IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Audrey Jones, special administrator and special representative of the estate of Louis Williams, deceased,	)	
Plaintiff,	)	No. 12 L 9332
v.	)	
Sandy Gibson, D.O.,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

The Local Governmental and Governmental Employees Tort Immunity Act immunizes a physician's negligent failure to make an adequate patient examination. In this case, the plaintiff's expert identifies various tests the defendant failed to conduct or order to arrive at a proper diagnosis. The act, however, explicitly immunizes those failures, and the expert fails to identify a negligent act or omission in patient treatment. For those reasons, the defendant is immune from liability and the case must be dismissed with prejudice.

FACTS

Between 2005 and 2010, Dr. Sandy Gibson was the medical director of the Near South Health Center, located at 3525 South Michigan Avenue in Chicago. The health center is an ambulatory care center operated by Cook County. It is there that Gibson began treating Louis Williams as a patient in December 2009.

In March 2010, Williams, then 68 years old, began treating with another physician, Dr. Chu-Kwan Augustine Wong. On July 14, 2010, Wong discontinued Williams' Lasix medication – a diuretic prescribed for congestive heart failure – and adjusted some other

medications. On August 11, 2011, Wong restarted Williams' Lasix medication with double the previous dosage.

One week later, on August 18, 2010, Williams returned to the health center with his wife, Audrey Jones, where Gibson examined him. Williams indicated that he had fallen the previous day. Gibson already knew that Williams suffered from a variety of ailments, including: hypertension, diabetes, retinopathy, congestive heart failure, renal insufficiency, chronic obstructive pulmonary disease, atrial fibrillation, episodic ventricular tachycardia, peripheral neuropathy, proteinuria, hypoxia, high blood pressure, and coronary artery disease. She also knew that he had previously suffered a myocardial infarction, a stroke, and was grossly obese. At the August 18 examination, Williams told Gibson that he had recently been seen and treated by Wong.

Gibson conducted a physical examination that revealed Williams had shortness of breath worse than usual, mild leg swelling, conjunctivitis, mild lung congestion, and weight gain. He was not nauseous, vomiting, or sweating. He did not complain about chest or arm pain. His blood pressure was a little abnormal, he had a regular heart rate and rhythm, and was not in distress. Gibson did not conduct an electrocardiogram (EKG) or chest X ray because the health center did not have the necessary equipment. Gibson did, however, have the ability to conduct at the health center a pulse-oximeter test – a test that measures oxygen saturation in the blood – but failed to do so.

Gibson concluded that Williams was "quite stable." She did not refer him to a cardiologist, a renal specialist, or order an immediate hospitalization. She also did not order an EKG, chest X ray, or pulse-oximeter test at another health facility. Rather, she issued prescriptions for Lasix and Enalapril – another blood-pressure regulating medication for patients with congestive heart failure. According to Gibson, Williams and Jones left the examination room, talked and laughed with the desk clerk, and then left the health center.

What happened next is disputed. According to Gibson, soon after Jones and Williams left, a person came into the health center and said that Williams was having problems outside. Gibson went out to Williams' side and was joined by a nurse and a janitor. Gibson asked someone to call 9-1-1 and stayed with Williams until the paramedics arrived. Gibson said that Williams' condition had changed since she had seen him a short time earlier inside the health center, but that she did not and could not examine him since she was simply attempting to keep him upright. Gibson testified that she kept calling Williams' name, but that he only grunted in response.

In contrast, according to Jones, she banged on the door to get someone from the health center to answer. She also testified that she called 9-1-1. Jones further testified that Gibson never came out of the health center to assist Williams.

The paramedics arrived and witnessed Williams accede to pulseless electrical activity. They transported him to Mercy Hospital. Williams never regained consciousness and died on August 21, 2009. Dr. Leo Taiberg testified that, because there was no autopsy, he could not determine whether Williams died from a cardiac or a pulmonary event.

