Circuit Court for Baltimore City
Case No. 24C14001249

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 238

September Term, 2016

ESTATE OF KERRY R. BUTLER, JR., et al.

v.

JOSEPH STRACKE, et al.

Leahy,
Reed,
Rodowsky, Lawrence, F.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.
Dissenting Opinion by Rodowsky, J.

Filed: October 1, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellants, the Estate of Kerry Butler, Jr. ("Mr. Butler"), Crystal Butler ("Ms. Butler), and Ms. Vera Ganey, collectively ("Appellants")[1] instituted a survival and wrongful death action against two Baltimore City Fire Department medics, Joseph Stracke and Stephanie Cisneros (collectively "Appellees"), and the Mayor and City Council of Baltimore (the "City").[2] Appellants assert that Appellees were grossly negligent in their emergency response to Mr. Butler, who was suffering from a heart attack when the medics arrived. A jury in the Circuit Court for Baltimore City found Appellees liable for gross negligence. Following trial, and at the behest of Appellees' Motion for Judgment Notwithstanding the Verdict, the circuit court granted Appellees' renewed Motion and concluded that Appellants' evidence of gross negligence was insufficient. Appellants timely appealed and present two questions for our review, which we have rephrased:

> I. Did the trial court err in entering a judgment notwithstanding the verdict on the grounds of insufficient evidence?
>
> II. Did the trial court err in ruling that Appellees were entitled to limited immunity afforded by the Maryland Fire and Rescue Company Act? [3]

Additionally, Appellees noted a timely cross-appeal. They present a single question for our review, which we have also rephrased:

[1] Mr. Kerry Butler Sr. also joined in filing the complaint against Appellees; however, does not appear to be an Appellant in this case.

[2] Appellants' case against the City, was dismissed and the jury verdicts rendered were only against Appellees Joseph Stracke and Stephanie Cisneros.

[3] Appellants ask that we address this question only if we affirm the trial court's decision to grant the motion for judgment notwithstanding the verdict.

III. Did the trial court err in denying Appellees' motions for mistrial?[4]

For the following reasons, we answer the first question in the affirmative and the second and third questions in the negative. In doing so, we also deny the cross-appeal. Therefore, we remand the case and order the court to strike the Judgment Not Withstanding the Verdict, and to re-instate the original verdict.

FACTUAL AND PROCEDURAL BACKGROUND

In the early morning hours of March 2, 2011, Kerry Butler, Jr., ("Mr. Butler") a 28 year old man, suffered a heart attack shortly after he had awakened. He complained of chest pains and told his wife, Crystal Butler ("Ms. Butler"), that he thought he was having a heart attack, and instructed her to call 911. Ms. Butler promptly called 911 and reported that her husband was conscious but was having chest pains, difficulty breathing and speaking between breaths, and his body temperature was somewhat cool. Ms. Butler testified that after she terminated the call, she observed her husband lying on the bed with his legs "balled up." Additionally, she testified that his speech was mumbled and faint, his teeth were clenched, he was holding his chest, and was unable to dress himself or walk down the stairs on his own. Appellees knew before arriving at the Butler residence that they were dispatched to respond to a chest pain patient. Appellee, Joseph Stracke ("Stracke"), testified that such patients are typically "Level 1" priority patients.

[4] Appellees ask that we address this question only if we find in favor of Appellants and reverse the circuit court's decision.

When Appellees arrived, Ms. Butler testified that Stracke arrived at the Butler's front door without a medic bag, and in a very loud voice yelled, "[w]hat seems to be the problem? What seems to be the problem?" Ms. Butler told Stracke that Mr. Butler "[said] he's having a heart attack." She testified that Mr. Butler had his hand on his chest and that he "could barely walk and . . . talk." She further testified that Stracke did not ask any questions about Mr. Butler's symptoms or medical history, performed no physical examination, and did not ask any questions about her husband's recent activities.

Further, Appellees did not get a stretcher to transport Mr. Butler to the ambulance and neither of the Appellees rendered any assistance to Mr. Butler as he walked from his house to the ambulance. Appellee Stephanie Cisneros ("Cisneros") conducted a visual assessment of Mr. Butler as he was walking towards the ambulance. She testified that Mr. Butler was walking with "perfectly normal" steps and had his hand on this throat, complaining that his throat was burning. In her Patient Care Report, Cisneros reported that Mr. Butler complained of "chest heart burn" and recorded his symptoms as "chest hurt."[5] Her assessment was contrary to Ms. Butler's testimony, who testified that Mr. Butler was staggering to the ambulance.

In the ambulance, Stracke took Mr. Butler's initial vital signs – his blood pressure and "pulse ox"[6] – and relayed them to Cisneros. Cisneros continued her assessment and

[5] Despite this, Cisneros testified that the Patient Care Report was inaccurate because she was forced to select symptoms from a drop-down menu which lacked Mr. Butler's actual complaints, as she understood them, of heartburn.

[6] "Pulse ox" is the heart rate and oxygen level in the blood.

learned that Mr. Butler had eaten a Spicy Chicken sandwich from Wendy's, Oreo cookies, and a Hawaiian Punch before going to bed. She further learned that he had pain under his right arm. She checked for reproducible pain, but found none and also felt for Mr. Butler's pulse, checked his pupils, looked at his skin, and listened to his lungs, which were "perfectly clear." Appellees concluded that Mr. Butler's vital signs were baseline and that he was in stable condition.

