test for lower level employees alleged to have committed an intentional tort is whether the employee's acts are discretionary or ministerial in nature. The difference between the two is described in *Odom supra*:

> The final *Ross* element to be considered when determining whether an individual is entitled to governmental immunity is whether the challenge "act" was ministerial or discretionary in nature. As explained in *Ross*, "'A ministerial officer has a line of conduct marked out for him, and has nothing to do but to follow it; and he must be held liable for any failure to do so which results in the injury of another.'" Ministerial acts "constitute merely an obedience to orders or the performance of the duty in which the individual has little or no choice." The execution of an act once the decision has been made is also ministerial in nature. "Discretion," on the other hand, "implies the right to be wrong." Discretionary acts "require personal deliberation, decision and judgment." Although the decision need not be extraordinary, governmental immunity is not afforded for "every trivial decision" and actor may

make. Granting immunity to employee engaged in discretionary act allows the employee to resolve problems without constant fear of legal repercussions. (Odom, *supra*, at 475-476). (Footnotes omitted).

The process of addressing incoming calls is described in Ms. Sutton's deposition testimony. Notably, she states at page 12 of her deposition:

Line 9	Q:	Okay. You take a call and then you determine priority code?
Line 11	A:	Yes.
Line 12	Q:	And you can determine which type of response would be necessary be it EMS, fire, police, correct?
	A:	That's correct.

Ms. Sutton goes on, at page 14 of her deposition, to discuss priority coding.

Line 13	Q:	Okay. Tell me about priority coding.
Line 14	A:	Each call is given a priority; life threatening being the highest priority to something to like a noise complaint being a low priority.
	Q:	Or even a prank?
	A:	Well, pranks are not prioritized?
	Q:	Does prank have any type of priority?
	A:	No, they are not prioritized.
	Q:	Is there a number system that's associated with these priority codes?
	A:	One through five.
	Q:	Five being the...
	A:	Lowest.

Finally, on page 15 of her deposition, Sutton indicates an absence of a priority code when the operators determine that a call is a prank call.

Line 22	Q:	You don't assign a priority code when there's a prank call? Is that correct?
Line 24	A:	That's correct.

Following this court's review and revision of governmental immunity law in *Odom*, there are two cases that address the dichotomy between discretionary and ministerial acts. Both involve police officers and implementation of police procedures during the apprehension and arrest of suspects. The first is *Oliver v Smith, ____ Mich App ____ (2010).*

In *Oliver*, a Dearborn Heights police officer was alleged to have committed gross negligence during the arrest and handcuffing of a recalcitrant and unruly suspect. It is clear from the facts of the case that the suspect was assisting arrest. Plaintiff alleges that the officer intentionally handcuffed him too tightly, resulting in injury. Despite the fact that it is "generally conceded in *Ross* that a police officer's use of excessive force and effectuate an arrest is a ministerial act and not entitled to the cloak of immunity",[26] the Court of Appeals determined that the actions of the officer while arresting and handcuffing the unruly individual became a discretionary act. In its discussion of this issue the court states:

> Here, defendant was faced with an aggressive individual who was intent on physically and forcefully resisting the officers' efforts to restrain him. While handcuffing an individual under normal circumstances incident to arrest without any resistance maybe ministerial, plaintiff's conduct in this case, given his belligerent attitude, physical resistance to being arrested, and defiant refusal to put his arms behind his back to be handcuffed, together with their concern for officer safety transforms the act of handcuffing plaintiff into a discretionary act. Under these circumstances, defendant's actions, in deciding how to respond to plaintiff, safely diffuse the situation, and effectuate a lawful arrest of plaintiff as he resisted, were clearly discretionary. Accordingly, it is a decision to which governmental immunity applies. (*Oliver, slip op*, pp 6-7)

The second case is *Norris v Lincoln Park Police Officers,* ____ *Mich App* ____, *(2011),* published May 17, 2011. Here, one of the officers was alleged to have used a police dog improperly while subduing and arresting a resistant suspect. In reversing the trial court's denial of summary disposition, the Court of Appeals determined that the officer's actions in his use of the police dog were discretionary. The court went on to state:

> A police officer's determination regarding the type of action to take, whether an immediate arrest, the pursuit of the suspect, or the need to wait for backup assistance, constitute discretionary action entitled to immunity. In police officer's ***decision regarding how to respond to a citizen, how to safely defuse the situation***, and how to effectuate a lawful arrest a citizen resists are clearly

[26] *Butler v Detroit, 149 Mich App 708 (1986)*

> discretionary. Once the decision to arrest is made, it must be performed in a proper manner. (*Norris, slip op* p 3) (Citations omitted and emphasis added).

Ms. Sutton's conduct as an Emergency Services Operator is discretionary as to the fielding of 911 calls. Despite the fact that there are written guidelines and policies for ESO's to use, her interaction with the public is **not** ministerial in nature. Plaintiff has consistently pointed out the existence of guidelines and policies that ESO's are supposed to follow, and argues that the existence of these written policies somehow render their jobs ministerial in nature. However, the mere existence of these policies and procedures does not make the actions of an ESO ministerial. Police officers have at least as many policy manuals, regulations and written guidelines as to how to affect an arrest or perform other functions of their duties than ESO's do. Yet in both of the above cases, the acts of the police officers were determined to be discretionary. The only question here remains, if the actions of a police officer in ***responding to a citizen*** and determining how to safely diffuse a situation are ***"clearly discretionary"***, then how could Terri Suttons response to Robert Turner **NOT** be discretionary? They are both lower level governmental employees dealing with the public in varying states of stress, confusion, chaos and even hysteria. How each of them deal with the public is not something done by rote or strictly by a manual.

The operators field prank and emergency calls, and in their discretion determine whether the call is legitimate, then determine the severity of the situation and assign a priority code – *all based upon their interaction with the caller* (i.e., "responding to a citizen"). This is the very *essence* of a discretionary act. If these acts were not discretionary, then operators would not be necessary. Municipalities could have automated responders where callers could simply punch in the type of response that they want, be it fire, police or

ambulance and a computer could dispatch the appropriate aid - just as we are now forced to do in virtually every other aspect of our daily lives.

For better or for worse, emergency dispatch, thankfully, is one of the few places where callers actually speak with a live human being. There are real human beings at the other end of the telephone lines assessing the nature of the calls and putting a priority to them. That is the essence of their discretion in this matter. Despite the fact that there are manuals to guide how the calls should be handled and how the priority coding should be done, the prioritization of an emergency call is not simply a ministerial act. By its very nature, it cannot be so.

The analysis of both lower courts that the fielding of these calls is ministerial and falls, therefore, outside of the protective realm of qualified governmental immunity, is erroneous.

RELIEF REQUESTED

For the reasons stated herein, Defendant-Appellant Terri Sutton respectfully requests this Honorable Court summarily reverse the trial court's denial of Defendant's Motion for Summary Disposition and Reconsideration dated October 21, 2008 and reverse the trial Court's Order Denying Defendant's second Motion for Summary Disposition dated March 9, 2009.

In addition, Defendant-Appellant Terri Sutton respectfully requests this Honorable Court summarily reverse the December 7, 2010 Opinion of the Michigan Court of Appeals and send this matter back to the trial court for entry of an Order granting both of Defendant-Appellant Terri Sutton's Motions for Summary Disposition with prejudice.

COTHORN & MACKLEY, P.C.

