

**Pokagon Band of Potawatomi Indians
Tribal Court of Appeals**

Estate of Rodney Holmes, Appellant)	
)	
v.)	Appeals Court Case No. 12-001-AP
)	Trial Court Case No. 10-701-CV
Pokagon Gaming Authority, Appellee)	
)	
)	
)	

Argued January 3, 2013, Pokagon Band Tribal Court, Dowagiac, Michigan

Opinion

ANDERSON, C.J.

This case arises from the death of Mr. Rodney Holmes on July 3, 2009. Mr. Holmes visited the Four Winds Casino (casino) on the day of his death and suffered a seizure of undetermined origin while on the casino property. After he collapsed on the floor of the casino, security staff provided aid. One of the responders was an Emergency Medical Technician (EMT), Mike Young, employed by the defendant-appellee. Mr. Holmes became agitated as he apparently drifted in and out of consciousness while on the floor of the casino. After rising from the floor and running away from those providing assistance, he collapsed for a second time. At that point he was restrained in a prone

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position as Mr. Young and others rendered medical aid and awaited the arrival of an ambulance. Mr. Holmes was transported to a local hospital and died there.

I. Trial Court Proceedings

The Estate of Mr. Holmes (plaintiff) filed this lawsuit against a number of tribal entities, but all now agree that the proper defendant is the Pokagon Gaming Authority, an entity established under tribal law. The Authority is constituted as an instrumentality of the Band to conduct gaming and related activities at the Four Winds Casino, which is located on tribal trust property in New Buffalo, Michigan. *See Pokagon Gaming Authority Ordinance, § V (as amended June 27, 2011)*. The Authority, like the Band, has sovereign immunity from suit, but that immunity has been waived for purposes of this case and other well-defined categories related to gaming activities. *Pokagon Gaming Authority Ordinance, § IX*. All other defendants were dismissed from the suit by agreement of the remaining parties. Trial Court Opinion and Order, p. 1, n. 1 (April 23, 2012), Appellate Docket No. 75.

Pokagon Band law gives the Tribal Court jurisdiction over civil cases when the Band, or its subordinate entities is a defendant.¹ The Pokagon Band's Tort Claims Ordinance, § 4.C.1., waives tribal immunity for:

Injury proximately caused by the negligent acts or omissions of the Gaming Enterprise or a Gaming Enterprise Employee at the Gaming Site; provided that, if the injury was caused by acts or omissions of a Gaming Enterprise Employee, such acts or omissions occurred in the performance

¹ The Tribal Court has jurisdiction over "tort claims against the Band, or any of its agencies, instrumentalities, officers or employees, but only to the extent provided in the Pokagon Band of Potawatomi Indians Tort Claims Ordinance." Pokagon Band Tribal Court Code § 3.A.1.d.

of his or her duties during the course and within the scope of his or her employment and authority.²

As for the applicable substantive law, the Pokagon Band's Tort Claims Ordinance,

§ 11 provides that:

Any Claim brought under this Ordinance shall be determined by the Tribal Court in accordance with the law of the Band and the principles of law applicable to similar claims arising under the laws of the State of Michigan if not inconsistent with any express provision of this Ordinance or other laws of the Band.

Id. The parties accordingly litigated the case under the Michigan Rules of Civil Procedure and assumed the application of Michigan law regarding tort liability. The contested issue is the quality of care provided by the EMT and others who were employed as security staff by the Authority at the Four Winds Casino. The trial court found that the Authority has the duty to provide reasonable aid to an injured casino patron and to summon professional medical assistance within a reasonable time. Opinion and Order, *supra*, at 8. The trial court ruled that the actions of the EMT and other casino employees satisfied the legal standard of care applicable to the Authority.

II. Standard of Review

The Tribal Court Code and rules of appellate procedure do not prescribe a standard of appellate review. Pokagon Band Tribal Court Code § 3. B. ("The Court of Appeals shall have jurisdiction to hear all appeals arising from Tribal Court decisions or proceedings. Decisions of the Court of Appeals on all matters within its jurisdiction shall be final, and shall not be subject to appeal to the Tribal Council."). See PBCR Chap. 5, §

² The "Gaming Enterprise" referred to in the Tort Claims Ordinance appears to be the same entity now referred to as the "Pokagon Gaming Authority" in the caption and trial court proceedings.