Appellees then took Mr. Butler to Harbor Hospital.[7] Upon arrival, Stracke retrieved a wheelchair for Mr. Butler. Mr. Butler exited the ambulance, again without any assistance from Appellees, and sat in the wheelchair. Stracke pushed Mr. Butler into the emergency room and Cisneros alerted the hospital staff that he "had a burning in his throat." Cisneros also wrote on the hospital form that the reason for Mr. Butler's hospital visit was heartburn. Mr. Butler waited in the emergency room for approximately ten minutes, holding his chest and complaining of chest pains. He then became unconscious and slid out of the wheelchair, prompting Cisneros to call out to a nurse that a doctor was needed. Mr. Butler was transported to a hospital code room and hospital staff, along with other paramedics who were in the hospital with another patient, began treating Mr. Butler. Stracke and Cisneros left the hospital to go "back in service ready to take another call". Despite life-saving efforts, Mr. Butler passed away. At his time of death, there was no cause and his

[7] Approximately seven minutes passed from when Appellees arrived at the Butler residence and when they arrived at the hospital.

body was sent to a medical examiner for an autopsy. The medical examiner concluded that he died of a myocardial infarction, commonly known as a heart attack.

As a result of his death, Mr. Butler's estate filed suit against the City and Appellees, alleging negligence and gross negligence due to their emergency response.

Trial

The case was tried from February 23, 2016 to March 10, 2016, before a jury in Baltimore City with the Honorable Althea Handy presiding.[8] Before the trial began, Appellees moved that the court decide the following questions of law in advance of trial: (1) whether the City was immune from suit under the doctrine of governmental immunity; and (2) whether the Fire and Rescue Company Act, MD. CODE, CTS. & JUD. PROC. ART., §5-604(a) (the "Act") granted Appellees immunity from civil liability, except for any willful or grossly negligent act. The trial court answered both questions in the affirmative, entering judgment in favor of the City.[9]

At the close of Appellants' case, Appellees moved for judgment asserting that "no evidence showed that Stracke or Cisneros acted grossly negligently or caused Mr. Butler's

[8] At the commencement of the case, Appellees filed a motion to dismiss Appellants' amended complaint for failure to allege facts sufficient to support their claims for gross negligence. That motion was denied. Appellees filed a motion for summary judgment, which was also denied, after the close of discovery asserting that the operative facts developed during discovery were insufficient to support Appellants' gross negligence claims. Several weeks prior to the start of trial, Appellees filed another motion for summary judgment based on the same grounds and the same legal authority. That motion was denied on the first day of trial.

[9] The judgment in favor of the City is not at issue on appeal.

death." The trial court denied the motion. Appellees renewed their motion for judgment at the close of all evidence, and the trial court reserved ruling on it. The jury returned a verdict in the amount of $3,707,000 in favor of the Appellants, finding that Appellees were grossly negligent and caused Mr. Butler's death. Following the jury verdict, Appellees moved for Judgment Notwithstanding the Verdict on the grounds advanced in support of their earlier motions for judgment. The trial court concluded that Appellants' evidence of gross negligence was insufficient and granted the motion. A final judgment in favor of Appellees was entered by the trial court on March 21, 2016. This timely appeal and cross-appeal followed. Additional facts will be discussed as necessary.

DISCUSSION

I. Judgement Notwithstanding the Verdict

A. Parties' Contentions

Appellants argue that the trial court erred in granting Appellees' Motion for Judgment Notwithstanding the Verdict ("JNOV") because there was substantial evidence of Appellees' gross negligence. Appellants assert that they presented evidence proving Appellees breached several protocols for emergency medical service providers and Baltimore City Fire Department procedures. Specially, Appellants argue that the trial testimony introduced into evidence generated a clear jury question on the issue of Appellees' gross negligence. Appellants further conclude that recent Court of Appeals' decisions, *Beall v. Holloway-Johnson*, 446 Md. 48, 130 A.3d 406 (2016) and *Cooper v.*

Rodriguez, 443 Md. 680, 118 A.3d 829 (2015), support the position that "the presence or absence of gross negligence in any colorable claim is an issue of fact for a jury." We agree.

Appellees argue that the trial court correctly granted the motion because no evidence showed any willful or gross negligent act by Appellees. Appellees rely heavily on two cases involving emergency medical technicians ("EMTs") and gross negligence: *Tatum v. Gigliottti*, 80 Md. App. 559 (1989), aff'd, 321 Md. 623 (1999)[10] and *McCoy v. Hatmaker*, 135 Md. App. 693 (2000). Appellees assert that according to the standards set in *Tatum* and *McCoy*, "there are no facts in this case that can cross the gross negligence threshold." Therefore, Appellees conclude, "the jury reached an unreasonable verdict untethered to the facts of this case."

B. Standard of Review

We review the trial court's decision to grant or deny a motion for JNOV by determining whether it was legally correct by, "viewing the evidence and the reasonable inferences to be drawn from it in the light most favorable to the non-moving party, and determining whether the facts and circumstances only permit one inference with regard to

[10] In *Chase v. Mayor and City Council of Baltimore*, 126 Md. App. 427 (1999), this Court declined to follow *Tatum v. Gigliotti*, 80 Md. App. 559 (1989) because of a statutory change that modified the language of Md. Code (1981) Art. 43 § 132 (a). At the time *Tatum* was written, the statute stated, "a person licensed by the State…who renders medical aid, care or assistance *for which he charges no fee or compensation*… is not liable for any civil damages. (emphasis in original). This court in *Tatum* was concerned with, among many other things, whether a receipt of salary destroyed a medical technician's immunity under the statute. Because we are answering Appellants' questions based on the facts of *Tatum*, we do not concern ourselves with the modification of the statute in *Tatum*, *Chase*, or the case in its consideration to the Court of Appeals.

the issue presented." *Cooper v. Rodriguez*, 443 Md. 680, 706 (2015) (quoting *Scapa dryer Fabrics, Inc. v. Saville*, 418 Md. 496, 503 (2011)). *See also Bradford v. Jai Med. Sys. Managed Care Orgs., Inc.*, 439 Md. 2, 15 (2014) ("In reviewing a trial court's denial of a motion for judgment notwithstanding the verdict, the appellate court considers whether there is any evidence adduced, however slight [,] from which reasonable jurors, applying the appropriate standard of proof, could find in favor of the plaintiff on the claims presented." (Citation, internal quotation marks, and ellipses omitted)). "[I]f the nonmoving party offers competent evidence that rises above speculation, hypothesis, and conjecture, the [judgment notwithstanding the verdict] should be denied." *Barnes v. Greater Balt. Med. Ctr., Inc.*, 210 Md. App. 457, 480 (2013).