BY: _____

MARK S. MACKLEY (P38847)
Attorney for Defendant-Appellant,
TERRI SUTTON
535 Griswold, Suite 530
Detroit, MI 48226
(313) 964-7600

DATED: July 27, 2011.

IN THE SUPREME COURT

APPEAL FROM MICHIGAN COURT OF APPEALS

AND FROM WAYNE COUNTY CIRCUIT COURT-JUDGE JOHN A. MURPHY

DELAINA PATTERSON, as Personal Representative of the Estate of SHERRILL TURNER, Deceased, and ROBERT TURNER, a Minor, Individually, By His Next Friend, DELAINA PATTERSON,

Docket No. 142441

Plaintiffs/Appellees,

-vs-

SHERRY NICHOLS, et al,

Defendant/Appellant.

/

DEFENDANT/APPELLANT SHARON J. NICHOLS' CORRECTED BRIEF ON APPEAL ORAL ARGUMENT REQUESTED PROOF OF SERVICE

SUBMITTED BY:

GRIER, COPELAND & WILLIAMS, P.C.

BY: RHONDA Y. REID WILLIAMS (P40523)
Attorney for Defendant/Appellant, Sharon J. Nichols
615 Griswold Street, Suite 531
Detroit, Michigan 48226
(313) 961-2600

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JURISDICTIONAL STATEMENT AND ORDER APPEALED

Pursuant to MCR 7.302(B)(3), the Supreme Court of Michigan has jurisdiction as this case "involves legal principles of major significance to the state's jurisprudence."

Defendant/Appellant Sharon Nichols appeals the Court of Appeals decision issued December 7, 2010 affirming the trial Court's denial of Defendant/Appellant's Motion for Summary Disposition on the basis of governmental immunity and denying dismissal of Plaintiff/Appellees' intentional infliction of emotional distress (hereinafter IIED) claim. Specifically, the Court of Appeals held: (1) that Defendants/Appellants Nichols' and Sutton's conduct was grossly negligent as a matter of law; (2) that there is a genuine issue of material fact as to whether Defendants/Appellants' conduct was the proximate cause of the decedent's death; (3) that mere recklessness is sufficient to satisfy the requirements for IIED; and (4) that Defendants/Appellants' actions were ministerial as opposed to discretionary.

The Court of Appeals Opinion herein conflicts with the Court of Appeals Opinion in *Dean v Childs*, 262 Mich App 48; 684 NW2d 894 (2004), *rev'd in part* 474 Mich 914 (2005), regarding the determination of "the proximate cause." In the case at bar, the decedent died as a result of her heart condition. Despite this undisputed fact, and contrary to *Dean*, the Court of Appeals herein held that reasonable minds could differ as to whether "the one most immediate, efficient, and direct cause" of death was the decedent's "medical emergency" (dilated cardiomyopathy) or Defendant/Appellant Nichols' failure to send EMS.

In addition, the Court of Appeals created a new standard for IIED. The Court of Appeals held that the existence of a "risk" that emotional distress "might" result, constitutes conduct that is so outrageous and so extreme that it equates with recklessness. The Court of Appeals relies on

Haverbush v Powelson, 217 Mich App 228; 551 NW2d 206 (1996), in support of its holding; however, the Court of Appeals has misinterpreted the *Haverbush* holding.

Haverbush pointed out that the defendant's conduct was '"made for the **purpose of**' inflicting emotional distress (which is **consistent with intent**) or . . . that 'any reasonable person **would know** that emotional distress **would** result."' *Id.* at 236. (Emphasis added).

Thus, the Court of Appeals herein has determined that **knowing** emotional distress **will** result (i.e., a willingness) is the same as knowing there is a "**risk**" that emotional distress **might** occur.

Further, the Court of Appeals ignores that the holding in *Haverbush* was limited to the facts of that case. *Id.* at 237 and *Webster v UAW Local 51*, 394 F 3d 436, 443 (6th Cir 2005).

Finally, the Court of Appeals contradicts itself in its opinion. The Court begins by saying Plaintiff has a cause of action for IIED on the basis that Defendants/Appellants ignored the information Robert Turner provided and treated his call as a prank and such action runs the "risk" of causing severe emotional distress. However, in the very next paragraph, the Court specifically states that Plaintiffs/Appellees' claim for IIED is not grounded in the decision not to dispatch EMS because the call was believed to be a prank, but rather, the claim is based on Defendants/Appellants' purported failure to be professional and courteous during the call. The Court of Appeals then holds that since the Detroit Police Department (hereinafter DPD) has policies requiring ESOs to be professional and courteous, Defendants/Appellants' actions were ministerial as opposed to discretionary.

Thus, in one paragraph, the Court of Appeals says Plaintiffs/Appellees have a cause of action because Robert's call was treated as a prank but in the next paragraph says the cause of action is not based on the fact that Robert's call was treated as a prank. The Court of Appeals

created, yet could not reconcile this contradiction because it conceded that ESOs must exercise discretion in order to prioritize calls.

Pursuant to MCR 7.302(B)(3), this Honorable Court has jurisdiction in the case at bar as this case involves legal principles of major significance.

STATEMENT OF STANDARD OF REVIEW

This Court reviews a trial court's ruling on a motion for summary disposition, de novo. *Maskery v University of Michigan Board of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003), citing *Hunkle v Wayne County Clerk*, 467 Mich 337, 340; 654 NW2d 315 (2002).

A motion for summary disposition filed pursuant to MCR 2.116 (C)(7), alleging governmental immunity, requires review of affidavits, depositions and all other documentary evidence submitted by the parties. *Dean v Childs*, 262 Mich App 43, 58; 684 NW2d 894 (2004), *rev'd in part* 474 Mich 914; 705 NW2d 344 (2005), citing *Maskery v University of Michigan Board of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003), quoting *Glancy v Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998). To survive a motion for summary disposition brought pursuant to MCR 2.116 (C)(7), the Plaintiff must allege facts warranting the application of an exception to governmental immunity. *Codd v Wayne Co.*, 210 Mich App 133, 134-135; 537 NW2d 453 (1995). If there are no facts in dispute, or if reasonable minds could not differ regarding the legal effect of the facts, then whether governmental immunity applies becomes a question of law for the Court to decide.

Similarly, a motion for summary disposition under MCR 2.116 (C)(10) tests the factual support for the non-moving party's claim, therefore, the pleadings, affidavits, depositions, admissions and other documentary evidence submitted must be considered; if there is no genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Graham v Ford*, 237 Mich App 670, 672; 604 NW2d 713 (1999), citing *Spiek v Michigan Department of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

Conversely, a motion for summary disposition brought pursuant to MCR 2.116 (C)(8) tests the legal sufficiency of the pleadings, therefore, this Court must consider the pleadings

alone and summary disposition is proper only if development of the facts could not justify recovery. *Dean, supra*, citing *Beaudrie v Henderson*, 465 Mich 124, 129-130; 631 NW2d 308 (2001).

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER DEFENDANT/APPELLANT NICHOLS OWED A DUTY TO THE DECEDENT?

Court of Appeals Answers "YES"
Defendant/Appellant Answers "NO"
Plaintiffs/Appellees Answer "YES"

II. WHETHER DEFENDANT/APPELLANT NICHOLS' CONDUCT CAN BE VIEWED AS "SO RECKLESS AS TO DEMONSTRATE A SUBSTANTIAL LACK OF CONCERN FOR WHETHER AN INJURY RESULTS"?