On August 17, 2012, Jones filed this lawsuit.[1] Count one of her two-count complaint is brought pursuant to the Wrongful Death Act, 740 ILCS 180/0.01 to 2.2, while count two is pursuant to the Survival Act, 755 ILCS 5/27-6. Each count claims that Gibson's negligence breached the standard of care by failing to: (1) treat Williams properly; (2) send Williams to the hospital for a cardiac work-up; and (3) conduct an EKG, chest X ray, and pulse-oximeter test before releasing him from her care.

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[1] Jones died in 2014. Williams' estate filed a motion to appoint Williams' daughter to replace Jones as special administrator. The motion has yet to be presented but, even if it were granted, a new special administrator would not affect the substance of the parties' arguments or this court's analysis.

Jones named Dr. Steven Tureff, as her Rule 213(f)(3) expert witness. Tureff's written disclosure indicates that Gibson was aware that Williams had numerous problems including, but not limited to, hypertension, diabetes, congestive heart failure, renal insufficiency, and chronic obstructive pulmonary disease. Tureff wrote that it was his opinion that Gibson deviated from the standard of care by failing to get Williams' medical history or to contact Wong to determine Williams' status. Tureff also disclosed that he believed Gibson breached the standard of care by failing to perform an EKG or chest X ray, check Williams' oxygen levels, consult with a cardiologist, or perform brain-natriuretic-peptide (BNP) and troponin tests – blood tests used to diagnose heart failure based on hormone and protein levels.[2] Tureff also wrote that Gibson should have immediately referred Williams to a hospital or called for an ambulance transport to an emergency room for treatment including oxygen, intravenous Lasix, and other treatment. Tureff opined that had this treatment been ordered on an emergent basis, it is more likely true than not that Williams would have avoided anoxic encephalopathy and death.

Tureff testified more expansively about his opinions at his deposition. He testified that Williams had numerous medical problems, including congestive heart failure. Tureff also testified that Gibson made a limited examination, but one sufficient enough for her to realize that Williams should have been hospitalized. He agreed that an EKG, chest X ray, and pulse oximeter, BNP, and troponin tests are part of a medical examination. Tureff opined that Gibson failed to make a proper diagnosis or recognize the seriousness of Williams' situation. He testified that she failed to diagnose what he was undergoing at the time of his examination. Tureff agreed that his criticisms are associated with Gibson's examination of Williams and that he died from a condition that did not manifest until soon after he left the health center.

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[2] Jones does not base her causes of action on Gibson's failure to conduct or order BNP or troponin tests, but since Tureff finds fault with those failures, we will include them as if they had been pleaded.

At his deposition, Tureff concurred that the health center did not have EKG or X ray machines and that it did not have the necessary equipment to conduct BNP or Troponin tests. He testified, however, that Williams' blood could have been drawn at the health center and then transported to an emergency room for testing. Tureff also admitted that Gibson's failure to contact Wong was not a cause of Williams' medical event after he had left the health center.

ANALYSIS

Gibson brings her motion pursuant to the Code of Civil Procedure section that authorizes summary judgment, "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005. A defendant moving for summary judgment may disprove a plaintiff's case by introducing affirmative evidence that, if uncontroverted, would entitle the defendant to judgment as a matter of law – the so-called "traditional test" – *Purtill v. Hess*, 111 Ill. 2d 229, 240-41 (1986) – or may establish that the plaintiff lacks sufficient evidence to establish an element essential to a cause of action – the so-called "*Celotex* test" – *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), *followed in Argueta v. Krivickas*, 2011 IL App (1st) 102166, ¶ 6. To create a genuine issue of material fact and defeat a summary judgment motion, a plaintiff must present enough evidence in response to support each essential element of a cause of action. *Prostran v. City of Chicago*, 349 Ill. App. 3d 81, 85 (1st Dist. 2004).