C. Analysis

In viewing the light most favorable to Appellants, we find significant evidence existed to show that Appellees acted grossly negligent. In *Barbre v. Pope*, 402 Md. 157, 187 (2007), the Court of Appeals noted the fine, fact-dependent, distinction between simple negligence and gross negligence. The Court explained:

> [G]ross negligence is an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another, and also implies a thoughtless disregard of the consequences without the exertion of any effort to avoid them.

The Court of Appeals recently reiterated that a claim for gross negligence, "sets the evidentiary hurdle at a higher elevation[.]" *Beall v. Holloway-Johnson*, 446 Md. 48, 64 (2016). In order to claim that a party has acted with gross negligence, it must be pled that the party acted with wanton and reckless disregard for others. *Id.* (holding that a wrongdoer

is guilty of gross negligence or acts wantonly and willfully only when they inflict injury intentionally or is indifferent to the rights of others, that he acts as if such rights do not exist).

This Court has explained the difference between the terms "willful" and "wanton" as follows:

> Willful misconduct is performed with the actor's actual knowledge or with what the law deems the equivalent to actual knowledge of the peril to be apprehended, coupled with a conscious failure to avert injury. By contrast, a wanton act is one performed with reckless indifference to its potential injurious consequences. The term "wanton" generally denotes "conduct that is extremely dangerous and outrageous, in reckless disregard for the rights of others."

Wells v. Polland, 120 Md. App. 699, 719 (1998) (citing *Doehring v. Wagner*, 80 Md. App. 237, 246 (1989)). Generally, whether there is gross negligence depends on the facts and the circumstances of each case and is typically a question for the jury. Further, gross negligence is a "question of law only when reasonable [people] could not differ as to the rational conclusion reached." *Romanesk v. Rose*, 248 Md. 420, 423 (1968). If the facts are so clear as to permit a conclusion as a matter of law, it is then for the trier of fact to conclude whether the Appellees' negligent conduct amounts to gross negligence. *See Taylor v. Harford Cnty. Dep't of Social Servs.,* 384 Md. 213, 229 (2004) (internal citations omitted).

In their pursuit to find that Appellees did not act with gross negligence, Appellees draw our attention to *Tatum* and *McCoy*, *supra*, which we discuss. In *Tatum v. Gigliotti*, 321 Md. 623 (1991), a representative of a patient who died during an asthma attack brought

a wrongful death and survival action against EMTs and Prince George's County. Mr. Tatum had called 911 and informed the dispatcher that he was having a severe asthma attack.[11] Medics responded to the call and attempted to treat him for hyperventilation, "although that act was in contravention of the prescribed treatment for an asthma attack." *Id* at 625. Mr. Tatum was aided walking down twelve flights of stairs but was not carried on a stretcher. En route to the hospital, the paramedic attempted to place an oxygen mask over Mr. Tatum's face, but he resisted. At some point during the ride, Mr. Tatum fell out of the seat and was lying face down on the floor. Upon arrival at the hospital, the ambulance report, compiled and signed by one of the EMTs, indicated that Mr. Tatum arrived to the hospital in stable condition. The emergency room nurse testified otherwise, stating that Mr. Tatum was in complete respiratory and cardiac arrest when he arrived. The hospital staff was unable to revive Mr. Tatum and he died due to oxygen deprivation. In that case, this Court rejected the argument that the EMTs' failure and falsification of the ambulance report rose to gross negligence by which we reasoned, "[t]he evidence…indicated that although the [medics'] actions may have amounted to negligence, they do not satisfy the threshold of gross negligence." *Tatum v. Gigliotti*, 80 Md. App. 599, 569 (1989).

In *McCoy v. Hatmaker*, 135 Md. App. 693 (2000), Mr. McCoy collapsed while driving himself and a co-worker to work. After the car came to a stop, Mr. McCoy was unresponsive and making a gargling noise. Seeing all of this, his co-worker flagged down

[11] Mr. Tatum had severe asthma and suffered from asthma for a considerably long time.

a passing police officer who stopped and took Mr. McCoy's pulse. The officer conveyed to the co-worker that McCoy had a small pulse. When an ambulance arrived, the officer advised EMT's that Mr. McCoy was in full cardiac arrest. The EMT ran to the vehicle and took no resuscitation efforts due to his observation that Mr. McCoy had no pulse, dilated and fixed pupils, expelled bodily fluids, and a decreased body temperature. In that case, McCoy's estate alleged that the EMT was grossly negligent in failing to render appropriate aid to the decedent. It further alleged that the EMT failed to follow emergency medical protocols related to the treatment of deceased patients. This Court ruled that the well-intentioned, accidental, medical decisions made under emergency circumstances does not equate to a deliberate choice not to render medical care to a patient. Thus, in that case, we found no gross negligence.

