Supreme Court of Michigan.

MAIDEN v. ROZWOOD

Sadie MAIDEN, as Personal Representative of the Estate of Leith Maiden, Deceased, Plaintiff-Appellee, v. Henry James ROZWOOD, Betty Jo Szabo, Paul Leonard Troy, and Karl Douglas Myles, Defendants-Appellants,

Southgate Regional Center and the Michigan Department of Health, Defendants. v. Yung A. Chung, M.D., Defendant-Appellee, Donald Portice, Mark Tonge, Larry Rushing and David Johnson, Defendants.

Docket Nos. 107936, 110035.Calendar Nos. 14, 15.

Argued Jan. 22, 1999. -- July 30, 1999

Donald M. Fulkerson, Westland, for plaintiff-appellant Reno.Law Offices of David J. Cooper, P.C. (by David J. Cooper), West Bloomfield, and Bendure & Thomas (by Mark R. Bendure), Detroit, for plaintiff-appellee Maiden. Plunkett & Cooney, P.C. (by Christine D. Oldani and Mary Massaron Ross), Detroit, for defendant-appellee in Reno.Jennifer M. Granholm, Attorney General, Thomas L. Casey, Solicitor General, and Santiago Rios, Jessica E. LePine and Michael C. McDaniel, Assistant Attorneys General, Lansing, for defendants-appellants in Maiden.

Opinion

In these consolidated cases, we granted leave to decide the quantum of proof required to survive a motion for summary disposition in gross negligence actions involving government employees under M.C.L. § 691.1407(2)(c); MSA 3.996(107)(2)(c). In Maiden v. Radwood,[1] unpublished order of the Court of Appeals, entered June 26, 1997 (Docket No. 200635), we hold that plaintiff has failed to present evidence of gross negligence sufficient to overcome the immunity conferred by statute. Therefore, we reverse the decision of the

Court of Appeals and reinstate the trial court's order. In Reno v. Chung, although plaintiff presented a material question of fact regarding defendant Chung's gross negligence, we hold that plaintiff's claim fails as a matter of law because defendant owed no duty to plaintiff. We therefore affirm the decision of the Court of Appeals, 220 Mich.App. 102, 559 N.W.2d 308 (1996).

I. Underlying Facts and Procedural History

A. Maiden v. Rozwood

Plaintiff's decedent, Leith Maiden, was a resident at the Southgate Regional Center, a state mental health facility. He had been diagnosed as a paranoid schizophrenic with adjustment disorder and disturbances of conduct and mood. On June 9, 1994, Maiden, who was 5'6" tall and weighed 240 pounds, became physically and verbally abusive toward another resident, striking the other resident twice. Paul Troy, a resident care aide, then escorted Maiden back to his assigned residence in another building.

En route to the residence, Maiden announced that he was not returning to the residence and began "wandering off." Troy enlisted the help of defendants Betty Jo Szabo, a licensed practical nurse, and Henry Rozwood, another resident care aide, to escort Maiden to his room. When Maiden entered the building, he ran to the dining room where he immediately caused another disturbance. He yelled, swore, and knocked over furniture in the proximity of other residents. Other staff and residents present in the dining room scurried away from the flying tables and chairs. Defendants Troy, Szabo, and Rozwood attempted to calm Maiden verbally without success.

Maiden struck defendant Troy in the head, knocking him to the floor. Troy lost his glasses and was momentarily dazed. Maiden also attempted to strike Rozwood, and during the struggle they both fell to the floor. Rozwood then sat on Maiden's buttocks in an effort to restrain him, but he was bucked off to Maiden's left side. Rozwood then leaned on Maiden's left shoulder and held his left arm as he lay face down on the floor. After Maiden thrashed about and attempted to bite defendant Szabo, Rozwood held the back of Maiden's head to prevent him from biting anyone. Troy held Maiden's left arm. Defendant Karl Myles, a fire and safety officer who also had been called to assist, straddled Maiden's legs and told him to calm down.

Maiden was asked if he was all right, to which he replied " yeah." Maiden was then asked if he had settled down, to which he replied "uh-huh." Myles told Maiden to place his hands behind his back and calm down. Maiden placed his arms against his body after the staff released him. Maiden suddenly went limp and stopped breathing. Szabo and Rozwood immediately initiated resuscitation efforts. An ambulance was called, and resuscitation efforts continued until Maiden reached the hospital, where he was pronounced dead.

Defendants Rozwood and Szabo estimated that the entire incident lasted two to three minutes, while another staff member estimated that Maiden was held down five to ten minutes. The medical examiner opined that Maiden's death was caused by "positional and/or compression asphyxia" and the "manner of death was an accident."

Plaintiff filed a wrongful death suit, naming as defendants the regional mental health facility, the Michigan Department of Community Health, and the four employees who participated in the attempt to restrain Maiden. The circuit court dismissed the complaint against the mental heath facility and the Department of Community Health on the basis of government immunity. MCL 691.1407(1); MSA 3.996(107)(1). No issues involving these defendants were raised on appeal.

The complaint alleged that the individual defendants' conduct was grossly negligent within the meaning of the statute and thus not immune from liability. MCL 691.1407(2)(c); MSA 3.996(107)(2)(c).

Defendants moved for summary disposition under MCR 2.116(C)(10). The trial court granted the motion, concluding that nothing in the record showed that defendants' actions "rose to the level of gross negligence as defined by the law ." The Court of Appeals thereafter granted plaintiff's motion for peremptory reversal, vacated the order granting summary disposition, and remanded for further proceedings, holding that genuine issues of material fact existed. We granted leave to appeal. 458 Mich. 874, 586 N.W.2d 85 (1998).

B. Reno v. Chung

On May 10, 1991, plaintiff arrived home and discovered that his wife, Carlynne, and daughter, Robin, had been brutally stabbed. Plaintiff's wife was already dead, but Robin was still alive. Her throat had been cut. She identified an acquaintance named Tommy Collins as their assailant just before she died. Plaintiff subsequently related his daughter's dying words to the police.