Court of Appeals Answers "YES"
Defendant/Appellant Answers "NO"
Plaintiffs/Appellees Answer "YES"

III. WHETHER DEFENDANT/APPELLANT NICHOLS' CONDUCT CAN BE VIEWED AS THE PROXIMATE CAUSE OF THE DECEDENT'S DEATH?

Court of Appeals Answers "YES"
Defendant/Appellant Answers "NO"
Plaintiffs/Appellees Answer "YES"

IV. WHETHER A CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IS COGNIZABLE UNDER THE CIRCUMSTANCES OF THIS CASE?

Court of Appeals Answers "YES"
Defendant/Appellant Answers "NO"
Plaintiffs/Appellees Answer "YES"

V. WHETHER DEFENDANT/APPELLANT NICHOLS' CONDUCT CAN BE VIEWED AS "EXTREME AND OUTRAGEOUS"?

Court of Appeals Answers "YES"
Defendant/Appellant Answers "NO"
Plaintiffs/Appellees Answer "YES"

VI. WHETHER DEFENDANT/APPELLANT NICHOLS ACTED IN GOOD FAITH?

Court of Appeals Answers "YES"
Defendant/Appellant Answers "NO"
Plaintiffs/Appellees Answer "YES"

VII. WHETHER MERE RECKLESSNESS IS SUFFICIENT TO MEET THE STANDARD REQUIRED TO ESTABLISH INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS?

Court of Appeals Answers "YES"
Defendant/Appellant Answers "NO"
Plaintiffs/Appellees Answer "YES"

VIII. WHETHER DEFENDANT/APPELLANT WAS PERFORMING MINISTERIAL ACTS, RATHER THAN DISCRETIONARY ACTS?

Court of Appeals Answers "YES"
Defendant/Appellant Answers "NO"
Plaintiffs/Appellees Answer "YES"

STATEMENT OF FACTS

SUBSTANTIVE FACTS:

On February 20, 2006, Defendants/Appellants, Sharon Nichols and Terri Sutton were governmental employees by virtue of their employment by the City of Detroit as Emergency Services Operators (hereinafter ESOs).

As an ESO for the City of Detroit, Defendant/Appellant Nichols' only training relative to prank calls was an instruction to use her discretion to identify and separate nuisance and prank calls from real emergencies. (Appendix 25a-26a). This is significant since at approximately 5:59 p.m. on February 20, 2006, Sherrill Turner's five-year-old son, Robert Turner, telephoned 911 from the Turner residence. Defendant/Appellant Sharon Nichols answered the call. The call between Defendant/Appellant Nichols and Robert Turner was recorded as follows:

ESO Nichols:	Emergency 911, where is the problem?
Robert:	My mom passed out.
ESO Nichols:	You over at Spruce?
Robert:	Huh?
ESO Nichols:	You on Spruce?
Robert:	My mom . . .
ESO Nichols:	Where's **Mr.** Turner at?
Robert:	Right here.
ESO Nichols:	Let me speak to **him**.
Robert:	She's not gonna talk.
ESO Nichols:	Okay, well I'm gonna send the police to your house and find out what's going on with you.
ESO Nichols:	1950 Spruce Apt. 3

(Appendix 27a). (Emphasis added).

At this point, the call was ended by Robert Turner. During the call, however, Robert Turner, was not crying, screaming or otherwise exhibiting behavior consistent with that which one would expect in an emergent situation. Defendant/Appellant Nichols spoke only to Robert

Turner and concluded that the call was a prank. As a result, the call was logged as such and neither police nor EMS was dispatched to the Turner residence. (Appendix 28a-29a).

Later that day, Robert Turner again dialed 911 at approximately 9:02 p.m. The second call was answered by Defendant/Appellant Sutton who believed the child was home alone. Given Defendant/Appellant Sutton's belief that Robert Turner was home alone, she forwarded the information to the police dispatcher who dispatched a police unit to the Turner residence. (Appendix 30a). Defendant/Appellant Sutton's call with Robert Turner was recorded as follows:

ESO Sutton:	Emergency 911 where is the problem?
Mr. Turner:	My mom has passed out in her room.
ESO Sutton:	1950 Spruce. Is that the Robert Turner residence?
Mr. Turner:	Yeah.
ESO Sutton:	Where the grown-up at?
Mr. Turner:	In her room. My mom . . .
ESO Sutton:	Let me speak to her. Let me speak to her before I send the police over there.
Mr. Turner:	She passed out.
Mr. Turner:	She's not gonna talk.
ESO Sutton:	Huh?
Mr. Turner:	She's not gonna talk.
ESO Sutton:	Okay. Well, you know what then? She's gonna talk to the police. Okay. She's gonna talk to the police because I'm sending them over there.
Mr. Turner:	She's still not gonna talk.
ESO Sutton:	I don't care. You shouldn't be playing on the phone. [pause] Now put her on the phone before I send the police out there to knock on the door and you gonna be in trouble.
Mr. Turner:	Argh!!!

(Appendix 31a).

The police arrived at the Turner residence at approximately 9:20 p.m. and discovered Ms. Turner. She was unresponsive; therefore, EMS was summoned. EMS arrived at approximately 9:40 p.m. and determined Ms. Turner was dead; therefore, the Wayne County Medical Examiner (hereinafter ME) was called to the scene, arriving at approximately 9:59 p.m. The ME Investigator pronounced Ms. Turner dead at 10:20 p.m.

An autopsy was performed on Ms. Turner resulting in the following opinion relative to cause of death:

> It is my opinion that death was due to dilated cardiomyopathy. . . cardiomyopathy is known to induce irregular rhythm of the heart and sudden death. . . .

(Appendix 32a-36a).

Based upon the findings of the EMTs and the ME Investigator, Plaintiffs' expert witness, Werner Spitz, M.D., testified that he agreed with the opinion relative to the cause of death as stated in the Post Mortem Report of February 21, 2006, to wit: **the disease that killed Ms. Turner was dilated cardiomyopathy** and the mechanism of death was congestive heart failure (CHF). (Appendix 37a-38a, pp.43-44). [1]

PROCEDURAL FACTS:

On April 30, 2008, Plaintiffs/Appellees, Delaina Patterson as Personal Representative of the Estate of Sherrill Turner, deceased, and as Next Friend of Robert Turner, a Minor, Individually, filed a complaint against Defendants/Appellants Nichols and Sutton alleging gross negligence and intentional infliction of emotional distress (IIED) as a result of the death of Sherrill Turner on February 20, 2006.

Defendant/Appellant Sutton filed a Motion for Summary Disposition relative to Plaintiffs/Appellees' claim of IIED, which was denied by the trial court, and a subsequent Motion for Reconsideration, which was denied on September 29, 2008. Thereafter, Defendant/Appellant Sutton filed a Motion for Summary Disposition relative to Plaintiffs/Appellees' gross negligence claim; same was denied on March 9, 2009. Thus, Defendant/Appellant Sutton filed a Claim of Appeal by right on March 30, 2009.

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[1] Werner Spitz, M.D. was deposed on September 25, 2009.

Defendant/Appellant Nichols filed a Motion for Summary Disposition relative to Plaintiffs/Appellees' gross negligence claim on October 28, 2009 and a Supplement to Motion for Summary Disposition relative to Plaintiffs/Appellees' claim of IIED on November 13, 2009. The trial Court denied Defendant/Appellant Nichols' Motion on January 12, 2010 without oral argument and adopted its prior Orders denying Defendant/Appellant Sutton's Motions. (Exhibit H). Defendant/Appellant Nichols filed a Claim of Appeal by right on January 26, 2010.