The purpose of a summary judgment proceeding is not to try a question of fact, but to determine whether one exists that would preclude the entry of judgment as a matter of law. *See Land v. Board of Ed. of the City of Chicago*, 202 Ill. 2d 414, 421, 432 (2002). The nonmoving party is not expected to prove its case in response to a summary judgment motion, but is required to present a factual basis as to each element that would arguably entitle the nonmoving party to judgment. *See id.* at 432. If the party seeking summary judgment presents facts that are not contradicted and are sufficient to support

summary judgment as a matter of law, the nonmoving party cannot rest on the complaint and other pleadings to create a genuine issue of material fact. *See Harrison v. Hardin Cnty. Cmty. Unit Sch. Dist. No. 1*, 197 Ill. 2d 466, 470 (2001).

Gibson's summary judgment motion is based on two provisions of the Local Governmental and Governmental Employees Tort Immunity Act. *See* 745 ILCS 10/1-101 to 10/9-107. The Tort Immunity Act provides only defenses and immunities to local public entities and is not a source of duties or liabilities. *See* 745 ILCS 10/1-101.1(a); *Sparks v. Starks*, 367 Ill. App. 3d 834, 838 (1st Dist. 2006). The legislature enacted statutory immunities for local governmental entities to prevent the diversion of public funds from their intended purpose to the payment of damage claims. *See Davis v. Chicago Hous. Auth.*, 136 Ill. 2d 296, 302 (1990), *quoting* 18 Eugene McQuillin, Municipal Corporations § 53.24 (3d ed. 1963). Put another way, statutory tort immunity incentivizes local public entities to provide social services the entities have no duty to provide. Local governmental entities are, nonetheless, "liable in tort on the same basis as private tortfeasors unless a valid statute dealing with tort immunity imposes limitations upon that liability." *Michigan Ave. Nat'l Bk. v. County of Cook*, 191 Ill. 2d 493, 502 (2000). Thus, the resolution of Gibson's motion hinges on the statutory construction of the Tort Immunity Act, which is a legal question for the court. *Id.*

When interpreting any statute, a court is to ascertain and give effect to the legislature's intention. *See Ries v. City of Chicago*, 242 Ill. 2d 205, 215-16 (2011). The Tort Immunity Act sections at issue here provide limited immunity for health care providers employed by local governmental entities. The two sections state that:

> Neither a local public entity nor a public employee acting within the scope of his employment is liable for injury caused by the failure to make a physical or mental examination, or to make an adequate physical or mental examination of a person for the purpose of determining whether such person has a disease or physical or mental condition that would

> constitute a hazard to the health or safety of himself or others.

745 ILCS 10/6-105.

> Neither a local public entity nor a public employee acting within the scope of his employment is liable for injury resulting from diagnosing or failing to diagnose that a person is afflicted with mental or physical illness or addiction or from failing to prescribe for mental or physical illness or addiction.

745 ILCS 10/6-106(a).

Before applying the facts of this case to sections 6-105 and 6-106(a), it is useful to plot the course of a typical medical examination. First, a patient presents to a physician complaining of one or more symptoms. Second, a physician takes a history and examines the patient to determine the cause of the symptoms. Such an examination may involve basic methods, such as palpation, auscultation, and percussion, or may call for the use of various diagnostic tools, machines, and tests to obtain more specific and accurate findings. Third, based on this constellation of information, the physician reaches a diagnosis of the cause, causes, or possible causes of the symptoms. Fourth, the physician prescribes one or more modalities of treatment to address the cause and remediate the patient's symptoms.

It is useful to place Jones' three claims within this timeline. One of her claims is that Gibson breached the standard of care by failing to conduct or order an EKG, chest X ray, or pulse-oximeter, BNP, and troponin tests before releasing Williams from her care. Tureff agreed in his deposition that each of these is an examination or diagnostic tool; consequently, this claim is plainly one of negligent examination. Second, Wilson claims that Gibson failed to send Williams to the hospital for a cardiac work-up. Tureff further agreed that a cardiac work-up is an examination or diagnostic tool; consequently, this claim, too, is one of negligent examination.