Both Collins and plaintiff were suspects in the double murder. The police investigation quickly focused on plaintiff after defendant, a Wayne County assistant medical examiner, performed autopsies on the decedents and opined that the stab wounds to Robin's neck made her unable to speak. On the basis of this information, plaintiff was arrested and charged with murder. He was bound over after a preliminary examination at which defendant testified that plaintiff's daughter could not possibly have implicated Tommy Collins, given the nature of the injuries to her throat.

In preparation for plaintiff's murder trial, the prosecutor consulted a pathologist, Dr. Laurence Simson, M.D., the Ingham County Medical Examiner, and an otolaryngologist, Dr. Robert Mathog, Chairman of Otolaryngology at Wayne State University, to corroborate defendant's opinion. Defendant thereafter refused to turn over records and specimens to the

prosecutor for the experts' review, requiring that the prosecution obtain a court order to compel her compliance.

Rather than corroborate defendant's conclusions, both experts stated that defendant's findings and conclusions were completely wrong. Both experts found that defendant's conclusions regarding the victim's ability to speak had no anatomical or physiological basis. Both experts unequivocally opined that the victim's neck injuries would not have prevented her from speaking.

Because defendant's conclusions had been discredited, the prosecutor dismissed the charges against plaintiff.[2] Ten months later, plaintiff sued defendant and other parties, alleging that defendant had been grossly negligent. Defendant moved for summary disposition under MCR 2.116(C)(7), (8) and (10), claiming that she owed no duty to plaintiff, that her conduct was not grossly negligent and that she was entitled to witness immunity. The trial court granted the motion under both MCR 2.116(C)(8) and (10), finding for defendant on all issues.

Plaintiff appealed. In a divided opinion, the Court of Appeals affirmed the order granting summary disposition. The majority found that defendant owed no duty to plaintiff under the public duty doctrine and that no special relationship existed between plaintiff and defendant. The dissenting judge found that defendant owed a duty to plaintiff and that plaintiff had presented a material question of fact regarding defendant's gross negligence. We granted leave to appeal, limited to (1) whether the Court of Appeals erred in holding that the defendant had no special relationship and owed no duty to the plaintiff, and (2) whether the trial court clearly erred in holding that the plaintiff had failed to present a material fact question regarding defendant's gross negligence under M.C.L. § 691.1407(2)(c); MSA 3.996(107) (2)(c). 457 Mich. 864, 577 N.W.2d 695 (1998).

II. Governing Legal Standards

This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. In making this determination, the Court reviews the entire record to determine whether defendant was entitled to summary disposition. Groncki v. Detroit Edison, 453 Mich. 644, 649, 557 N.W.2d 289 (1996) (opinion of Brickley, C.J.).

In Maiden, the trial court granted summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact). In Reno, the trial court granted summary disposition on the basis of both MCR 2.116(C)(8) (failure to state a claim upon which relief can be granted) and MCR 2.116(C)(10). MCR 2.116(C)(7) permits summary disposition where the claim is barred by immunity.[3] The appropriate grounds for granting summary disposition in Reno are MCR 2.116(C)(7), (8).

A. Legal Standard Under MCR 2.116(C)(7)

A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered. MCR 2.116(G)(5). Moreover, the substance or content of the supporting proofs must be admissible in evidence. See part III. Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. Patterson v. Kleiman, 447 Mich. 429, 434, n. 6, 526 N.W.2d 879 (1994).

B. Legal Standard Under MCR 2.116(C)(8)

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. Wade v. Dep't of Corrections, 439 Mich. 158, 162, 483 N.W.2d 26 (1992). A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." Id. at 163, 483 N.W.2d 26. When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5).

C. Legal Standard under MCR 2.116(C)(10)

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). Quinto v. Cross & Peters Co., 451 Mich. 358, 547 N.W.2d 314 (1996).

The plaintiff relies on Rizzo v. Kretschmer, 389 Mich. 363, 207 N.W.2d 316 (1973), for the proposition that a motion for summary disposition under MCR 2.116(C)(10) is properly granted where it is impossible for the claim to be supported by evidence at trial. In fact, the 1985 amendment of the court rules superseded the standard described in Rizzo. McCart v. J Walter Thompson USA, Inc., 437 Mich. 109, 115, n. 4, 469 N.W.2d 284 (1991).

MCR 2.116(G)(4) requires:

A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as

otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10). The court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial.

Today we clarify the correct legal standard under MCR 2.116(C)(10) because our Court has inconsistently applied the standard since the 1985 amendment of the court rules. Compare Johnson v. Detroit, 457 Mich. 695, 579 N.W.2d 895 (1998); Oakland Co. Bd. of Co. Rd. Comm'rs v. Mich. Property & Casualty Guaranty Ass'n, 456 Mich. 590, 575 N.W.2d 751 (1998); Landelius v. Sackellares, 453 Mich. 470, 556 N.W.2d 472 (1996); Quinto v. Cross & Peters Co, supra, with Lytle v. Malady (On Rehearing), 458 Mich. 153, 579 N.W.2d 906 (1998); Weymers v. Khera, 454 Mich. 639, 563 N.W.2d 647 (1997); Radtke v. Everett, 442 Mich. 368, 501 N.W.2d 155 (1993); Farm Bureau Mut. Ins. Co. of Michigan v. Stark, 437 Mich. 175, 468 N.W.2d 498 (1991). The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules.

III. Gross Negligence

Generally, government officers and employees acting within the scope of their authority are immune from tort liability, provided that their actions are not grossly negligent. The plain language of the governmental immunity statute indicates that the Legislature limited employee liability to situations where the contested conduct was substantially more than negligent. Gross negligence is defined by statute as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c); MSA 3.996(107)(2)(c). With this statutory definition in mind, we consider the proof sufficient to survive summary disposition of a gross negligence claim against a government employee.

In Jackson v. Saginaw Co., 458 Mich. 141, 580 N.W.2d 870 (1998), the plaintiff sued the Saginaw County jail physician, claiming that the doctor was grossly negligent in failing to diagnose the plaintiff's throat cancer. This Court upheld the order granting summary disposition for the defendant county. Agreeing with the trial court that reasonable minds could not differ in concluding that the defendant's conduct was not grossly negligent, this Court stated:

As we have noted, it appears that the deposition testimony offered to the trial court fails to raise a question whether the defendant even violated the standard of care applicable to him and therefore would be guilty of negligence. There is, however, clearly no testimony at all

offered to support a notion that his conduct would be so reckless as to demonstrate a substantial lack of concern for whether an injury results. [Id. at 150-151, 580 N.W.2d 870.]