Thereafter, on December 7, 2010, the Court of Appeals issued an unpublished Opinion affirming the trial Court's denial of Defendants/Appellants' Motion for Summary Disposition.

Defendants/Appellants Sutton and Nichols each filed an Application for Leave to Appeal in this Court on January 18, 2011 and this Court granted Defendants/Appellants' Leave to Appeal on May 25, 2011.

ARGUMENT I

DEFENDANT/APPELLANT NICHOLS DID NOT OWE A DUTY TO THE DECEDENT

Duty is an essential element of a gross negligence claim. *Smith v Jones,* 246 Mich App 270, 274; 632 NW2d 509 (2001). Thus, in order to establish a prima facie case of gross negligence, a plaintiff must prove the defendant owed him/her a recognized duty of care. *Ross v Glasser,* 220 Mich App 183, 186; 559 NW2d 331 (1996); *Chivas v Koehler*, 182 Mich App 467, 475; 453 NW2d 264 (1990).

Further, MCL §691.1407 does not create a cause of action against a governmental employee, instead, a plaintiff must first establish that the governmental employee owed the plaintiff a common-law duty. *Rakowski v Sarb,* 269 Mich App 619, 627; 713 NW2d 787 (2006), citing *Beaudrie v Henderson,* 465 Mich 124, 134, 139; 631 NW2d 308 (2001). Under common-law, "a duty 'concerns whether a defendant is under any legal obligation to act for the benefit of the plaintiff.'" *Rakowski, supra* at 629, quoting *Balcaniant v Detroit Edison Co.,* 470 Mich 82, 86 n 4; 679 NW2d 689 (2004).

In *Beaudrie*, this Court held that "[t]he liability of government employees, other than those who have allegedly failed to provide police protection, should be determined by using traditional tort principles without regard to the defendant's status as a government employee." *Beaudrie, supra* at 134. In order to determine whether a common-law duty exists, the Court considers

> (1) the relationship of the parties, (2) the "foreseeability" of the harm, [(3) the] degree of certainty of injury, [(4) the] closeness of connection between the conduct and injury, [(5) the] moral blame attached to the conduct, [(6) the] policy of preventing future harm, and, [(7)] finally, the burdens and consequences of imposing a duty and the resulting liability for breach.

Rakowski, supra at 629, quoting *Buczkowski v McKay,* 441 Mich 96, 101 n 4; 490 NW2d 330 (1992).

When weighing the above considerations, the focus "is ultimately a question of fairness" wherein the relationship of the parties, the nature of the risk and public interest must be weighed. *Rakowski, supra* at 629, quoting *Samson v Saginaw Professional Bldg., Inc.,* 393 Mich 393, 420; 224 NW2d 843 (1975).

As it pertains to "the relationship of the parties", there was no relationship between Ms. Turner and Defendant/Appellant. There is no evidence that Defendant/Appellant and Ms. Turner ever met and the evidence presented herein reveals that they never spoke on the date at issue herein; thus, there was no relationship between Defendant/Appellant and Ms. Turner.

Plaintiffs/Appellants argued in their Response that the communication between Robert Turner and Defendant/Appellant was sufficient enough to give rise to a relationship between the two and in so arguing relied upon *White v Humbert*, 206 Mich App 459; 522 NW2d 681 (1994), *rev'd on other grounds* 453 Mich 308; 552 NW2d 1 (1996). This reliance is, however, misguided. The analysis upon which Plaintiffs/Appellees relies applies solely and specifically to police officers. *White, supra* at 465.

With reference to the foreseeability of an injury, this Court addressed this issue in *Samson* and explained that the fact that an occurrence is foreseeable does impose a duty upon a defendant, a relationship must exist between the defendant and the injured party. *Samson, supra* at 406.

Thus, this Court has made it clear that when weighing the above factors, the first element, a relationship between the defendant and the injured person absolutely must exist. (See also, *Massey v Department of Corrections,* 182 Mich App 238, 241; 451 NW2d 869 (1990); *Duvall v Golden,* 139 Mich App 342, 351; 362 NW2d 275 (1984); *lv den* 422 Mich 976 (1985)).

While Defendant/Appellant recognizes that the "special relationship" test is applicable to the public duty doctrine and further, that the public duty doctrine is not applicable to the case at bar, the Court's analysis in *White v. Humbert,* 206 Mich App 459; 522 NW2d 681 (1994), nevertheless is instructive. In *White,* as in the case at bar, the 911 operator did not have any contact or discussion with the injured person as neighbors telephoned 911 on White's behalf. When analyzing whether a special relationship existed between the operator and the injured party, the Court noted that not only was there an absence of a "special relationship", but there was absolutely no relationship under the circumstances

> In essence, the connection between decedent and Humbert **is simply too attenuated to conclude that any relationship or duty would arise between the two** beyond the general duty owed by Humbert to the public at large.

White, supra at 462.

This Court analyzed the issue of a legal duty in great detail in *In re Certified Question from the Fourteenth District Court of Appeals of Texas (Miller) v. Ford Motor Company,* 479 Mich 498; 740 NW2d 206 (2007). In *Miller,* the plaintiff's stepfather worked for an independent contractor, but on Ford's premises relining the interiors of blast furnaces with material containing asbestos. The plaintiff alleged that she developed mesothelioma as a result of washing her stepfather's clothes.

The certified question presented to the Miller Court was whether defendant Ford owed a duty to the plaintiff and the Court answered in the negative. *Miller, supra* at 502. This Court explained that there was no relationship between the plaintiff and the defendant. Upon answering the question, this Court explained that when determining whether the defendant owes an actionable legal duty to the injured party, the inquiry involves consideration of "the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the

nature of the risk presented." *Miller, supra* at 505. However, "**the most important factor to be considered is the relationship of the parties. 'A duty arises out of the existence of a relationship between the parties of such a character that social policy justifies' its imposition.'**" *Id.* (Emphasis added).

In the case at bar, there was no relationship between Defendant/Appellant Nichols and Ms. Turner; thus, if the factor from which the duty arises does not exist, there can be no duty. As such, Plaintiffs/Appellees cannot establish a prima facie case of negligence, as there existed no duty.

Therefore, since Plaintiffs/Appellees cannot establish duty, they necessarily have failed to establish gross negligence.

ARGUMENT II

DEFENDANT/APPELLANT NICHOLS' CONDUCT WAS NOT SO RECKLESS AS TO DEMONSTRATE A SUBSTANTIAL LACK OF CONCERN FOR WHETHER AN INJURY RESULTS

Should this Court determine that Defendant/Appellant Nichols owed a duty to Ms. Turner Plaintiffs/Appellees must nonetheless prove Defendant/Appellant Nichols' conduct amounted to gross negligence. As this Court is aware, the Governmental Tort Liability Act (GTLA), MCL § 691.1407, et seq., grants qualified immunity to governmental employees under certain circumstances. It provides in pertinent part as follows:

> (2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each . . . employee of a governmental agency, each volunteer acting on behalf of a governmental agency . . . is immune from tort liability for an injury to a person . . . caused by the . . . employee . . . while in the course of employment . . . while acting on behalf of a governmental agency if all of the following are met:
>
> (a) The . . . employee . . . 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 . . . employee's . . . conduct does not amount to ***gross negligence*** that is the proximate cause of the injury or damage.
>
> (3) Subsection (2) does not alter the law of intentional torts as it existed before July 7, 1986. . .
>
> (7) As used in this section:
>
> *(a) "Gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. . .*

MCL § 691.1407(2)(3) and (7)(a). (Emphasis added).