4 (“Court of Appeals may affirm, modify, vacate, or reverse a final decision of the Trial Court”). The trial court and the parties relied on Michigan law, and because there is no controlling Pokagon Band law, we also apply Michigan law on appeal. *See Tort Claims Ordinance*, § 11.

The trial court granted the Authority’s motion for summary disposition under Michigan Court Rule (MCR) § 2.116(C)(10). A trial court’s ruling on a motion for summary disposition is subject to *de novo* review. *Maskery v. Univ. of Michigan Bd. of Regents*, 468 Mich. 609, 613, 664 N.W.2d 165 (2003); *Kreiner v. Fischer*, 471 Mich. 109, 129, 683 N.W.2d 611, 624 (2004). Under this standard, we are free to affirm or reverse the trial court after conducting an independent review of the pleadings, affidavits, depositions, admissions, and other admissible evidence submitted by the parties. The evidence must be viewed in the light most favorable to the nonmoving party – the Estate of Mr. Holmes in this case. If the admissible evidence does not establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law if the undisputed facts could not support a finding of liability under applicable law. *Maiden v. Rozwood*, 461 Mich. 109, 120, 597 N.W.2d 817 (1999).

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.

Id. at 121. The plaintiff must offer specific admissible evidence to support the claim that defendant’s conduct was negligent. On the basis of the record presented, the trial court determined that reasonable minds could not differ on the

question of liability and dismissed the action. Critical to the trial court's ruling was its determination of the duty of care owed by the Authority to members of the public who visit the casino.

III. Duty of Care

In order for the plaintiff to recover in this action it must demonstrate: 1) that the defendant owed a duty to the plaintiff; 2) that the defendant breached that duty; 3) that the defendant's breach of duty was a proximate cause of the plaintiff's damages; and 4) that the plaintiff suffered damages. *See Krass v. Tri-County Sec., Inc.*, 233 Mich. App. 661, 667-668, 593 N.W.2d 578, 581 (Mich. App. 1999). Plaintiff's four claims in this case are premised on the breach of various duties allegedly owed by the Authority to its patrons. Plaintiff alleged in its complaint that the Authority had: 1) a duty to provide immediate and adequate care for Mr. Holmes when he suffered his seizures at the Casino; 2) a duty to act reasonably in operating and maintaining the casino; 3) a duty to act reasonably by having an automated external defibrillator (AED) in the casino to use in appropriate situations; and 4) a duty to act reasonably by having adequately trained security staff on the premises. First Amended Complaint, Counts I-IV (Aug. 20, 2010). Appellate Docket No. 29.

The Authority operates the Four Winds Casino for the enjoyment of the general public and thus has the obligation to make conditions at the Four Winds Casino reasonably safe, and to conduct its business with reasonable care for the invitees who come to make use of the facilities. *See generally*, Dobbs, THE LAW OF TORTS at 602 (West 2000). That duty includes an obligation to provide first aid to guests who become

injured while on the premises. The trial court and the parties all looked to the RESTATEMENT (SECOND) OF TORTS, § 314A³ for a formulation of the duty owed by the Authority to patrons of the Four Winds Casino. The Restatement provides that:

(1) A common carrier is under a duty to its passengers to take reasonable action

(a) to protect them against unreasonable risk of physical harm, and

(b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.

(2) An innkeeper is under a similar duty to his guests.

(3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.

(4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

Id. Section 314A Comments (e) and (f) further illuminate the responsibilities of a defendant in such a case.

e. The duty in each case is only one to exercise reasonable care under the circumstances. The defendant is not liable where he neither knows nor should know of the unreasonable risk, or of the illness or injury. He is not required to take precautions against a sudden attack from a third person which he has no reason to anticipate, or to give aid to one whom he has no reason to know to be ill. He is not required to take any action where the risk does not appear to be an unreasonable one, as where a passenger appears to be merely carsick, and likely to recover shortly without aid.

f. The defendant is not required to take any action until he knows or has reason to know that the plaintiff is endangered, or is ill or injured. He is not required to take any action beyond that which is reasonable under the circumstances. In the case of an ill or injured person, he will seldom be required to do more than give such first aid as he reasonably can, and take

³ THE RESTATEMENT (SECOND) OF TORTS, is published by the American Law Institute and is regarded as a leading authority on a wide variety of legal topics.

reasonable steps to turn the sick man over to a physician, or to those who will look after him and see that medical assistance is obtained. He is not required to give any aid to one who is in the hands of apparently competent persons who have taken charge of him, or whose friends are present and apparently in a position to give him all necessary assistance.