The logical import of Jackson, consistent with the statutory definition of gross negligence, is that evidence of ordinary negligence does not create a material question of fact concerning gross negligence.[4] RATHER, A PLAINTIFf must adduce proof of conduct "so reckless as to demonstrate a substantial lack of concern for whether an injury results." To hold otherwise would create a jury question premised on something less than the statutory standard.

In addition to requiring that a plaintiff show reckless conduct, the content or substance of the evidence proffered must be admissible in evidence. In Lytle v. Malady, supra, this Court clarified the evidentiary standard required to survive summary disposition in age and gender discrimination claims. The Lytle Court stated:

[W]e find that, in the context of summary disposition, a plaintiff must prove discrimination with admissible evidence, either direct or circumstantial, sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff. [Id. at 176, 579 N.W.2d 906 (emphasis added).]

No principle requires a higher evidentiary standard to support a material question of fact for age and gender discrimination claims and a lower standard in support of gross negligence claims. Therefore, only evidence whose content or substance is admissible can establish the existence of gross negligence as statutorily defined.[5] See also Pauley v. Hall, 124 Mich.App. 255, 335 N.W.2d 197 (1983); SSC Associates Ltd. Partnership v. General Retirement System of Detroit, 192 Mich.App. 360, 480 N.W.2d 275 (1991). This requirement is consistent with the predecessor rule, GCR 1963, 117.3, and the plurality opinion in Durant v. Stahlin, 375 Mich. 628, 638-639, 657, 135 N.W.2d 392 (1965), as well as the federal evidentiary standard for summary judgment under FR Civ P 56(e).[6]

A. Maiden v. Rozwood

In opposing defendant's motion for summary disposition, plaintiff presented excerpts of the deposition of witnesses, portions of a Michigan State Police Supplemental Report dated June 23, 1994, portions of an incident report prepared by the employees, and the medical examiner's report.

The excerpts of the supplemental police report are inadmissible hearsay when offered against codefendants Troy and Rozwood.[7] The police report itself is plausibly admissible under the business record exception, MRE 803(6). The statement in the police report attributed to defendant Myles, describing the actions of defendants Troy and Rozwood, is hearsay. When the document to be admitted contains a second level of hearsay, it also must qualify under an exception to the hearsay rule. Merrow v. Bofferding, 458 Mich. 617, 581

N.W.2d 696 (1998). Because Myles' statement to the police describing the actions of the codefendants does not fall within any of the enumerated hearsay exceptions, the police report is inadmissible and may not be considered in opposing the motion for summary disposition.[8]

The information contained in the remaining documents, viewed in a light most favorable to the plaintiff, reveals that a staff member may have lain across the decedent's upper body using an unapproved restraint technique, a staff member momentarily held the back of decedent's head to prevent biting, and that the incident may have lasted as long as five to ten minutes.[9] THE UNCONTROVERTED evidence establishes that the decedent was out of control during his outburst and posed a serious danger to himself and others. The staff attempted verbal redirection without success. Maiden struck another patient twice, threw furniture in a confined area with other residents present, hit staff members, and attempted to bite them. The imminent danger posed by decedent's volatile behavior required that the staff exercise split-second judgment in deciding how and when to use physical intervention. While they might have used other means to restrain Maiden, reasonable minds could not agree that the failure to employ those alternatives was so reckless "as to demonstrate a substantial lack of concern for whether an injury results."

Plaintiff essentially argues that because Maiden died of compressional asphyxia after being restrained, gross negligence is presumed. Plaintiff thus employs the doctrine of res ipsa loquitur to establish the existence of gross negligence.[10] "The major purpose of the doctrine of res ipsa loquitur is to create at least an inference of negligence when the plaintiff is unable to prove the actual occurrence of a negligent act." Jones v. Porretta, 428 Mich. 132, 150, 405 N.W.2d 863 (1987). While the doctrine of res ipsa loquitur may assist in establishing ordinary negligence, the doctrine is not available where the requisite standard of conduct is gross negligence or wilful and wanton misconduct. See Prosser & Keeton, Torts (5th ed.), § 39, p. 255; 23 ALR3d 1083, § 2, pp. 1085-1086; 2 Restatement Torts, 2d, § 328D, comment on clause (c) of subsection (1), pp. 163-164; Burghardt v. Olson, 223 Or. 155, 354 P.2d 871 (1960); Laster v. Tatum, 206 Va. 804, 146 S.E.2d 231 (1966).

Plaintiff's proofs in opposition to defendants' motion for summary disposition fail to raise a material question that defendant employees' conduct was so reckless as to demonstrate a substantial lack of concern for whether an injury results. Plaintiff failed to meet her burden to come forward with specific facts to support her claim that defendants' conduct was grossly negligent. On the basis of the record before us, reasonable minds could not differ. Accordingly, the trial court properly granted summary disposition for defendants.

B. Reno v. Chung

Plaintiff submitted affidavits from otolaryngologist Robert Mathog, M.D., and pathologist Laurence Simson, M.D., the Ingham County Medical Examiner, the experts whom the prosecutor had consulted to prepare for plaintiff's criminal trial, in opposition to defendant's

motion for summary disposition.

Dr. Simson's affidavit stated in part:

Dr. Chung's testimony that Robin Reno could not have spoken to Kenneth Reno before she died is incorrect. The basis for her testimony . is erroneous and is not consistent with the laryngeal injuries recorded by Dr. Chung. There is no anatomic or physiologic basis for her assertion that Robin Reno would have been unable to speak. Dr. Chung's assertion . reflect[s] a misunderstanding on the nature of Robin Reno's laryngeal injuries and/or the mechanisms of laryngeal function in the generation of speech. Since Robin Reno's ability or inability to speak was such an important issue in the case ., it would have been prudent for the medical examiner to have sought consultation if she did not have confidence in her own ability to interpret such laryngeal injuries.