Plaintiffs/Appellees do not dispute that Defendant/Appellant Nichols was, at all times relevant hereto, a governmental employee, within the course of her employment, acting on behalf of a governmental agency. In addition, Plaintiffs/Appellees also do not dispute that Defendant/Appellant Nichols was or reasonably believed she was acting within the scope of her authority. Further, Plaintiffs/Appellees do not dispute that the governmental agency, the City of Detroit, was engaged in the exercise or discharge of a governmental function.

Plaintiffs/Appellees argue, however, and the Court of Appeals agreed, that Defendant/ Appellant Nichols' conduct amounted to gross negligence. The Court of Appeals appears to conclude as a matter of law that Defendant/Appellant Nichols' conduct was grossly negligent, however, the Opinion is devoid of any analysis utilized by the Court of Appeals in reaching this conclusion.

Plaintiffs/Appellees argue that because Defendant/Appellant Nichols was found guilty of Willful Neglect of Duty under MCL § 750.478, this determination necessarily means her actions amounted to gross negligence. This argument is flawed as

MCL § 750.478 provides:

> When any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every **willful neglect** to perform such duty, where no special provision shall have been made for the punishment of such delinquency, constitutes a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00.

MCL § 750.478 (Emphasis added).

"Willful neglect" is simple or ordinary negligence and is not synonymous with "gross negligence." Thus, even if this Court found that Defendant/Appellant was negligent, same is not sufficient as gross negligence is **"substantially"** more than negligence or a failure to do

something. *Costa v Community Emergency Medical Services, Inc.*, 475 Mich 403, 411; 716 NW2d 236 (2006). "Gross negligence is defined as 'conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.'" *Costa, supra,* quoting MCL § 691.1407(7)(a).

Thus, Defendant/Appellant Nichols' conviction of violating MCL § 750.478 has no bearing on whether Defendant/Appellant Nichols' conduct amounted to gross negligence. As such, Defendant/Appellant's failure to follow the sample script when she received Robert Turner's call and her decision not to request dispatch of EMS or police in response to Robert Turner's call did not amount to gross negligence simply because a policy or procedure existed; at worst, Defendant/Appellant Nichols made an error in judgment (ordinary negligence); however, ordinary negligence is not relevant to the determination of gross negligence. *Poppen v Tovey,* 256 Mich App 351, 358; 664 NW2d 269 (2003).

Gross negligence requires a showing of "substantial" negligence. In *Harris v Rahman,* 474 Mich 1001; 708 NW2d 100 (2006), this Court reversed the Court of Appeals decision and held that the defendant environmental health inspector's actions were not gross negligence despite the inspector's (1) knowledge of the mercury spill in the plaintiffs' home and the amount of the spill; (2) belief that one pound of elemental mercury required immediate evacuation; (3) awareness that one pound of elemental mercury was spilled in plaintiffs' home and that the Poison Control Center had advised plaintiffs to evacuate their home; (4) testing that revealed legal limits for industrial sites, but limits for industrial sites are higher than those for residential areas; (5) advice to plaintiffs to keep their pet away from the most heavily exposed area and opinion that it was only speculation that their home was dangerous; and (6) failure to recommend

the family evacuate the home. *Harris v Rahman, unpublished opinion per curiam of the Court of Appeals, issued July 22, 2004 (Docket No. 247253)*, p. 3, rev'd *Harris v Rahman* 474 Mich 1001; 708 NW2d 100 (2006). (Appendix 63a-65a).

If the facts in *Harris* do not constitute gross negligence, the facts herein certainly do not constitute gross negligence. In *Harris,* the defendant had actual knowledge that the plaintiffs were in a dangerous environment by way of test results and the defendant took affirmative steps that convinced the plaintiffs they were safe and that they should ignore the recommendation of the Poison Control Center despite his awareness of the danger, and this Court held that the defendant's actions were not gross negligence. In the case at bar, Defendant/Appellant did not have actual knowledge of the danger or risk of injury to Ms. Turner. Further, Defendant/Appellant did not take affirmative steps to convince Ms. Turner that there was no risk of danger and Ms. Turner did not rely upon any assertions made by Defendant/Appellant.

Plaintiffs/Appellees argue that since a policy or procedure was in existence and since Defendant/Appellant was found noncompliant with same, her conduct was necessarily gross negligence. Again, failure to comply with a procedure created by Defendant/Appellant's employer might amount to ordinary negligence at best, but it is not persuasive or even relevant in determining gross negligence. Further, in making this argument, Plaintiffs/Appellees rely upon hindsight to support their argument. Hindsight is not the appropriate test under Michigan law "because, with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result." *Tarlea v Crabtree,* 263 Mich App 80, 90; 687 NW2d 333 (2004).

Thus, while the outcome in this case is unfortunate, the evidence reveals that approximately 50% of the calls received by City of Detroit Emergency Services Operators (ESOs) are pranks. (Appendix 25a-26a & 39a). Given this fact, Defendant/Appellant's belief

that Robert Turner's call was a prank and her decision not to request dispatch was reasonable and certainly did not amount to "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."

Further, the evidence reveals that Defendant/Appellant was not trained on how to handle prank calls, but rather, was instructed to use her discretion. Thus, since Defendant/Appellant was not trained how to distinguish a prank call from a non-prank call, she certainly cannot be found to have acted with gross negligence when her conclusion regarding this issue was erroneous. On the contrary, the fact that Defendant/Appellant was not formally trained tends to exonerate her error because she was not equipped with the requisite training and knowledge to make the proper determination; a reality that was no fault of hers.

Moreover, not only is the prank call ratio approximately 50%, but couple this fact with the fact that Defendant/Appellant had difficulty hearing Robert Turner and this creates a scenario wherein not only was Defendant/Appellant's decision not gross negligence, it was reasonable. The fact that an injury resulted does not make Defendant/Appellant's belief and decision gross negligence.

Finally, Plaintiffs/Appellees argue that Defendant/Appellant was aware of the risk of injury and that this awareness makes her failure to act gross negligence.

This argument is absurd if for no other reason than such a conclusion would require dispatch in response to each and every 911 call as there is necessarily a risk of injury or death with every call received by an ESO. Therefore, if this analysis were applied, the only way an ESO could avoid the potential risk of injury, would be to request dispatch in response to each and every call they receive; this would be ridiculous and impossible. As such, since Defendant/Appellant's actions were reasonable under the circumstances herein, her conduct

cannot be deemed as so reckless as to demonstrate a substantial lack of concern for whether an injury results.

ARGUMENT III

DEFENDANT/APPELLANT NICHOLS' CONDUCT WAS NOT THE PROXIMATE CAUSE OF THE DECEDENT'S DEATH

Should this Court decide Defendant/Appellant Nichols did owe Ms. Turner a duty and, further, that Defendant/Appellant's conduct amounted to gross negligence, Plaintiffs/Appellees' claim fails nonetheless as Plaintiffs/Appellees cannot satisfy the requirements set forth in MCL § 691.1407(2); specifically, Plaintiffs/Appellees cannot prove that Defendant/Appellant Nichols' conduct amounted to gross negligence that was **the** proximate cause of Ms. Turner's death.