Returning to the case at bar, we hold that there existed evidence that could lead the jury to find gross negligence. The evidence that exists includes: (1) Harbor Hospital emergency room physician Dale Barnes' testimony that he first witnessed Mr. Butler seated in a wheelchair in the hallway just inside the ambulance entryway to the emergency room. He recalled that when he approached him, Mr. Butler was slumped over, unresponsive, and without a pulse; (2) Cisneros' testimony revealed that she understood if a patient complained of chest pains they were going to get certain levels of treatment that Mr. Butler was not allowed;[12] (3) John Blake, Captain of Emergency Medical Services for the BCFD,

[12] A portion of Cisneros' deposition testimony was read to the jury and revealed her understanding that: "[I]f they're complaining of chest pain, they're automatically going to get all of diagnostics. If I find [from those] diagnostics that there is, in fact, a serious issue,

testified that before a patient is moved, all EMS providers must question each patient as to the reason for each call, the duration, nature, and location of their symptoms. Moreover, they are required to inquire about their activities at the time the symptoms appeared, past medical history, and any medication used. Further, he confirmed that all EMTs are trained to recognize that patients who are clutching their chest, having trouble speaking or breathing, sweating, or are complaining of chest pain or heartburn-like symptoms may be suffering from Acute Coronary Syndrome (a reduction of blood flow to the heart).

It is clear from the testimony provided at trial that both Appellees knew or should have known that Mr. Butler's symptoms were, at the very least, signs of Acute Coronary Syndrome. While Appellees contend that Mr. Butler did not complain of chest pain, there are records and documentation that indicate Appellees knew of Mr. Butler's chest pain ("[Mr. Butler] had chest pain three minutes ago…"). In addition, Appellees had knowledge of Ms. Butler's 911 call describing Mr. Butler's chest pain, as well as the pain Mr. Butler was experiencing under his right arm and in his throat. As such, a jury could reasonably conclude that Appellees were grossly negligent in failing to administer the proper aid required to treat Acute Coronary Syndrome.

then the next steps are taken. But if you're complaining about chest pain, you're going to get nitroglycerine. You're going to get aspirin. You're going to get oxygen, in fact, if necessary. You're going to get an IV, you know? Those are just givens. That's it." An additional portion of her deposition testimony was read to the jury, during which Cisneros admitted knowing that permitting a cardiac patient to walk could worsen his condition.

As mentioned, gross negligence arises when a person "inflict[s] injury intentionally or is so utterly indifferent to the rights of others that he [or she] acts as if such rights did not exist." *Kelly v. Duvall*, 441 Md. 275 (2015); *see also*, *McCoy v. Hatmaker*, 135 Md. App. 693 (2000). Considering the facts outlined above, Appellees knew the protocol required to treat a patient who is clutching their chest, having difficulty speaking or breathing, and complaining of heartburn-like symptoms. Here, a jury could have reasonably found that they employed none of their training in the case of Mr. Butler, and that these were not well-intentioned, accidental, medical decisions made under emergency circumstances. A jury could have found these facts show a deliberate choice not to render medical care or a failure to perform a manifest duty in reckless disregard of the consequences affecting the life of another. We hold that there was sufficient evidence adduced at trial for the jury to have found Appellees acted with gross negligence in their treatment of Mr. Butler. The mere fact that another panel of jurors may have reached a different conclusion is not enough to justify the trial court's decision to grant a motion for JNOV.

II. Maryland Fire and Rescue Company Act

A. Parties' Contentions

Appellants ask that we "reconsider whether the Maryland Fire and Rescue Company Act . . . afforded Appellees immunity for simple negligence." Appellants argue that the Fire and Rescue Act does not apply to municipalities and their employees, despite the Court of Appeals' stating otherwise in *Mayor & City Council of Baltimore v. Chase*, 360 Md.

121, 756 A.2d 987 (2000). Instead, Appellants assert that the statute was intended to apply only to volunteers, as evidenced by legislative history. Appellants maintain that the continued validity of *Chase* is questionable "[b]y virtue of the majority's refusal to consider substantively the legislative history of the Act[.]" To support this position, Appellants draw our attention to Judge Raker's dissent in *Chase*, which Appellants insist "convincingly establishes that the legislature intended the law to apply only to private or quasi-private volunteer fire companies[,]" as well as the Court's subsequent decision in *TransCare Maryland v. Murray*, 431 Md. 225 (2013).

Appellees respond that this Court is bound by the *Chase* decision and "cannot look to legislative history to contradict a statute's plain meaning." Furthermore, Appellees assert that if the plain language of the statute is ignored, "dire consequences for firefighters, medics, and the public they serve would result."

B. Standard of Review

Trial courts are granted broad discretion in granting or denying equitable relief. However, "where an order [of the trial court] involves an interpretation and application of Maryland constitutional, statutory or case law, our Court must determine whether the trial court's conclusions are 'legally correct' under a *de novo* standard of review." *Schisler v. State*, 394 Md. 519, 535 (2006).

C. Analysis

Although there is clear merit to both the parties' arguments here, this Court is bound by precedent, and precedent is clear on this issue. The Fire and Rescue Company Act, MD. CODE, CTS & JUD. PROC., §5-604 ("the Act") provides, in pertinent part:

> (a) Notwithstanding any other provision of law, except for any willful or grossly negligent act, a fire company or rescue company, and the personnel of a fire company or rescue company, are immune from civil liability for any act or omission in the course of performing their duties.

The Court of Appeals considered this language to determine whether, under the Act, a paramedic in the Baltimore City Fire Department was immune from civil liability in the performance of his duties. *Chase*, 360 Md. at 123. There, the patient's estate sued the paramedic, alleging that his negligence in care caused the patient's death. *Id*. at 124. The estate made the same argument Appellants make here – that the Act applied only to volunteer and private fire companies. *Id*. The majority disagreed in a 4-3 decision.[13] After a thorough examination, the Court determined that "it is clear that, whether looking at the plain language of [the Act], or looking at its legislative intent, [the Act] grants, and was intended to grant, immunity to fire and rescue companies, be they municipal, or volunteer." *Id*. at 132-33.