Dr. Mathog's affidavit provided:

Dr. Chung's understanding of the anatomy and physiology of the larynx is flawed and full of misconceptions.

Dr. Chung's testimony that Robin Reno could not have spoken to Kenneth Reno before she died is absolutely wrong.

Her alleged basis for that statement as contained in her testimony . is erroneous and has no medical basis.

There is no physiological basis for her assertions. She is anatomically incorrect. She has failed to make a proper examination or gain essential knowledge of the physiology of that area of the body to make findings or testify in regard to same.

Dr. Chung's failure to properly perform the autopsy with the requisite knowledge of the anatomy, physiology and function of the effected area and then testifying to the impossibility of speech based on erroneous assertions regarding the nature of the wounds and their effect on the deceased constituted a breach of her duty to perform her duties as a medical examiner as a reasonably prudent medical examiner would have, and was gross negligence defined as conduct so reckless as to demonstrate a substantial lack of concern for whether an injury was likely to result, resulting in the imprisonment of Mr. Reno based on her testimony.

Defendant Chung failed to possess the requisite knowledge and skill to testify as to the effect of the wounds in the throat area. A reasonably prudent medical examiner would not have testified as she did nor made the baseless findings that she did.

The affidavits of both these expert witnesses reveal more than a mere difference of medical opinion. Rather, both emphatically indicate that defendant had no medical basis

for her findings and conclusions. Both expert witnesses essentially opine that defendant's medical findings and testimony were incompetent.[11]

We also note defendant's refusal to cooperate with the prosecutor after he consulted the other expert witnesses. Defendant made her records and specimens available to the prosecutor for the experts' review only after a court order compelled her to do so. A reasonable inference can be drawn that defendant refused to comply because she knew her opinion was fallacious and that her incompetency would be revealed.

Defendant's erroneous conclusion regarding the victim's ability to speak before she died was the key factor leading to plaintiff's arrest. The assistant prosecutor testified in his deposition that defendant's medical opinion was "the most important part of my decision-making process." On these facts, plaintiff's proofs in opposition to the motion for summary disposition thus raised a material question of fact regarding the statutory standard for gross negligence.

IV. Duty (Reno v. Chung)

The Court of Appeals in this case extended the public duty doctrine of White v. Beasley, 453 Mich. 308, 552 N.W.2d 1 (1996), to hold that defendant medical examiner owed no duty to and had no special relationship with plaintiff. Because the Legislature has implicitly delineated the nature and scope of defendant's duties relative to criminal defendants, we need not determine whether an individual duty exists under the common law or whether the public duty doctrine of White v. Beasley should be extended to the facts of this case.[12]

The question presented is whether defendant medical examiner owed a duty to plaintiff, a person under investigation for murder, as a consequence of performing an autopsy to ascertain the victim's cause of death and testifying as a state's witness against plaintiff.[13] Whether a duty exists to protect a person from a reasonably foreseeable harm is a question of law for the court. Murdock v. Higgins, 454 Mich. 46, 53, 559 N.W.2d 639 (1997); Trager v. Thor, 445 Mich. 95, 105, 516 N.W.2d 69 (1994). "A negligence action may only be maintained if a legal duty exists which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." Riddle v. McLouth Steel Products Corp., 440 Mich. 85, 96, 485 N.W.2d 676 (1992).

In determining whether the relationship between the parties is sufficient to establish a duty, the proper inquiry is " 'whether the defendant is under any obligation for the benefit of the particular plaintiff.' " Buczkowski v. McKay, 441 Mich. 96, 100, 490 N.W.2d 330 (1992), quoting Friedman v. Dozorc, 412 Mich. 1, 22, 312 N.W.2d 585 (1981). This analysis concerns whether the relationship of the parties is of a sort that a legal obligation should be imposed on one for the benefit of another. Id.

We need not apply the usual Buczkowski common-law analysis, since statutory law provides

that defendant owed no legal duty to plaintiff.

A. A Medical Examiner's Statutory Obligations

The statutory powers and duties of a county medical examiner are found at M.C.L. § 52.201 et seq.; MSA 5.953(1) et seq. Under our statutory scheme, a county medical examiner must investigate the cause of death in all cases of persons who meet a violent death. MCL 52.202; MSA 5.953(2). Further, a medical examiner "may be required to testify in behalf of the state in any matter arising as the result of any investigation required under this act, and shall testify in behalf of the state ." MCL 52.212; MSA 5.953(12) (emphasis added). Accordingly, our Legislature has defined a medical examiner's duties. Nothing in the statutory scheme has created duties to a criminal defendant; instead, the duty is owed to the state.[14] Defendant thus communicated her medical findings to the prosecutor in fulfilling her statutory duty to investigate cases of violent death and to testify as a state's witness regarding the results of her investigation. While an injury to a wrongly accused criminal defendant from erroneous findings is foreseeable, the express language of the statute requiring medical examiners to testify on behalf of the state militates against imposing any duty on defendant Chung to plaintiff as a consequence of her incompetent medical findings and testimony.[15]

B. Witness Immunity

Defendant Chung consulted with the prosecutor and later testified against plaintiff as the state's factual and expert witness at plaintiff's preliminary examination. As such, her role was plainly adversarial to plaintiff's interests. In Friedman v. Dozorc, supra, this Court declined to impose a duty on an attorney to his client's adversary, stating that to do so would be "inconsistent with basic precepts of the adversary system." Id. at 23, 312 N.W.2d 585. Moreover, the duty imposed on a witness is generally owed to the court, not the adverse party. Accordingly, a breach of the duty owed to the court does not give rise to a cause of action in tort by the adverse party.[16]

Further, witnesses who testify during the course of judicial proceedings enjoy quasi-judicial immunity. This immunity is available to those serving in a quasi-judicial adjudicative capacity as well as "those persons other than judges without whom the judicial process could not function." 14 West Group's Michigan Practice, Torts, § 9:393, p. 9-131. Witnesses who are an integral part of the judicial process "are wholly immune from liability for the consequences of their testimony or related evaluations." Id., § 9:394, pp. 9-131 to 9-132, citing Martin v. Children's Aid Society, 215 Mich.App. 88, 96, 544 N.W.2d 651 (1996). Statementsmade during the course of judicial proceedings are absolutely privileged, provided they are relevant, material, or pertinent to the issue being tried. See Martin v Children's Aid Society, supra; Rouch v. Enquirer & News, 427 Mich. 157, 164, 398 N.W.2d 245 (1986); Meyer v. Hubbell, 117 Mich.App. 699, 709, 324 N.W.2d 139