"The proximate cause" as used in the governmental immunity statute has been defined as "the one most immediate, efficient and direct cause preceding an injury," not merely "a" proximate cause. *Robinson v City of Detroit,* 462 Mich 439, 445-446; 613 NW2d 307 (2000), *rehearing denied,* 463 Mich 1210; 618 NW2d 590 (2000). (Emphasis added).

The *Robinson* Court held that individual governmental employees are immune from liability where:

> . . . their actions were not the proximate cause of the plaintiff's injuries. . . . [A]nd [we] hold that the phrase 'the proximate cause' as used in the employee provision of the governmental immunity act, MCL 691.1407(2); MSA 3.996 (107)(2), means the one most immediate, efficient and direct cause preceding an injury, not 'a proximate cause.' Because the conduct of the individual [governmental employee] in these cases was not 'the proximate cause' i.e., the most immediate, efficient, and direct cause, of the passengers' injuries, the [governmental employees] are entitled to governmental immunity.

Robinson, supra, pp. 445-446.

In *Robinson,* plaintiffs sought to impose civil liability upon individual police officers involved in high speed chases wherein the pursued vehicles collided with roadside obstacles or other vehicles not involved in the pursuit. To reach its holding regarding whether the officers'

decision to initiate pursuit, or the pursuit itself, proximately caused the alleged injuries or harm, this Court conducted an exhaustive analysis of the employee provision of the GTLA, MCL § 691.1407(2).

In so doing, this Court in *Robinson* reversed its earlier decision in *Dedes v Asche,* 446 Mich 99; 521 NW2d 488 (1984) interpreting "the proximate cause" in subsection (c) to mean merely "a proximate cause," as the *Robinson* standard is emphatic.

Consequently, to avoid a governmental employee's statutory immunity, a plaintiff must demonstrate the employee's conduct was grossly negligent, and such gross negligent conduct was, in the restrictive sense as defined in *Robinson,* "the one most immediate, efficient and direct cause of the injury or harm" of which plaintiff complains. This Court concluded that governmental employees who are carrying out governmental functions are to be afforded greater protection from civil tort liability than non-governmental employees.

Robinson has been applied in cases with fact patterns similar to those herein. The analysis most compelling and applicable to the facts in this case is that found in *Dean v Childs,* 262 Mich App 48; 684 NW2d 894 (2004), *rev'd in part* 474 Mich 914 (2005). In *Dean,* the plaintiff filed suit against the Royal Oak Fire Department shift supervisor, Childs, alleging that his decision to hook the fire truck's hose to a hydrant a block away from the house on fire when there was a hydrant across the street, and his instruction to the other fire fighters to direct the hoses at the front of the house, which forced the blaze engulfing the front of the home to the back of the home and thereby prevented the firemen from gaining entry and prevented the rescue of the four children trapped inside the home in toto, constituted gross negligence. **The evidence at trial revealed that the children would have likely survived the fire if Childs had not acted in a gross negligent manner.** *Dean v Childs, supra,* at 58.

The Court of Appeals held that Childs' actions were the proximate cause of the children's deaths, however, this Court reversed the Court of Appeals and adopted the reasoning in the dissent wherein it was noted that ***while Childs' actions may have been the cause of the fire spreading to the rear of the house which thereby eliminated the other firefighters' ability to rescue the trapped children, his actions were not the proximate cause of the children's deaths.*** *Dean, supra,* p. 61.

This Court held that the dissent properly concluded that ***the proximate cause of the children's deaths was the fire itself:***

> After reviewing the facts in a light most favorable to plaintiff, I conclude 'the most immediate, efficient, and direct cause,' of the tragic deaths of plaintiff's children was the fire itself, not defendant's alleged gross negligence in fighting it.

Id.

Thus, despite evidence showing that the children would have survived the fire but for *Dean's* gross negligence, this Court held that *Dean's* gross negligence was not the proximate cause of their deaths--the fire was the proximate cause.

In the case at bar, Plaintiffs/Appellees' expert witness, Werner Spitz, M.D., testified that the evidence revealed that Ms. Turner had a diagnosis of cardiomyopathy, which is an enlarged heart. (Appendix 43a). He further opined that Ms. Turner's cardiomyopathy was related to a disease of the heart muscle. (Appendix 43a). This condition pre-existed Robert Turner's 911 telephone call. Further, according to Dr. Spitz, a day or two prior to her demise, Ms. Turner was seen by her physician and complained of chest pain and shortness of breath; both of which, according to Dr. Spitz, are common findings in patients with cardiomyopathy. (Appendix 44a-45a).

Further still, it was Dr. Spitz's testimony that Ms. Turner's cause of death, or manner of death, was congestive heart failure. (Appendix 46a). Dr. Spitz's opinion that Ms. Turner died as a result of her heart condition is confirmed by the Autopsy Report. (Appendix 32a-36a).

Plaintiffs/Appellees argued in response to Defendant/Appellant's Application to this Court that Dr. Spitz testified that had Ms. Turner received medical attention prior to 9:00 p.m. she could have been saved and that this testimony is sufficient to raise a question of fact regarding causation. (See page 4 of Plaintiffs/Appellees' Response). Again, this argument must fail as this argument is contrary to this Court's holding in *Dean.*

Further, Dr. Spitz's opinion regarding the likelihood of survival is purely speculative as Dr. Spitz admits that as a pathologist that the overwhelming majority of "patients" he encounters are dead and in those instances in which he becomes involved with living individuals, he does not evaluate or treat them; but rather, he reviews their medical records in order to determine the person's ability to perform a certain job function and for how long. (Appendix 40a-41a). However, given that Dr. Spitz does not treat and/or evaluate living individuals and has not since right after graduating from medical school over 50 years ago, his "opinion" regarding survivability is speculative at best since he is not qualified, as a forensic pathologist, to render an expert opinion regarding treatment and the likelihood of survival following treatment. (Appendix 39a).

Therefore, while Plaintiffs/Appelleees may argue Ms. Turner was alive when Robert Turner called 911 at 5:59 p.m., and had Defendant/Appellant Nichols requested EMS dispatch, Ms. Turner would have survived, said argument is purely speculation. Nevertheless, even if this Court is inclined to accept Plaintiffs/Appellees' argument, Defendant/Appellant Nichols is still entitled to qualified immunity pursuant to the holding in *Dean* as her action was not "**the** most

immediate, efficient, and **direct cause**" of Ms. Turner's death. Instead, Ms. Turner's heart disease was the most immediate, efficient, and direct cause" of her death.

ARGUMENT IV

PLAINTIFFS/APPELLEES' CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IS NOT COGNIZABLE IN THIS CASE

In order to invoke liability for the intentional tort of Intentional Infliction of Emotional Distress (IIED), a plaintiff must prove (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. *Haverbush v Powelson*, 217 Mich App 228, 233-234; 551 NW2d 206 (1996), citing *Roberts v Auto-Owner Ins. Co.*, 422 Mich 594, 602; 374 NW2d 905 (1985) and *Johnson v Wayne County,* 213 Mich App 143, 161; 540 NW2d 66 (1995).

Thereafter, assuming the Plaintiffs/Appellees herein can prove the above identified elements, since Defendant/Appellant is a governmental employee, the Court must next look to *Ross v Consumers Power Co.*, (On Rehearing), 420 Mich 567; 363 NW2d 641 (1984) for the test to be applied to determine whether a governmental employee can be held liable for IIED.