This Court is bound by the Court of Appeals' decision in *Chase*. "Unless a case can be distinguished on its facts, this Court does not have the option of disregarding Court of

[13] In doing so, the Court of Appeals reversed this Court's decision in *Chase v. Mayor and City Council of Baltimore*, 126 Md. App. 427(1999).

Appeals' decisions that have not been overruled, no matter how old the precedent may be." *Johns Hopkins Hosp. v. Correia*, 174 Md. App. 359, 382 (2007), aff'd, 405 Md. 509 (2008). Therefore, we continue to follow the precedent set in the *Chase* decision and conclude that the trial court's conclusion was legally correct.

III. Appellees' Motions for Mistrial

In their cross-appeal, Appellees argue that the trial court abused its discretion in denying their Motions for Mistrial due to jury misconduct and statements made during Appellants rebuttal.

Standard of Review

We review Appellees' claim that the trial court erred when it denied their motion for mistrial under an abuse of discretion standard. *See Nash v. State*, 439 Md. 53, 66-67 (2014) ("Like many aspects of a trial, we review a court's ruling on a mistrial motion under the abuse of discretion standard."); *see also, Braxton v. Faber*, 91 Md. App. 391, 409-10 (1992) ("in determining whether a party has been denied a fair trial due to juror misconduct, the Court of Appeals advises that…such questions be left to the sound discretion of the trial court, whose decision should only be disturbed in those cases where there has been a plain abuse of discretion, resulting in palpable injustice.") (quoting *Safeway Trails, Inc. v. Smith* 222 Md. 206. 217-18 (1960). An abuse of discretion occurs when no "reasonable person would take the view adopted by the [trial] court or when the court acts without reference to any guiding rules or principles." *North v. North*, 102 Md. App. 1,13-14 (1994) (internal citations omitted).

An abuse of discretion does not exist in situations where, upon appellate review, this Court would not have made the same ruling. *Id.* at 14. Instead, this Court's decision is that an abuse of discretion is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable." *Gray v. State*, 388 Md. 366, 389 (2005) (internal citations omitted). Because we give such deference to trial judges, the court's decision will not be disturbed absent some abuse of discretion.

1. Jury Misconduct

A. Parties' Contentions

Appellees contend if we decide that the trial court erred in granting the Motion for Judgment Notwithstanding the Verdict, which we did, we should remand this case for a new trial because the trial court erred when it denied Appellees' motion for mistrial based on juror misconduct. They claim juror misconduct based on the jury foreperson's comments to the trial court's clerk. The jury foreperson stated, "we don't have to stay, or we don't have to hear anymore, we made our decision." The clerk reported this comment to the trial judge, who asked the jury foreperson to write down his comment. Both parties were notified and Appellees filed a motion for mistrial. In response, the trial judge asked the jury foreperson if he had been discussing the case with other jurors, to which he responded "Not really, no." After the jury foreperson made conflicting statements, the judge conducted a voir dire of each juror. All but one juror mentioned that they had not discussed the merits of this particular case. The one juror who mentioned discussing the

case, juror number four, stated that she made a few comments to another juror during lunch. Following the voir dire, Appellants moved to strike juror number four. Appellees disagreed, arguing instead to strike the jury foreperson. The Jury foreperson was subsequently dismissed and an alternate juror took his place.

Appellants argues because the trial judge notified counsel of the jury foreperson's remarks and completed a voir dire of each juror to determine whether they had discussed the evidence, the court did not abuse its discretion. Moreover, Appellants contend that Appellees' counsel "asked no follow-up questions of any jurors other than in establishing with juror number two that she was unaware of any discussion of testimony by any jurors." Finally, Appellants contend "…Appellees failed to carry their burden before the trial court of demonstrating misconduct, and have failed to demonstrate in this appeal that the responses of any one or more jurors were either untruthful or that their cursory observations and opinions as they described them when asked were so prejudicial as to indicate that Appellees were denied their right to a fair trial." Thus, Appellants maintain, the trial court did not abuse its discretion. We agree.

B. Analysis

> When considering whether a trial court abused its discretion, we must first determine whether the movant was prejudiced by the denial. *Owens-Corning Fiberglas Corp. v. Garrett*, 343 Md. 500 (1996). In *Medical Mut. Liab. Ins. Soc'y v. Evans*, 330 Md. 1, 19-20 (1993) the court of Appeals held: Where the [Motion for Mistrial] is denied and the trial judges give a curative instruction, we must determine whether the evidence was so prejudicial that it denied the defendant a fair trial; that is, whether the damage in the form of prejudice to the defendant transcended the curative effect of the instruction.

In this case, the jurors were instructed by the trial court that they should not discuss anything about the case with each other, or anyone else. At the first instance of juror misconduct, the trial court promptly notified the parties and conducted a voir dire of each juror individually. Upon finding misconduct, the court dismissed the jury foreperson and replaced her with an alternate. After reviewing cases where courts have been faced with juror misconduct and did not act with proper discretion, we hold that this case does not rise to that level of abuse. *See Johnson v. State,* 423 Md. 137 (2010) (The Court of Appeals held that the trial court abused its discretion in denying the defendants motions for a mistrial without first conducting a voir dire of the jury to determine the nature and scope of potential prejudice.); *see also, Wardlaw v. State,* 185 Md. App. 440 (2009) (After it was discovered that a juror had done outside research on an issue, constituting misconduct, the trial court abused its discretion in not conducting a voir dire of the jurors to determine whether they could still render an impartial verdict based on the evidence adduced at trial.); *Dillard v. State*, 415 Md. 445 (2010) (The Court of Appeals held that a trial judge's neglect to conduct a voir dire examination of two jurors who had contact with State's witnesses constituted an abuse of discretion.) The trial court took steps necessary to isolate the jurors and determine whether the jury was improperly biased. Thus, we hold that these actions do not result in palpable injustice to Appellees and there is no abuse of discretion.