(1982); Sanders v. Leeson Air Conditioning Corp., 362 Mich. 692, 695, 108 N.W.2d 761 (1961). Falsity or malice on the part of the witness does not abrogate the privilege. Sanders, supra. The privilege should be liberally construed so that participants in judicial proceedings are free to express themselves without fear of retaliation. Id. As this Court noted in Daoud v. De Leau, 455 Mich. 181, 202-203, 565 N.W.2d 639 (1997):

Witness immunity is also grounded in the need of the judicial system for testimony from witnesses who, taking their oaths, are free of concern that they themselves will be targeted by the loser for further litigation. Absent perjury of a character requiring action by the prosecuting attorney, the testimony of a witness is to be weighed by the factfinder in the matter at bar, not by a subsequent jury summoned to determine whether the first lawsuit was tainted.

We reject as factually inaccurate plaintiff's claim that witness immunity is unavailable here because the "impact" of defendant's opinion "was not initiated and did not occur in any judicial proceeding." The autopsy, investigating the circumstances surrounding Robin Reno's death, was performed under statutory mandate and was a necessary predicate to defendant's statutorily compelled testimony. Moreover, defendant's testimony at the preliminary examination regarding the autopsy results led to plaintiff's continued detention. Indeed, scrutiny of the deposition testimony of plaintiff's experts reflects that their opinions hinged on her medical findings and her testimony in court. (See excerpts of Mathog and Simson depositions quoted at pp. 21-22, supra.) Plaintiff cannot avoid the protection of witness immunity by artful pleading; the gravamen of plaintiff's action is determined by considering the entire claim.

Because defendant owed no legal duty to plaintiff, the gross negligence claim alleged is unenforceable as a matter of law. Summary disposition was properly granted under MCR 2.116(C)(8).

V. Conclusion

In Maiden v. Rozwood, we reverse the order of the Court of Appeals and affirm the trial court's order granting summary disposition. In Reno v. Chung, we affirm the decision of the Court of Appeals.

I respectfully dissent from the majority opinion in both Maiden v. Rozwood (Docket No. 110035) and Reno v. Chung (Docket No. 107936). In Maiden, I would hold that plaintiff has presented sufficient evidence of defendants' gross negligence to survive a motion for summary disposition. In Reno, I would hold that defendant owed a duty to plaintiff that supported a cause of action for gross negligence under the governmental immunity statute. MCL 691.1407(2)(c); MSA 3.996(107)(2)(c).

I. Maiden v. Rozwood

A

In finding a lack of gross negligence on the part of defendants in this case, the majority erroneously concludes that the statement by defendant Myles was inadmissible hearsay and, therefore, may not be considered by this Court. In addition, the majority needlessly engages in a discussion concerning evidence admissibility under MCR 2.116(G)(4) and whether our court rule henceforth is to be read as mirroring Federal Rule of Civil Procedure 56(e). This Court has not had the benefit of briefing and oral argument regarding whether federal law interpreting Rule 56(e) should be applied to our Rule 2.116(G)(4). Also, the discussion is unnecessary to answer the question actually presented. Hence, it is irrelevant. See Mudge v. Macomb Co., 458 Mich. 87, 105, 580 N.W.2d 845 (1998); Mitcham v. Detroit, 355 Mich. 182, 203, 94 N.W.2d 388 (1959).

B

Reviewing the evidence in the light most favorable to plaintiff in this case, the facts support her assertion that a jury reasonably could find that defendants' actions constituted gross negligence.

The governmental immunity statute defines gross negligence as “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.” MCL 691.1407(2)(c); MSA 3.996(107)(2)(c). Here, the evidence supports plaintiff's assertion that defendants held down Mr. Maiden, compressing his airway in such manner that he was unable to breathe for five to ten minutes. While the majority characterizes this as a classic case of “the tail wagging the dog,” Mr. Maiden certainly did not, to paraphrase plaintiff's counsel, simply suffocate from choking on a cherry pit. Sometimes, the result of an action provides a characterization of the action itself.

Contrary to the majority's assertion, plaintiff has provided a significant amount of factual support in the record to establish gross negligence on the part of the defendants. In particular, defendants' supervisor testified at his deposition:

[T]here are no techniques that I demonstrate whereby an individual is placing their weight on a client's head, neck, chest, back, buttocks, legs. It's not-we do not instruct that.

* * *

[W]hat I train are the techniques which are approved for use, they know that those are the techniques that are approved for use, and use of any other technique may not be considered an approved technique.

He also testified that defendants were not taught any technique that would allow them to put pressure on the head or neck. None of the methods of restraint defendants were taught

would result in a person not being able to breathe for an extended period.

There is clear evidence in the record that defendants disregarded their training and used "unapproved" restraining techniques. For example, in defendant Rozwood's written statement to the Michigan State Police, he indicated that he "sprawled myself across his upper body trying to grab his [right] arm," and "pushed myself more on to Leith's [left] side of back hoping my weight would assist in [at] least restricting his [left] side from twisting." He also admitted putting "both my hands on the back of his head" and holding him down for a few seconds. He gave similar testimony at his deposition:

I put my arm, I believe on his head, to stabilize his head so he couldn't move his head anymore to lunge, and then I would sit there and continue to talk to him, and that's what went on.

* * *

Q. You just indicated to your neck, when you were showing what area you grabbed, were you holding his neck or head?

A. The back of his head, right over here.

Q. Right at the base of his neck?

A. At the base, bottom part of his head.

Q. And were you holding it hard enough so he could not move his head?

A. For that initial moment, yeah."

Defendant Troy gave similar testimony in his deposition concerning defendant Rozwood's actions:

Q. Was [Rozwood] holding on to his arms or his legs or any other part of his body?

A. More than likely-I think he was lying across his-across the side of his back trying to hold his back down onto the floor.