Id. (emphasis added).

In *Tame v. A. L. Damman Co.*, 177 Mich. App. 453, 442 N.W.2d 679 (Mich. App. 1989) the court considered whether to impose liability on a merchant who took action to deter criminal activity that might be harmful to its patrons, but failed in a particular case. The court refused to adopt “a policy that imposes liability on a merchant who, in a good faith effort to deter crime, fails to prevent all criminal activity on its premises. [The court found that] such a policy would penalize merchants who provide some measure of protection, as opposed to merchants who take no such measures.” *Id.* at 456-57. The court was careful to note, however, that this rule would not “preclude claims of negligent supervision or vicarious liability for negligence on the part of security guard services.”

Id. In an analogous case, the Wyoming Supreme Court carefully considered the obligations owed by a restaurant owner to patrons in distress. The court approved the trial court’s jury instruction, which described the following duty owed by a business owner to its patrons.

A restaurant whose employees are reasonably on notice that a customer is in distress and in need of emergency medical attention has a legal duty to come to the assistance of that customer. However, a restaurant does not have a duty to provide medical training to its food service personnel, or medical rescue services to its customers who become ill or injured through no act of omission of the restaurant or its employees. A restaurant in these circumstances meets its legal duty to a customer in distress when it summons medical assistance within a reasonable time.

Drew v. LeJay's Sportsmen's Cafe, Inc., 806 P.2d 301, 304 (Wyo. 1991). *Cf.*,

MacDonald v. PKT, Inc., 464 Mich. 322, 345, 628 N.W.2d 33, 44 (2001) (“merchants

have a duty to respond reasonably to situations occurring on the premises that pose a risk of imminent and foreseeable harm to identifiable invitees”).

The parties identified no authorities regarding the duty of care when aid is rendered by a security guard who happens to be an EMT. Given the general duty to provide assistance and summon aid, it is appropriate to consider the reasonableness of the care based on the ability of the provider. One court described the duty of an innkeeper as a duty to exercise reasonable care under the circumstances. “A high school student employed at Taco Bell would not be expected to provide the type of first aid an emergency room doctor would provide, as such an expectation would not be ‘reasonable.’” *Baker v. Fenneman & Brown Properties, LLC*, 793 N.E.2d 1203, 1209-1210 (Ind. App. 2003) (internal citation omitted.) See Dobbs, *THE LAW OF TORTS*, *supra*, at 633. (“The architect, engineer, lawyer, and auditor, for example, owe their clients the standard of qualified practitioners in the same profession, or other practitioners in the same general geographic area. * * * the professional standard asks the trier only to determine whether the defendant’s conduct conformed to the medical standard or medical custom in the relevant community.”). Here, plaintiff alleges that the Authority did not provide reasonable care by an EMT under the circumstances.

Defendant argues that imposing a “reasonable EMT” standard would have the perverse effect of leading it to “decline to hire EMT’s [sic] or any other persons with specialized medical knowledge. Such a result is contrary to the interests of visitors to Defendant’s establishment and all other businesses.” Appellee’s Brief at 10. An onerous liability standard would penalize the Authority for seeking qualified EMTs to fill security positions to satisfy its obligation to render aid to any patrons in need. On the other hand,

refusing to employ a “reasonable EMT” standard of care could be interpreted as sanctioning substandard care by such personnel. The reasoning in *Tame v. A. L. Damman Co.*, *supra*, supports the Authority’s argument.