2. Appellants' Rebuttal

A. Parties' Contentions

Appellees claim that the trial court abused its discretion because it did not grant its motion for mistrial because "Appellants' counsel sought to exploit the jurors' emotional response to the case by suggesting, during the rebuttal portion of his closing argument, that the Appellees had engaged in criminal activity and that such activity had somewhere been covered up." Specifically, they claim that when Appellants' counsel stated in its rebuttal:

> Now, the coroner has an obligation to conduct an investigation, and you'll see in the Harbor record that not only was there an investigation by them, but there was an investigation by the police department. We couldn't get that record. Nowhere to be found. Appellants made false, inflammatory, and unfair prejudicial statements and by allowing those statements, thereby denying Appellee's motion for mistrial, the trial court abused its discretion. Much like its former argument on jury misconduct, Appellees cite no case law to support its contention.

Appellants concede that they mistakenly referred to the medical examiner as a coroner's office and had done so without the awareness of any true distinction between the two, and without objection from Appellees. Moreover, it argues "any error or taint created by references to 'coroner' and 'an investigation' was cured when the trial court instructed the jury that Maryland does not have a 'coroner' and that the jury was to disregard the reference to an investigation." Appellants contend that there was no unfair prejudice because the jury was told that nothing the lawyers say is evidence. Finally, they maintain "Appellees have not sustained their burden of demonstrating that the remarks of

Appellants' counsel were so blatantly prejudicial that Appellees were deprived of a fair trial." We agree.

B. Analysis

This Court has oft used a party's neglect to cite any authority in making its arguments as grounds to not answer its questions. *See Oroian v. Allstate Ins. Co.,* 62 Md. App. 654 (1985) (This Court refused to answer Appellant's question, and thus they waived it, because they cited no authority to support their position.) Nonetheless, we will answer Appellees' question, but are unconvinced that there existed an abuse of discretion on the part of the trial court. As mentioned in the section *supra*, when looking to determine whether there is an abuse of discretion for the denial of a Motion for a Mistrial, when the judge gives a curative instruction, we look for whether the evidence was so prejudicial that it denied Appellees a fair trial.

In the instant case, there exists no abuse of discretion based on the allowance of Appellants' alleged "prejudicial" language. Rather, the trial court made every effort to cure any such bias by stating:

> All right. Members of the jury, please disregard any statements or remarks about a police investigation and/or a coroner's investigation. We don't have a coroner's here in Maryland. We have an office of the Chief Medical Examiner that performs the autopsies. And that report is in evidence.

We do not believe that the jury based its verdict on whether or not a police investigation was conducted or if Maryland has a coroner's office. Instead, the verdict was based on evidence adduced at trial that showed that Appellees were at least negligent in their care of

Mr. Butler. Therefore, we hold that these actions do not result in palpable injustice to Appellees and there is no abuse of discretion on the part of the trial court.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED IN PART AND AFFIRMED IN PART. THE CASE IS REMANDED TO STRIKE THE JUDGMENT NOTWITHSTANDING THE VERDICT AND IMPOSE THE JURY VERDICT. 33.5% OF COSTS TO BE PAID BY APPELLANTS, 66.5% OF COSTS TO BE PAID BY APPELLEES.

Circuit Court for Baltimore City
Case No. 24C14001249

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 238

September Term, 2016

ESTATE OF KERRY R. BUTLER, JR., et al.

v.

JOSEPH STRACKE, et al.

Leahy,
Reed,
Rodowsky, Lawrence F.
(Senior Judge, Specially Assigned),

JJ.

Dissenting Opinion by Rodowsky, J.

Filed: October 1, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

I respectfully dissent. In my opinion the Court has failed to appreciate the breadth of the grant of immunity to members of fire and rescue companies as recognized by our cases and, ultimately, as conferred by Maryland Code (1973, 2013 Repl. Vol.), § 5-604(a) of the Courts and Judicial Proceedings Article (CJ).

When reviewing a judgment notwithstanding the verdict, I recognize that the Court resolves conflicts of fact in favor of the party that prevailed before the jury. The conflict may be direct or as the result of fair inference from primary facts. This does not mean that uncontradicted facts and facts that are not controverted by fair inference may be ignored. In this case there is no direct contradiction of the testimony of ***Emergency Medical Technician (***EMT) Stephanie Ann Cisneros (Cisneros) relating the symptoms described to her by Mr. Butler and observed by her when she took the patient's history at and in the ambulance.

The appellees, Cisneros and Joseph Stracke (Stracke), in response to a call for "chest pain," departed Locust Point at 1:09 a.m. on March 2, 2011. Cisneros is an Advanced Life Support medic. She has had 100 hours of courses on the protocols for acute coronary symptoms. Stracke is an EMT-B. He is basically an ambulance driver who can read blood pressure and blood oxygen. The dispatch was to 850 Bethune Road near the intersection of Seagull Avenue and Bunche Road in Cherry Hill. They arrived at the intersection at 1:18 a.m. but could not find No. 850 (because there is no such address). Stracke stopped the ambulance, alighted with a flash light, and searched in the dark for No. 850. He did not go searching pushing a stretcher or carrying a medical bag.