As regards his own actions, defendant Troy testified that he may have lain across the decedent's back at some time:

Q. Did you see anybody laying across Leith's back or neck at any time?

* * *

A. I might have been laying across his back. I'm not even sure.

In addition, defendant Myles' statement to the police implicated himself in forcefully subduing Leith Maiden along with Paul Troy and Henry Rozwood. The majority incorrectly states that Myles' statement was not admissible under MRE 801(d)(2)(A). This rule requires that, to be admissible, the proffered statement must be offered against a party and be the party's own statement, either in an individual or in a representative capacity. The majority concludes that Myles' statement to the police is not probative of Myles' own negligence and is thus inadmissable to establish defendants' negligence. This is incorrect.

Myles is a named defendant in this joint tortfeasor action by virtue of his direct involvement in the effort to restrain defendant. The evidence in question is directly probative of Myles' negligence and is his own statement to police. The trial court may be required to give a limiting instruction to the jury regarding its use concerning the negligence of the other individual defendants. However, for purposes of summary disposition, this evidence is clearly admissible under MRE 801(d)(2)(A).

Hence, as the evidence presented illustrates, defendants violated their training procedures for subduing a patient, knowing the possible consequences of restraining a patient improperly. Those facts constitute significant evidence that they were acting with "a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c); MSA 3.996(107)(2)(c).

As plaintiff noted, Harrison, Principles of Internal Medicine (12th ed.), also supports her assertion that the defendants suffocated Mr. Maiden in a manner that evidenced a substantial lack of concern for whether they injured him. In discussing the subject of Anoxic-Ischemic Encephalopathy,[1] the following language pertains to the instant case:

This common and often disastrous condition is caused by a lack of oxygen to the brain, resulting from . respiratory failure. The conditions that most often lead to anoxic-ischemic encephalopathy are . (5) suffocation [from drowning, strangulation . compression of the trachea .].

With severe hypoxia or anoxia [loss of oxygen] . consciousness is lost within seconds, but recovery will be complete if breathing, oxygenation of blood and cardiac action are restored within 3 to 5 min. If anoxia persists beyond this time, there is serious and permanent injury to the brain. [Id., p. 2050].[2]

This evidence, combined with the above testimony, indicates a degree of recklessness sufficient to allow a jury to conclude that defendants were grossly negligent, and that their actions evidence a "substantial lack of concern for whether an injury [could] result[ ]." MCL 691.1407(2)(c); MSA 3.996(107)(2)(c).

The majority emphasizes that the events leading up to the death were relatively chaotic.

While this is certainly true, defendants were professionals who were trained to deal with chaotic situations. A jury might ultimately decide that the defendants were, in fact, justified in their actions. However, the question is not for this Court to decide. Rather it is asked only to determine whether there is sufficient evidence in the record to create a question of fact. I believe that plaintiff has produced enough evidence that reasonable minds could differ as to whether these defendants were grossly negligent.

Thus, I would affirm the judgment of the Court of Appeals and hold that plaintiff has presented sufficient evidence of defendants' gross negligence to survive a motion for summary disposition.

B. Reno v. Chung

I agree with the majority that defendant's actions in this case clearly constituted gross negligence. However, I would hold that defendant owed a duty to plaintiff that supports a cause of action for gross negligence under the governmental immunity statute.

The majority maintains that defendant Reno owes no duty to this plaintiff. It bases that conclusion on the fact that she is statutorily required to perform autopsies and to testify in court for the prosecutor and had no "special relationship" with plaintiff. Op. at 828. It concludes that "our Legislature has defined a medical examiner's duties. Nothing in the statutory scheme has created duties to a criminal defendant; instead, the duty is owed to the state." Op. at 829. The majority takes great pains to point out that this opinion is not to be read as extending the public duty doctrine.

However, the majority's pronouncements are strongly reminiscent of those in the lead opinion in White v. Beasley,[3] which stated that "[g]overnment employees should enjoy personal protection from tort liability based on their actions in conformity with, or failure to conform to, statutes or ordinances not intended to create tort liability." Id. at 319, 552 N.W.2d 1.

Indeed, owing a duty to the state or the prosecutor is synonymous with owing a duty to the public-at-large, as the state and prosecutor are representatives of the public. I fail to see the difference between the majority's "traditional" duty analysis and an untoward expansion of the public duty doctrine. The opinion essentially grants an absolute immunity to any government employee who has statutorily enumerated duties. Indeed, such a restrictive reading of duty goes beyond the public duty doctrine, which at least provides an exception for cases where a "special relationship" exists.

The opinion acknowledges that the statutory provisions outlining the duties of medical examiners do not delineate the examiner's duties in all cases. "There may well be instances of misconduct on the part of a medical examiner that are not implicated by the statute." Op. at 828, n. 12.

However, the opinion makes no attempt to clarify this statement and explain why the unusual actions by defendant Chung in this case would not constitute such circumstances. Not only did defendant Chung negligently perform the autopsy, she took active steps to cover up her failures when the prosecutor and defense counsel tried to verify her findings. The majority provides no indication that the Legislature intended to protect medical examiners under such circumstances.

The majority opinion misconstrues the nature of plaintiff's claim. He does not allege that the defendant failed to perform her statutory duties; rather, he argues that she performed the autopsy in a grossly negligent manner, and that she tried to hide the evidence of it, afterward. The difference is critical. Defendant owes a duty to the state to autopsy certain decedents. Plaintiff cannot hold her liable for failing to autopsy a certain body. However, once she pulls out the scalpel and makes the first incision, a duty to another may attach depending on how she performs her work.

The facts support the imposition of such a duty here. Determining whether a duty exists in a particular case is a question of law to be decided by the court. Moning v. Alfono, 400 Mich. 425, 436-437, 254 N.W.2d 759 (1977). In the past, we have considered various factors to decide whether the relationship between the actor and the injured party gives rise to a legal obligation on the actor's part. "In determining whether a duty exists, courts examine a wide variety of factors, including the relationship of the parties and the foreseeability and nature of the risk." Schultz v. Consumers Power Co., 443 Mich. 445, 450, 506 N.W.2d 175 (1993) (citation omitted). In addition, we have examined the burden on the defendant and the nature of the risk presented. Murdock v. Higgins, 454 Mich. 46, 53, 559 N.W.2d 639 (1997).