Claims that a physician working for a local public entity is negligent for failing to conduct or order diagnostic tests have previously been considered and consistently rejected by Illinois courts. In *Michigan Avenue National Bank*, for example, the court held that Tort Immunity Act section 6-105 immunized the defendant-physicians' failures to perform examinations that would have led to the plaintiff's breast cancer diagnosis. 191 Ill. 2d 493, 512 (2000). In *Mabry v. County of Cook*, the court reached the identical conclusion based on the defendants' failure to order various tests to diagnose the plaintiff's pulmonary embolism. 315 Ill. App. 3d 42, 53 (1st Dist. 2000). In *Wilkerson v. County of Cook*, the court held that section 6-105 immunized the defendants' failure to conduct a follow-up Pap smear or cervical biopsy that would have led to a correct cervical cancer diagnosis. 379 Ill. App. 3d 838, 847 (1st Dist. 2008). Finally, *Hemminger v. Nehring*, held that section 6-105 immunized the defendants who negligently examined the plaintiff's Pap smear slides as part of a screening test and diagnostic process and, thereby, failed to diagnose the plaintiff's cervical cancer. 399 Ill. App. 3d 1118, 1125-26 (3d Dist. 2010).

The result here can be no different regarding Jones's failure-to-examine claims. Tureff opined that Gibson should have conducted or ordered a variety of tests – EKG, chest X ray, pulse-oximeter, BNP, troponin – and that her failure to do so breached the standard of care. Tureff agreed, however, that each of these tests is part of a patient examination. Since it is undisputed that Gibson failed to include these tests as part of her examination of Williams, the only possible conclusion is that Gibson failed to make an adequate examination. As explained above, Illinois courts have consistently held that Tort Immunity Act section 6-105 immunizes the breach of a standard of care based on an inadequate examination. The inexorable conclusion is that subparagraphs 6(b) and 6(c) in counts one and two must be dismissed with prejudice.

Jones' third claim – failure to treat – leads to the same result by different means. Jones attempted to establish a breach of the standard of care for an act or omission in treatment by establishing

the predicate diagnosis. To that end, Jones' response brief argues that Gibson diagnosed Williams with congestive heart failure and that her failure to treat that condition led to his cardiac or pulmonary event outside the health center. The fundamental problem with that argument is that Gibson did not, in fact, diagnose Williams with congestive heart failure. In her deposition, Gibson merely acknowledges that she assessed Williams' congestive heart failure. Indeed, even Tureff recognizes that Williams' congestive heart failure was a previously diagnosed condition already known to Gibson when he presented to her on August 18, 2010.

This fact does not end the analysis, however, because it is possible that independent of Gibson's failure to conduct an adequate examination or to make a diagnosis, she could have wrongfully administered treatment to Williams. Such conduct is not statutorily immunized. *Cf.* 735 ILCS 10/5-106(a) & (d); *Mills v. County of Cook*, 338 Ill. App. 3d 219, 222 (1st Dist. 2003) (section 5-106(a) immunizes only failures to make a diagnosis and failures to prescribe treatment). The record indicates that Gibson did, in fact, prescribe treatment by restarting Williams on Lasix and Enalapril. Tureff does not, however, criticize that treatment as a breach of the standard of care. Rather, when asked what treatment Gibson should have prescribed, Tureff answers that she should have conducted or ordered the tests that she failed to conduct or order. Tureff is explicit that those tests would have shown that Williams was hypoxic. That may be true, but a finding of hypoxia is merely a diagnosis, not a treatment.

In short, Tureff's testimony returns us to the same legal conclusion concerning subparagraphs (b) and (c) – Tort Immunity Act section 6-105 immunizes Gibson from her failure to conduct an adequate examination. Since we have arrived back at the same conclusion, Tort Immunity Act section 6-106(a) is irrelevant to any legal analysis since Tureff dos not criticize the treatment that Gibson provided to Williams. Given this conclusion, subparagraph (a) of counts one and two must also be dismissed with prejudice.

CONCLUSION

For the reasons presented above, it is ordered that:

1. the defendant's summary judgment motion is granted;
2. the plaintiff's motion for leave to file an amended complaint to name a special administrator is stricken as moot;
3. the case is dismissed with prejudice; and
4. the May 7, 2015 ruling date at 11:00 a.m. is stricken.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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Circuit Court 2075