The Michigan legislature and courts have addressed this issue in some detail, and in the absence of Pokagon Band law on the subject we look to Michigan’s rules dealing with emergency medical personnel. Under the Michigan Emergency Medical Services Act (EMSA), “emergency medical technicians and paramedics are not liable for services they provide absent gross negligence or willful misconduct. MCL § 333.20965.” *Lee v. Dowagiac Volunteer Fire Dept. Ambulance Service, Inc.*, 2010 WL 2332391, 2 (Mich. App. 2010).⁴ The Michigan Supreme Court interpreted the statute to require that “a plaintiff alleging willful misconduct under the EMSA must allege that the actor intended to harm the plaintiff. *Jennings v. Southwood*, 446 Mich. 125, 142, 521 N.W.2d 230, 238 (1994) (emphasis added). Of course, Michigan law has no independent force within the Pokagon Band’s territory, but the Band has provided the Pokagon courts with authority to apply Michigan law when not inconsistent with Band law. In addition, the parties have litigated this case by looking to Michigan law for procedure and substance. Accordingly, we are free to apply Michigan law regarding EMT liability, and plaintiff’s claims would plainly fail under that standard. However, the court need not go that far in this case.

The trial court refused to impose an elevated duty of care on the Authority based on its employment of an EMT as a security guard. The court stated that: “the assertion

⁴ While this is an unreported decision under Michigan court rules, we cite it simply as a recent application of the liability rules.

of ‘EMT malpractice’ is beyond the scope of the reasonable duty required of the possessor of land to a business invitee.” Opinion and Order at 9. Based on a review of the foregoing authorities, we agree with the trial court. We adopt the rule that the Authority has a duty to invitees to the Four Winds Casino to keep the premises reasonably safe and to render aid to invitees who are in distress and in need of assistance. That duty includes the obligation to promptly summon appropriate medical professionals to render assistance, or transport the injured invitee to a hospital where further aid may be provided.⁵

IV. The Evidence

As with the substantive law of torts, the Pokagon Band allows the use of the Michigan rules of evidence and the parties have litigated this case assuming the application of those rules. Pokagon Rule of Evidence § 4. The court views the evidence

⁵ Defendant argues that the complaint should be dismissed because plaintiff failed to allege inadequate care by an EMT. Appellee’s Brief at 9. While the First Amended Complaint contains allegations related to general negligence, and specific claims related to defibrillators and adequate security, none of the four causes of action assert claims related to EMTs. The relevant Michigan rules provide that a complaint must contain, “A statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend.” MCR § 2.111. In addition, there are elevated pleading requirements for medical malpractice actions. *See also* M.C.L.A. § 600.2912d (“plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff’s attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff’s attorney reasonably believes meets the requirements for an expert witness,” which describes the duty of care and grounds for alleged breach.). Although the complaint is bereft of any mention of liability premised on the failure of an EMT to reasonably perform his duties, we liberally construe complaints and find the allegation of violation of the duty of care by emergency personnel meets the notice-pleading requirement of the rules. Moreover, defendant had ample opportunity to meet the plaintiff’s claims as presented in the trial court, and the court declines to affirm the dismissal on this ground.

in the light most favorable to the nonmoving party – the Estate of Mr. Holmes. If the admissible evidence does not establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law if the undisputed facts could not support a finding of liability. *Maiden v. Rozwood*, 461 Mich. 109, 120, 597 N.W.2d 817 (1999). We conduct an independent review of the pleadings, affidavits, depositions, admissions, and other admissible evidence submitted by the parties.

The key evidence relied upon by plaintiff is the deposition of Dr. Guy Haskell, who has “a PhD in anthropology and folklore from Indiana University” and no formal University medical training. Haskell Dep. at 4-5, Appellate Docket 69. Dr. Haskell studied aspects of emergency medical services from other sources and has testified in a number of court cases as an expert witness. *Id.* at 17-20. Dr. Haskell opined that based on his review of videotapes and other witness statements, the care provided by Mr. Young was substandard because Mr. Holmes was treated while prone after his second collapse. Plaintiff argues that defendant’s actions at the casino led to the death of Mr. Holmes. The trial court rejected the opinion evidence offered by Dr. Haskell in reliance on Michigan court cases that are described below.