In this case, the factors weigh in favor of finding an enforceable duty. The injury to plaintiff was actually and directly foreseeable to defendant. Before seeking defendant's professional opinion, the prosecutor specifically identified plaintiff and his account of Robin Reno's dying declaration. Under the circumstances, defendant was well aware that her opinion would play a major part in the decision to charge and incarcerate plaintiff. The performance of defendant's duties clearly affected plaintiff in a manner different from the general public.

In addition, the burden on defendant to perform her duties without gross negligence was minimal. Certainly it is to be expected that a medical person employed to accurately determine the medical cause of an unexpected death should be able to accomplish that task.

Moreover, the risk presented by defendant's negligence was serious. This court does not lightly regard the responsibility of ensuring that innocent persons are not wrongfully incarcerated, even for a short time.

Other states' case law supports a finding of duty here. For example, in Lauer v. New York

City,[4] the court held that the plaintiff had stated valid claims for negligent and intentional infliction of emotional distress. There, a medical examiner failed to properly perform an autopsy and concealed information that caused the plaintiff to be wrongfully suspected in the death of his child. The court stated:

Defendants' claim that no duty was owed directly to plaintiff is without merit. Even if, as defendants assert, the duty to perform the original autopsy in a responsible manner was owed solely to the public at large as a governmental function, when Lilavois later discovered his error, a duty was owed directly to plaintiff to transmit truthfully the information concerning his son's death, especially in light of his alleged knowledge that plaintiff was suspected of the homicide. [Id.][5]

In this case, defendant not only negligently failed to correctly perform the autopsies, she refused to cooperate with the prosecutor when he attempted to substantiate her findings. She forced the prosecutor to obtain a court order to examine forensic evidence, causing greater delay in the innocent plaintiff's release from incarceration. The circumstances in this case justify a finding that defendant owed a duty to plaintiff.

I also disagree with the majority's assertion that a finding of liability here will infringe the adversarial process. The majority characterizes the relationship between plaintiff and defendant as adversarial, defendant having sided with the prosecution during her court testimony at plaintiff's preliminary examination. What the majority disregards is that, while defendant ultimately became plaintiff's adversary in court, it was as a direct result of her gross negligence in performing the autopsy.

Moreover, defendant's actions in attempting to cover up her incompetence take this case out of the norm. But for defendant's original incompetence, and her subsequent attempts to hinder a discovery of the facts in the case, plaintiff and defendant would likely never have become adversaries. Holding defendant liable for her gross negligence in this instance would not prevent competent medical examiners from testifying fully. Rather, it would encourage them to take greater care in performing autopsies in the future.

Thus, I would reverse the judgment of the Court of Appeals and remand to the trial court for further proceedings consistent with this opinion.

FOOTNOTES

1. Throughout the lower court proceedings, Henry James Rozwood is erroneously referred to as Radwood.

2. Tommy Collins thereafter confessed to the crime. He and a coconspirator were later convicted and sentenced for the double murders.

3. MCR 2.116(C)(7) permits summary disposition where "[t]he claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action."

4. See also Harris v. Univ. of Michigan Bd. of Regents, 219 Mich.App. 679, 694, 558 N.W.2d 225 (1996); Vermilya v. Dunham, 195 Mich.App. 79, 83, 489 N.W.2d 496 (1992).

5. Demanding that evidence be substantively admissible is consistent with MCR 2.116(G)(4), which requires that an adverse party "set forth specific facts showing that there is a genuine issue for trial." By presenting inadmissible hearsay evidence, a nonmoving party is actually promising to create an issue for trial where the promise is incapable of being fulfilled. The nonmovant is not showing that a genuine issue exists. Permitting inadmissible evidence to suffice in opposing summary disposition would require less than the pre-1985 court rule and create illusory fact issues.

6. Under FR Civ P 56, a plaintiff is required "to present evidence of evidentiary quality-either admissible documents or attested testimony, such as that found in depositions or in affidavits-demonstrating the existence of a genuine issue of material fact. The evidence need not be in admissible form; affidavits are ordinarily not admissible evidence at a trial. But it must be admissible in content. Occasional statements in cases that the party opposing summary judgment must present admissible evidence . should be understood in this light, as referring to the content or substance, rather than the form, of the submission." Winskunas v. Birnbaum, 23 F.3d 1264, 1267-1268 (C.A.7, 1994) (internal citations omitted).

7. The supplemental police report indicates that "Mr. Myles states that Paul Troy was lying across Leith's back and Henry Rozwood was lying across Leith's upper back and shoulder area."

8. The dissent essentially concedes that Myles' statement in the police report is inadmissible against defendants Rozwood and Troy. Op. at 832. This is properly so, for the evidence is rank hearsay, not appropriately considered in deciding whether plaintiff has met his burden in establishing gross negligence against Rozwood and Troy. A party admission under MRE 801(d)(2)(A) is "simply words or actions inconsistent with the party's position at trial, relevant to the substantive issues in the case, and offered against the party." 2 McCormick, Evidence (4th ed.), § 254, p. 142. The evidentiary rule requires that the statement: (1) be offered against a party and: (2) be the party's own statement, either in an individual or representative capacity.While Myles' statement that his coworkers laid across Maiden's back is plausibly admissible against Myles himself, the statement does not establish or advance a genuine issue of material fact regarding his own gross negligence. In any event, the statement was not offered to establish Myles' gross negligence, but the gross negligence of Myles' coworkers. While the statement may be used to impeach Myles under

MRE 613(b), it may not be offered for the truth of the matter asserted to create a genuine issue of material fact regarding the codefendants.