After calling 9-1-1, Mrs. Butler had assisted her husband in dressing and in getting downstairs where, just inside the front door, he sat in a chair awaiting the ambulance. Mrs. Butler saw Stracke, got his attention, and he came directly to No. 860 Bethune Road. Cisneros notified the dispatcher that the medics were at the patient at 1:20 a.m. She moved the ambulance to directly in front of No. 860.

If Bethune Road is considered as running east and west, No. 860 is on the north side. It is second from the west end of a group of four, two-story, party wall houses. The groups are separated by open space and not by cross streets. There are no steps between the front door of No. 860 and the north curb of Bethune Road. The walkway is flat and the distance from Mr. Butler's front door to the parked ambulance was "short" according to Mrs. Butler.

A principal contention of the appellants is that the appellees violated protocol by having or allowing Mr. Butler to walk from his front door to the ambulance. Appellees failed to get a stretcher from the ambulance in order to transport the patient by that means.

Whether there was a conversation between Mrs. Butler and Stracke is the subject of conflicting evidence. Mrs. Butler testified that she "yelled" to Stracke and that the tone of his response was "very angry[, v]ery loud."[1] Mrs. Butler further testified that she told Stracke that Mr. Butler had said to her that he was having a heart attack. Stracke,

[1]Mrs. Butler did not say that Stracke was angry with her or her husband. He could have been upset over the response time lost due to the incorrect address furnished by the dispatcher.

nevertheless, said to Mr. Butler, "Sir, sir, you're going to have to walk." Mrs. Butler said that her husband walked "slowly" and was "stumbling," with his hands on his chest.

Mrs. Butler's evidence may or may not be sufficient to support a finding of negligence, but it is not evidence of gross negligence. *Tatum v. Gigliotti*, 80 Md. App. 559 (1989), *aff'd*, 321 Md. 623 (1991), is on point. It involved a patient who was transported due to a severe asthma attack and who died as a result of severe oxygen deprivation. Immunity in that case was claimed by two Prince George's County EMTs under the "Good Samaritan" statute, Md. Code (1957, 1980 Repl. Vol.), Art. 43, § 132, later recodified as CJ § 5-603, conferring immunity for "any professional act or omission [in rendering medical assistance] not amounting to gross negligence."

The facts as stated by the Court of Appeals were these:

> "[The EMTs] attempted to place a paper bag over his face as treatment for hyperventilation, although that act was in contravention of the prescribed treatment for an asthma attack. The EMTs assisted Tatum *as he walked down the twelve flights of stairs to reach the ambulance*, but they did not carry him on a stretcher, even though he was having great difficulty breathing. In the ambulance, Gigliotti attempted to place an oxygen mask over Tatum's face, but the latter struggled against that action and would not allow it. At some point, on the way to the hospital Tatum fell off the ambulance bench onto the floor of the vehicle. He was lying face down on the floor when the ambulance arrived at the hospital.
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> "Gigliotti's ambulance report indicated that Tatum arrived at the hospital in stable condition, but that diagnosis was contradicted by the emergency room nurse who testified that Tatum had been in complete respiratory and cardiac arrest upon his arrival at the hospital."

321 Md. at 625-26 (emphasis added).

On the gross negligence issue, this Court held that "[t]he breach of duties of an E.M.T. is not, *per se*, tantamount to gross negligence." 80 Md. App. at 571. Further, the actions of Gigliotti did "not satisfy the threshold of gross negligence," *id.* at 569, defined as "'wil[l]ful and wanton misconduct,' a 'wanton or reckless disregard for human life or for the rights of others.'" *Id.* at 568 (quoting ***Foor v. Juvenile Services,*** 78 Md. App. 151, 170, *cert. denied*, 316 Md. 364 (1989)).[2]

Here, while Mr. Butler walked toward the ambulance, Mrs. Butler, dressed only in a night coat, stayed in the doorway. When Mr. Butler exited the house, Cisneros grabbed her medical bag and an oxygen bottle, and went toward Mr. Butler. She started assessing him as they approached each other. He was walking without a cane, his breathing appeared normal, and he was talking. She deferred taking vital signs until she, Mr. Butler, and Stracke were in the ambulance.

In the ambulance, all of the patient's vital signs were normal. Mr. Butler denied, *twice*, that he had chest pain. He said that his throat was burning. He also said that he had pain on his *right* side. Cisneros palpated under the right arm but could not reproduce the pain. Mr. Butler's lungs were clear. While taking the patient's history, Cisneros learned that, shortly before retiring for the night, Mr. Butler had eaten a spicy chicken sandwich. Mrs. Butler confirmed the content of her husband's late meal.

[2]The petition for certiorari did not seek review of this Court's holding that there was no gross negligence.

Mr. Butler was twenty-eight years at the time of his death. He was 5' 7" tall and weighed 244 pounds. He had no history of any heart problems and was in apparent good health.

Taking all of the above-reviewed factors into consideration, Cisneros concluded that Mr. Butler was "Priority 3," *i.e.*, "[n]on-emergent."

At 1:24 a.m., four minutes after encountering the patient, the ambulance departed for Harbor Hospital where it arrived at 1:27 a.m. There was no change in Mr. Butler's condition en route. Stracke took Mr. Butler into the hospital in a wheelchair. There, on the very sketchy Patient Arrival Information form, Cisneros described the patient's complaint as "heartburn." The triage form, taken at 1:40 a.m., and based on information from Cisneros, states that the chief complaint is "heartburn, p[atient] eating spicy food." While seated in a wheelchair in the emergency room, awaiting attention by the medical staff for about ten minutes, Mr. Butler complained that his chest was hurting. He suddenly collapsed and was prevented by Stracke from falling from the chair. When the emergency room physician saw him, Mr. Butler was unresponsive and had no pulse.