Pursuant to *Ross,* and *Odom v Wayne County*, 482 Mich 459, 470; 760 NW2d 217 (2008), subsection 2 of the Governmental Tort Liability Act (GTLA) encompasses only negligent tort thus, governmental employees enjoy qualified immunity from intentional tort liability at common law in those instances wherein the governmental employee can establish that her:

> . . . acts were taken 'during the course of . . . employment' and that the employee was 'acting, or reasonably believe[d] [he was] acting, within the scope of [his] authority[.]' . . . The governmental employee must also establish that he was acting in 'good faith.'

Id. at 473, citing *Ross, supra.*

The first two elements of the *Ross* test are not at issue herein; Plaintiffs/Appellees do not dispute that Defendant/Appellant was acting during the course of her employment, nor do they dispute that Defendant/Appellant was acting within the scope of her authority. Thus, the only issue remaining is whether Defendant/Appellant was acting in good faith.

A. DEFENDANT/APPELLANT NICHOLS ACTED IN GOOD FAITH DURING HER ENCOUNTER WITH ROBERT TURNER

Lack of good faith has been described by this Court as "malicious intent, capricious action or corrupt conduct." *Odom, supra* at 474, quoting *Veldman v Grand Rapids*, 275 Mich 100, 113; 265 NW 790 (1936) and *Amperse v Winslow*, 75 Mich 234, 245; 42 NW 823 (1889).

The *Odom* Court went on to note that:

> This Court has held that 'wilful and wanton misconduct is made out only if the conduct alleged shows an **intent to harm** or if not that, such indifference to whether harm will result as to be **the equivalent of a willingness that it does**.'

Odom, at 475, quoting *Burnett v City of Adrian*, 414 Mich 448, 455; 326 NW2d 810 (1982). (Emphasis added).

Further, the Court noted, "The good faith element of the *Ross* test is subjective in nature. It protects a defendant's honest belief and good-faith conduct with the cloak of immunity while exposing to liability a defendant who acts with malicious intent." *Odom, supra* at 481, citing Prosser § 132, p. 989.

The evidence reveals that fifty percent of the calls received by a Detroit Police Department ESO are prank calls (Appendix 25a-26a). There has been no evidence that Robert Turner's tone even conveyed fear or a sense of urgency or that he was excited. The absence of emotion, coupled with the high ratio of prank calls and Defendant/Appellant's inability to clearly

hear Robert Turner, supports a finding that Defendant/Appellant acted in good faith when she classified Robert Turner's call as a prank call.

These facts certainly do not suggest willful or wanton misconduct or such an indifference to whether harm occurs as to be the equivalent of a willingness that it does occur.

B. MERE RECKLESSNESS IS INSUFFICIENT TO MEET THE STANDARD REQUIRED TO ESTABLISH INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, INSTEAD, THE CONDUCT MUST BE SO RECKLESS THAT THE DEFENDANT KNOWS EMOTIONAL DISTRESS WILL RESULT

Defendant/Appellant Nichols is uncertain which "act" purports to give rise to Plaintiffs/Appellees' IIED claim. This confusion was created by the Court of Appeals. On page 7 in the second and third paragraphs of its Opinion, the Court of Appeals analyzed Defendant/Appellant Nichols' decision not to dispatch EMS for the purpose of concluding recklessness. However, in the very next paragraph, the Court of Appeals contradicts itself by specifically stating that Plaintiffs/Appellees' claim for IIED is based on the way Robert Turner was treated on the telephone and not upon Defendant/Appellant Nichols' decision not to dispatch EMS. Thus, Defendant/Appellant Nichols will analyze the recklessness standard relating to both acts.

The Court of Appeals erred when it suggested that recklessness can be established whenever there is a **risk** that harm (emotional distress) **might** occur, the fact of the risk itself amounts to recklessness sufficient to satisfy the elements of intentional infliction of emotional distress.

As this Court is aware, the standard requires that the conduct be **so outrageous** in character and **so extreme** in degree that it goes **beyond all bounds** of decency in a civilized society. *Haverbush v Powelson*, 217 Mich App 228, 234; 551 NW2d 206 (1996). This is a

significant or "**very high standard.**" *Nguyen v General Motors Corp.*, 2006 U.S. Dist. LEXIS 60088 (W.D. Mich Aug 23, 2006). (Appendix 47a-55a). "Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressors, or other trivialities." *Doe v Mills*, 212 Mich App 73, 91; 536 NW2d 824 (1995).

C. DEFENDANT/APPELLANT NICHOLS' DECISION NOT TO DISPATCH EMS DUE TO HER BELIEF THAT ROBERT TURNER'S CALL WAS A PRANK WAS REASONABLE AND THUS DOES NOT MEET THE HIGH RECKLESSNESS STANDARD

The Court of Appeals, misapplying *Haverbush, supra,* concluded that whenever an ESO treats a 911 call as a prank, she is aware that there is a risk that the caller may experience emotional distress and therefore, her decision not to dispatch EMS constitutes recklessness.

This analysis is faulty for two reasons. First, *Haverbush* did not hold that a risk that emotional distress might occur, amounts to recklessness. On the contrary, the *Haverbush* Court held that where a reasonable person would **know** emotional distress **would result** from their actions, recklessness is proven. *Haverbush, supra* at 236.

Knowing your actions **will** result in emotional distress is very different from knowing there is a **risk** that your actions **might** result in emotional distress. The first is a certainty while the latter is an 'if, might, maybe.'

This is an absurd conclusion that knowledge that emotional distress might result is sufficient to prove recklessness is absurd because under the Court of Appeals' analysis, each ESO necessarily engages in recklessness fifty percent of the time, during each and very shift they work since approximately fifty percent of the calls are classified as prank calls. Further still, every single time an ESO answers the phone there is a risk that if police/fire/EMS are not dispatched an injury might result. Nevertheless, an ESO cannot request dispatch of emergency

services in response to every call answered; there are insufficient resources for same and, further, to do so would amount to recklessness as units would necessarily be unavailable when an emergency presented.

The second error in the Court of Appeals' analysis is its failure to recognize "that the decision in *Haverbush* was limited to its particular facts." *Haverbush, supra* at 267; *Webster v UAW Local 51,* 394 F3d 436, 443 (6th Cir 2005).

Thus, considering the particular facts in the case at bar, believing the call was a prank call and deciding not to dispatch EMS was not conduct "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." *Doe, supra* at 91.

D. THE MANNER IN WHICH DEFENDANT/APPELLANT NICHOLS TREATED ROBERT TURNER DURING THE CALL DID NOT MEET THE HIGH RECKLESSNESS STANDARD

Plaintiffs/Appellees argue and the Court of Appeals agreed that Defendant/Appellant's tone was rude and harsh and they rely upon the Detroit Police Department internal investigation in support of their position. However, even if this Court assumes Defendant/Appellant's tone was rude and harsh, same does not create liability for IIED.

According to the transcript of the telephone call, the only thing Defendant/Appellant said to Robert Turner, with the exception of asking what was the problem and his location, was "Okay, well I'm gonna send the police to your house and find out what's going on with you." (Appendix 27a). Even if this is interpreted as a threat, "[l]iability does not extend to mere insults, indignities, threats. . . ." *Id.*

Further, even if Defendant/Appellant's voice was stern, this would not impose liability either given her belief that Robert Turner was playing and her knowledge that if she is occupied handling a prank call, she is not available to handle a call involving a real emergency. [2]

Plaintiffs/Appellees rely upon *Hayes v Langford,* unpublished opinion per curiam of the Court of Appeals, issued December 9, 2008 (Docket No. 280049), in support of their argument that an ESO's tone can give rise to a claim for IIED. (Appendix 56a-62a).