9. Plaintiff also submitted excerpts from a supplemental police report, indicating that a police officer observed discoloration on the decedent's neck. The officer observed decedent's neck at the funeral home five days after his death, well after the body had been embalmed. The medical examiner's report contains no indication of any significant abnormality about the neck. Further, no evidence suggests that the discoloration resulted from any employee's restraint efforts. Considering that physicians performed advanced life support for approximately thirty minutes and the body was embalmed in the time between the incident and the police officer's observations, an inference that the discoloration directly resulted from the restraint is speculative at best.Both the dissent and plaintiff's brief cite Harrison, Principles of Internal Medicine (12th ed.), and its discussion of Anoxic-Ischemic Encephalopathy to further the claim that a fact question exists regarding whether defendants' actions were grossly negligent.This evidence was not properly before the court. Plaintiff offered the textbook passages for the first time in support of its motion for rehearing. In ruling on a motion for summary disposition, a court considers the evidence then available to it. Accordingly, in ruling on the propriety of the trial court's grant of defendant's motion for summary disposition, we do not consider the textbook evidence. Quinto v. Cross & Peters Co, supra at 366, 547 N.W.2d 314. See also Grand Rapids v. Harper, 25 Mich.App. 447, 449, 181 N.W.2d 581 (1970) ("In reviewing the granting of summary judgment, we are governed only by what was then before the trial court-the complaint, answer, depositions and affidavits-and not by what the [nonmovant] raises" on appeal for the first time).The dissent contends that the textbook evidence was properly before the trial court because the motion for rehearing was submitted after the summary disposition motion was argued, but before the trial court issued its written order. This argument implicitly demands that the trial court treat plaintiff's motion for rehearing as a motion to amend the original pleadings. We decline to impose such a requirement, conspicuously absent in the court rules, where proper amendment to the pleadings was possible under MCR 2.118(A)(2).

10. The dissent raises a similar argument, stating that a jury could reasonably conclude that the cause of death supported the assertion that "defendants suffocated Mr. Maiden in a manner that evidenced a substantial lack of concern for whether they injured him." Op. at 833. The dissent's argument is essentially a classic case of the tail wagging the dog. To establish gross negligence as statutorily defined, the plaintiff must focus on the actions of the governmental employee, not on the result of those actions. That death resulted from the restraint does not support the conclusion that defendant's actions were so reckless "as to demonstrate a substantial lack of concern for whether an injury results."

11. Dr. Mathog averred that defendant's performance was grossly negligent as defined by statute. However, the witness did not create a question of fact by merely opining that defendant's performance violated the statutory standard. Whether the statutory standard of

care was violated is a legal conclusion. The opinion of an expert does not extend to legal conclusions. Downie v. Kent Products, 420 Mich. 197, 205, 362 N.W.2d 605 (1984). The facts in the expert witnesses' affidavits properly created a question of fact.

12. We do not mean to suggest that the statute, infra, delineates the scope of the medical examiner's duty in all cases. There may well be instances of misconduct on the part of a medical examiner that are not implicated by the statute. However, such a case is not before us today, and we need not speculate on facts not presented.

13. The dissent relies on Lauer v. New York City, 171 Misc.2d 832, 656 N.Y.S.2d 93 (1997), to support the conclusion that a duty should be imposed on defendant. Lauer was modified by the New York Supreme Court, Appellate Division, in Lauer v. City of New York, 1999 WL 448894. There, the court differentiated the duty of the medical examiner in performing the autopsy from the duty to correct the cause of death on medical records. The appellate court held that the medical examiner had immunity in the performance of the autopsy because "in issuing that diagnosis Dr. Lilavois was exercising his judgment as a Medical Examiner for the benefit of the general public only, and so was shielded by sovereign immunity."

14. We disagree that we are essentially granting "absolute immunity to any government employee who has statutorily enumerated duties." Op. p. 834. The statute applies only to medical examiners, and the scope of the statutory duty imposed on the medical examiner to the state is completely incompatible with a duty to a criminal defendant. As noted supra, n. 12, we do not suggest that the statute grants absolute immunity in every case. The specific facts of this case militate against imposing a duty on defendant medical examiner for the benefit of plaintiff.

15. The dissent fails "to see the difference" between finding no duty to plaintiff under the statute and finding no duty under the public duty doctrine. Op. p. 834. We reject the dissent's claim that we have merely adopted the public duty doctrine, a creature of the common law, in another guise. The dissent essentially ignores the explicit legislative directive compelling a medical examiner to investigate the cause of death and to testify as a witness on behalf of the state. The dissent substitutes its own policy choice for that of the Legislature in finding the duty is owed to a criminal defendant.

16. See Lewis v. Swenson, 126 Ariz. 561, 566, 617 P.2d 69 (Ariz.App., 1980); Kahn v. Burman, 673 F.Supp. 210, 214 (E.D.Mich., 1987); OMI Holdings, Inc. v. Howell, 260 Kan. 305, 918 P.2d 1274 (1996).

1. A condition caused by lack of oxygen to the brain.

2. The majority maintains that it would be improper to consider the evidence contained in Harrison in support of plaintiff's argument. I am not convinced that a rehearing motion

before the trial court should be treated as an appeal when considering the evidence to be weighed in reviewing a summary disposition ruling. Nevertheless, even accepting the correctness of the majority's position, the passages in Harrison are still properly before this Court. The trial court had the opportunity to examine the evidence before it issued the order granting defendants' summary disposition motion. The trial court indicated its preference in entering an order granting summary disposition in favor of defendants during the November 22, 1996, proceedings. However, no order was entered until December 20, 1996. Plaintiff's motion for rehearing, along with an accompanying brief containing the quoted passages from Harrison, was filed with the court on December 10, 1996. Thus, the trial court had an opportunity to review this evidence before issuing the summary disposition order. The evidence is properly before this Court.

3. 453 Mich. 308, 357, 552 N.W.2d 1 (1996).

4. 171 Misc.2d 832, 837, 656 N.Y.S.2d 93 (1997).

5. Although the holding in Lauer v. City of New York, 1999 WL 448894, was later modified, it provides guidance here. Even if the duty to perform an autopsy competently should be differentiated from the duty to correct medical records concerning the cause of death, defendant Chung could still be liable. Not only did she incorrectly perform the autopsy, she deliberately withheld the evidence of her negligence, thus causing defendant to remain wrongfully incarcerated.

CORRIGAN, J.

WEAVER, C.J., and TAYLOR and YOUNG, JJ., concur with CORRIGAN, J.BRICKLEY and MICHAEL F. CAVANAGH, JJ., concur with MARILYN J. KELLY, J.