With the hindsight furnished by the autopsy, we now know that Mr. Butler had atherosclerotic cardiovascular disease and died as the result of thromboses in nearly completely occluded arteries on each side of his heart. We now know that the assessment by Cisneros did not conform to the actual medical situation. The issue here is whether, in terminology more suited to alleged medical malpractice, this failure correctly to "diagnose" was grossly negligent.

Summary judgment was entered in favor of two EMTs and affirmed by this Court in *McCoy v. Hatmaker*, 135 Md. App. 693 (2000), *cert. denied*, 364 Md. 141 (2001), where, because the patient, McCoy, was diagnosed as dead by an EMT, cardiopulmonary resuscitation (CPR) was not administered as required by the applicable protocol. McCoy suffered a heart attack on the street. He was unresponsive to the first police officer on the scene, who detected a small pulse. That officer so advised a second officer, a qualified EMT, but the latter detected no pulse. When the ambulance arrived the EMT, Hatmaker, examined the patient and concluded that he was dead. Hatmaker did not follow protocol. Protocol directed that advanced life support procedures be applied and continued, absent obvious signs of death, until the patient reached the hospital or a physician directed termination of treatment. Obvious signs of death were defined as "injury incompatible with life," and included decapitation, rigor mortis, or decomposition of bodily organs. *Id.* at 710 n.6.

Hatmaker felt no heartbeat in McCoy's carotid artery and detected no heart sound by stethoscope. Opening the patient's eyelids revealed a fixed stare. The patient's body "had already released body fluids and his body temperature had already dropped markedly." *Id.* at 701. But, Hatmaker had not, as set forth in the protocols, asked other persons at the scene about the patient's symptoms (there was a passenger in the patient's car), not used a monitoring device to determine the compatibility of heart rhythms with life, not checked for electrical pulse activity, and not continuously applied CPR.

This Court said that "we cannot equate a well-intended error in medical judgment—even if it costs the patient's life—with wanton and reckless disregard for the life of that patient." *Id*. at 713. The appellant in *McCoy* could "not point to *any* facts that show he made a *deliberate* choice not to give McCoy a chance to survive." *Id.* We held that "at the end of the day, it is deliberateness that lies at the core of the *Tatum* standard of willfulness and wantonness." *Id.* at 713-14.

In the case before us, Mr. Butler was not only responsive, he was described by Cisneros as "very pleasant" and "very chatty." "He was upset that he had to go to the hospital, but he had no other way. He had tried other means to get rid of the burning in his throat." His blood pressure, pulse, and blood oxygen were normal. His lungs were clear. His complaint of pain on the right side was not reproducible. His complaint of a burning sensation in the throat could well have been attributable to his spicy chicken meal. The assessment by Cisneros was accomplished in the four minutes that elapsed after the medics located Mr. Butler and before departure to Harbor Hospital. There is no legally sufficient evidence that the appellees made a deliberate choice not to give Mr. Butler a chance to survive.

This rule which this Court has adopted in these cases conforms with the intent of the General Assembly. One commentator has explained:

> "The immunity statutes, as a whole, were enacted to protect individuals engaged in activities that are considered to be socially beneficial, even though harm may sometimes result. This is particularly true in cases such as those involving police officers, rescue personnel, or other persons rendering emergency assistance, where, as a society, we expect those individuals to

> consciously and knowingly make instantaneous decisions that may result in harm to others."

Randolph Stuart Sergent, *Gross, Reckless, Wanton, and Indifferent: Gross Negligence in Maryland Civil Law*, 30 U. Balt. L. Rev. 1, 35 (2000) (footnotes omitted).

This policy is particularly forceful in the Fire or Rescue Companies statute, CJ § 5-604(a), as manifested by its terms. The personnel of those entities "are immune from civil liability for any act or omission in the course of performing their duties," but the immunity is lost only for "any willful or grossly negligent act." Literally, if there is willful or gross negligence by an omission, the immunity is not lost. This seems to be deliberately intended. As introduced in Senate Bill 731 of the 1983 session, the provision read:

> "A volunteer fire company is immune from liability in the same manner as a local government agency for any act or omission in the course of performing its duties if:
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> "The act or omission is not one of gross negligence."

"Omission" was dropped from the grounds for loss of immunity by amendment in the course of passage of what became Chapter 546 of the Acts of 1983. The strong implication is that the Legislature wanted severely to restrict second guessing about what an EMT should have done, but did not do.

I am hard pressed to find in the Court's opinion in this case what the appellees deliberately failed to do that they should have done. It is said that Mr. Butler's symptoms were signs of Acute Coronary Syndrome (ACS). The protocol for "Cardiac Emergencies: Chest Pain/Acute Coronary Syndrome" defines ACS "as patients presenting with angina or angina equivalents such as chest, epigastric, arm, or jaw pain or discomfort and may be

associated with diaphoresis, nausea, shortness of breath or difficulty breathing." I shall assume, *arguendo*, that the heartburn recorded by Cisneros falls within the concept of epigastric pain. The Court says that the appellees "knew the protocol required to treat" suspected ACS but failed to employ their training. Slip opinion at 13. The treatment for ACS prescribed by the protocol, after placing the patient in a position of comfort, is to "[a]ssist patient with administration of patient's own prescribed nitroglycerin. May be repeated in 3-5 minutes" under certain conditions. It is undisputed that Mr. Butler had no history of heart disease. He was not under treatment for heart disease. He had no supply of nitroglycerin. Even if the appellees had a supply, they could not administer it because it had not been previously prescribed for Mr. Butler by a doctor of medicine.

There is no gross negligence. I would affirm.