There are several problems with Plaintiffs/Appellees' reliance on *Hayes*, the most obvious being that it is not precedent.

In addition, the facts in *Hayes* are distinguishable from those herein. The 911 operator in *Hayes* "**repeatedly** insulted plaintiff, **berated** plaintiff, asked whether plaintiff was a 'mental patient,' **and** threatened plaintiff with legal repercussions for making a false 911 call." *Id.* at pp. 1 & 2. (Appendix 47a-48a). During plaintiff's second call to 911, "defendant **again insulted** plaintiff, berated plaintiff, and asked whether plaintiff was a 'mental patient.'" *Id.*, at p. 2. (Appendix 48a).

However, unlike the defendant in *Hayes*, Defendant/Appellant did not berate Robert Turner once, let alone "repeatedly," nor did she repeatedly insult him. Thus, the facts herein do not support an IIED claim as Defendant/Appellant's conduct did rise to the level necessary to impose liability.

E. DEFENDANT/APPELLANT NICHOLS' CONDUCT CANNOT BE VIEWED AS EXTREME AND OUTRAGEOUS

[2] Plaintiffs/Appellees will likely respond that Robert Turner's call was a real emergency; however, this argument necessarily relies upon hindsight, something Defendant/Appellant did not have and something the Court does not have the liberty of using.

E. DEFENDANT/APPELLANT NICHOLS' CONDUCT CANNOT BE VIEWED AS EXTREME AND OUTRAGEOUS

As noted hereinabove, in order to establish IIED, Plaintiffs/Appellees must prove that Defendant/Appellant's conduct was **so outrageous** in character and **so extreme** in degree that it went **beyond all bounds** of decency in a civilized society. *Haverbush, supra* at 234. As further noted hereinabove, this is a "**very high standard**." *Nguyen v General Motors Corp.*, 2006 U.S. Dist. LEXIS 60088 (W.D. Mich Aug 23, 2006). (Appendix 47a-55a, see p. 54a).

Since "liability does not extend to mere insults, indignities, threats, annoyances, petty oppressiond, or other trivialities," Plaintiffs/Appellees cannot meet the high standard required as Defendant/Appellant did berate Robert Turner, she did not verbally abuse or assault Robert Turner, she simply tried to get him to admit he was playing on the phone and attempted to convey to him the seriousness of such actions. *Doe v Mills*, 212 Mich App 73, 91; 536 NW2d 824 (1995), citing *Linebaugh v Sheraton Michigan Corp.,* 198 Mich App 335, 342; 497 NW2d 585 (1993).

Given the circumstances, not only were Defendant/Appellant's actions not extreme and outrageous, they were very reasonable.

ARGUMENT V

DEFENDANT/APPELLANT NICHOLS' ACTS WERE DISCRETIONARY RATHER THAN MINISTERIAL DESPITE THE EXISTENCE OF A DETROIT POLICE DEPARTMENT PUBLIC INTERACTION POLICY

In its analysis of this issue, the Court of Appeals states that: "the gravamen of plaintiff's complaint . . . [is that] Robert's emotional distress was caused by defendants' treatment of him on the telephone. In other words, the allegedly tortious conduct was not defendants' failure to properly carry out the duties they describe as discretionary, but their interaction with Robert." *Patterson v Nichols,* unpublished opinion per curiam of the Court of Appeals, issued December 7, 2010 (Docket Nos. 288375 & 291287), p. 7. (Appendix 4a-12a), However, in the paragraph immediately preceding this comment, the Court of Appeals writes:

> On the facts before this Court, a reasonable juror could find defendants' conduct, failing to send assistance, . . . amounted to recklessness. . . . But defendants arguably did not exercise such discretion. Rather it appears they ignored the information Robert was providing. . . ."

Patterson v Nichols, unpublished opinion per curiam of the Court of Appeals, issued December 7, 2010 (Docket Nos. 288375 & 291287), p. 7. (Appendix 4a-12a).

Aside from contradicting itself regarding the "gravamen" of Plaintiffs/Appellees' complaint, the foundation of the Court of Appeals Opinion inaccurately presumes that simply because the Detroit Police Department concluded Defendant/Appellant violated Detroit Police Department policies, that issue has been decided as a matter of law.

The Court of Appeals goes on to change the focus of its analysis from the failure to dispatch, which it originally concluded gives rise to Plaintiffs/Appellees' claim for IIED to Defendant/Appellant's alleged rude manner. The Court of Appeals' change of focus is necessary because the Court of Appeals acknowledges Defendant/Appellant had some discretion, to wit:

some of Detroit Police Department policies "strictly limit the discretion an operator has." *Patterson v Nichols,* unpublished opinion per curiam of the Court of Appeals issued December 7, 2010 (Docket Nos. 288375 & 291287), p. 7. (Appendix 4a-12a).

The Court of Appeals intentionally attempted to split hairs because it knows that even if Defendant/Appellant's statement to Robert Turner that she was going to send the police could be perceived as a threat and even if her voice was unfriendly, there was nothing about the exchange that would give rise to liability for IIED. Further, the Court of Appeals also knows that Defendant/Appellant's decision whether to dispatch EMS or not, absolutely required the exercise of discretion.

If Plaintiffs/Appellees' IIED claim is based upon the telephone exchange and this Court determines Defendant/Appellant has no discretion concerning the proper tone to use when addressing the public, Plaintiffs/Appellees' claim still fails because Defendant/Appellant's actions were neither extreme nor outrageous, nor would she know with certainty that her tone would result in extreme emotional distress for purposes of *Ross* and *Odom, supra.* If the IIED claim is based upon Defendant/Appellant's failure to send assistance, the claim must fail as under the circumstances Defendant/Appellant's actions were neither extreme nor outrageous, nor would she know with certainty that her tone would result in extreme emotional distress for purposes of *Ross* and *Odom, supra.*

The Court of Appeals ruling was improper as it relates to a finding of duty and gross negligence. Further, its conclusion that causation remains a question of fact for the jury was erroneous.

In addition, the Court's conclusion that the claim of Intentional Infliction of Emotional Distress is a cognizable claim under the circumstances herein was erroneous, as was its conclusion that Defendant/Appellant Nichols' conduct was extreme and outrageous and met the high standard of recklessness required for Intentional Infliction of Emotional Distress.

Finally, the Court's determination that Defendant/Appellant Nichols' actions were ministerial as opposed to discretionary was also flawed.

Therefore, Defendant/Appellant Sharon Nichols respectfully requests that this Honorable Court reverse the trial court and Court of Appeals and remand this case to the trial court for entry of an order granting summary disposition in favor of Defendant/Appellant Sharon Nichols on Plaintiffs/Appellees' Gross Negligence and Intentional Infliction of Emotional Distress claims.

STATEMENT IN SUPPORT OF REQUEST FOR ORAL ARGUMENT

Defendant/Appellant Sharon Nichols relies upon MCR 7.214 (E)(2).

Respectfully submitted,

GRIER, COPELAND & WILLIAMS, P. C.

BY: Rhonda Y. Reid Williams

RHONDA Y. REID WILLIAMS (P40523)
Attorney for Defendant/Appellant Nichols
615 Griswold Street, Suite 531
Detroit, Michigan 48226
(313) 961-2600

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