Defendant does not object to Dr. Haskell’s expert qualifications, but instead argues that his opinion is inadmissible on the ground that it is premised on assumptions that are inconsistent with the testimony of witnesses who personally viewed the events in question. Appellee’s Brief at 14-16. Plaintiff counters that Dr. Haskell’s opinion evidence is based on other witness testimony suggesting that Mr. Holmes was not breathing while being treated in a prone position on the casino floor. Appellant’s Brief at 14-16. Plaintiff reasons that unlike the facts in *Badalamenti v. William Beaumont*

Hospital–Troy, 237 Mich. App. 278, 602 N.W.2d 854 (1999), upon which the trial court relied, the opinion evidence is not premised solely on a disbelief of an eyewitness’s testimony. Appellant’s Brief at 14-16, citing *Robins v. Garg*, 276 Mich. App. 351, 741 N.W.2d 49 (2007). In *Badalamenti*, the court stated “that an expert’s opinion is objectionable where it is based on assumptions that are not in accord with the established facts.” 237 Mich. App. at 286, 602 N.W.2d 854. The rejected expert in *Badalamenti* based his opinion that the plaintiff was in cardiogenic shock solely on his “skepticism” about the reading of an echocardiogram performed by another doctor. *Id.* at 287. While the question of the admissibility of Dr. Haskell’s deposition evidence may be a close one, it is an issue we need not decide because we hold that no reasonable finder of fact could conclude that the Authority failed to meet the duty of care owed to a patron under these circumstances.

Mr. Young described the events surrounding the incident in his deposition.

Young Deposition at 45-86 (Appellate Docket No. 63). His testimony reveals the chaotic nature of the incident. Mr. Holmes engaged in erratic behavior that posed the risk of injury to other patrons at the casino, as well as to himself. After an initial fall, Mr. Holmes was reported to be having a seizure. *Id.* at 45. Mr. Young left for the scene from his office and summoned aid from a patrol unit outside the casino. *Id.* at 46. Mr. Young arrived at the scene and began to administer emergency aid to prevent further injury. *Id.* at 47. An ambulance had been called in the interim. *Id.* at 49. Mr. Holmes got up from the floor and became “uncontrollable,” and ran down a promenade away from those providing assistance. *Id.* at 58, 59-61. Mr. Holmes collapsed again after hitting a pillar

in the Casino. *Id.* at 61-62. Mr. Young and other casino staff continued to administer aid until the ambulance arrived and Medic One staff took over the medical care. *Id.* at 73-74.

There is no dispute about any material facts bearing on the question of whether Authority fulfilled its duty to Mr. Holmes during this traumatic incident. Simply put, plaintiff argues that in the moments before the ambulance arrived there was a breach of the Authority's duty of care to its patrons. The claim is based on the fact that Mr. Holmes was in a prone position for up to two minutes following his second collapse. Brief of Appellant at 8-12 (citing various portions of the Haskell Deposition). Dr. Haskell stated in his deposition that he had reviewed the videotapes of the incident for the first time on the morning of his deposition. Haskell Dep. At 36 (Appellate Docket No. 69). When asked about what should be done when, as here, a large individual such as Mr. Holmes was engaged in a struggle with security and first responders, Dr. Haskell stated that "there's nothing they can do except the best they can." *Id.* at 37. In sum, Dr. Haskell offers no evidence to contradict the facts presented through the deposition of Mr. Young. Rather, the substance of his opinion and plaintiff's claim is that the EMT acting in this volatile, emergency situation should have done something different during a two-minute period following a chaotic scene in the Four Winds Casino. Even if the court assumes the admissibility of Dr. Haskell's opinions, it is the court's view that no reasonable finder of fact could conclude that the Authority breached its duty to provide assistance and summon aid. It must be remembered that Mr. Holmes had been struggling and running through the casino. There were many other patrons in the vicinity and the emergency aid workers provided assistance and summoned aid. As noted above, under Michigan law liability for a first-responder under these circumstances could be imposed

only if there were evidence of “gross negligence or willful misconduct.” MCL § 333.20965. That standard is certainly not met in this case, and neither is there any evidence that the Authority failed to provide assistance and summon aid. Plaintiff’s expert is essentially second-guessing the actions taken by Mr. Young in a most difficult situation. While we view the evidence in the light most favorable to the plaintiff, there is no basis for finding a breach of the Authority’s duty to provide aid and summon assistance to an injured patron.

Conclusion

The Authority’s obligation to injured patrons in Mr. Holmes’ circumstances is to provide assistance and summon emergency medical aid for transportation to a hospital. Because the Authority satisfied its duty of care, the motion for summary disposition was properly granted. The trial court’s judgment is affirmed.

TOMPKINS AND FLETCHER, JJ. , concur.

Filed: March 27, 2013