STATE OF MICHIGAN

COURT OF APPEALS

CHRISTINE SIELER, Personal Representative of the ESTATE OF KURTIS SIELER, WILBERT SIELER, TODD SIELER, and BRENT SIELER,

Plaintiffs-Appellees/Cross Appellants,

v

STATE OF MICHIGAN, DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT, FOOD AND DAIRY DIVISION, and TAJALLI HODGE,

Defendants-Appellants/Cross Appellees,

and

DIRECTOR OF DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT and DIRECTOR OF DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT, FOOD AND DAIRY DIVISION,

Defendants.[1]

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No. 367323
Court of Claims
LC No. 21-000229-MM

Before: BORRELLO, P.J., and MALDONADO and WALLACE, JJ.

WALLACE, J.

[1] Pursuant to the parties' stipulation, the Court of Claims dismissed with prejudice defendants the Director of the Department of Agriculture and Rural Development, and the Director of that Department's Food and Dairy Division.

Defendants-appellants appeal by right the Court of Claims' order denying their motion for summary disposition brought under MCR 2.116(C)(10) (no genuine issue of material fact) with regard to plaintiffs' negligence-based tort claims,[2] while plaintiffs cross-appeal that order insofar as it granted defendants summary disposition of their constitutional claims.[3] We affirm.

I. FACTS

This case arose from the tragic death of plaintiff Christine Sieler's decedent, Kurtis Sieler, after he inhaled toxic fumes while working inside a confined bulk-milk tank at the Sieler family's dairy farm. Plaintiffs Wilbert, Todd, and Brent Sieler, also allegedly sustained injuries from exposure to the fumes while attempting to rescue Kurtis, as well as extreme emotional distress resulting from their involvement in the incident. Plaintiffs' complaint, asserting claims of gross negligence, grossly negligent infliction of emotional distress, and a deprivation of the constitutional right to bodily integrity free from government interference under Const 1963, art 1, § 17, centered around the alleged reckless conduct of defendant Tajalli Hodge, in her official capacity as a dairy inspector with the Department of Agriculture and Rural Development (MDARD), in instructing or advising plaintiffs to enter the bulk tank and manually clean its interior to rid it of a protein film using a paste made from a chlorinated-alkaline industrial cleaner, Cold War, which plaintiffs allege reacted with residue from a sanitizer to produce the toxic fumes.[4]

For decades, Wilbert, his two sons, Todd and Kurtis, and Kurtis's son, Brent, have owned and operated a dairy farm in Dundee. The Sieler farm stores its milk in a bulk tank that has an automated clean-in-place (CIP) system for cleaning the tank's interior. The bulk-milk tank holds 1,500 gallons, is oblong in shape and roughly 10 feet long by 5 feet high, measuring 78 inches at its widest. Approximately a third of the tank is situated inside the farm's milk house, with the remainder extending through the exterior wall to the outside. There is an 18-inch circular hatch or "manhole" on top of the tank, which provides the only access to its interior. The manhole is located approximately 6 inches from the south end of the portion of the tank situated inside the milk house.

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[2] An order denying a motion for summary disposition under MCR 2.116(C)(10) based on a claim of governmental immunity is a final order appealable by right. MCL 600.308(1); MCR 7.202(6)(a)(v); MCR 7.203(A)(1).

[3] Although defendants appeal by right the order denying their motion for summary disposition based on a claim of governmental immunity, MCR 7.203(A)(1) provides that an appeal from such order "is limited to the portion of the order with respect to which there is an appeal of right." Because the dismissal of plaintiffs' constitutional claim does not bear on that matter, plaintiffs were required to seek leave to appeal to challenge the trial court's order in this respect; a cross-appeal was not sufficient. However, in the interest of judicial economy, we will consider plaintiffs' cross-appeal as an application for leave, and decide it as on leave granted. See *Wardell v Hincka*, 297 Mich App 127, 133 n 1; 822 NW2d 278 (2012); *Pierce v Lansing*, 265 Mich App 174, 182-183; 694 NW2d 65 (2005).

[4] Although the decedent, Kurtis, is not, in fact, a plaintiff, we will generally refer to Kurtis, Todd, Wilbert, and Brent collectively as "plaintiffs."

The top of the tank is roughly 21 inches from the milk-house ceiling, and it is necessary to use a ladder to reach the manhole. The tank is large enough for a person to fit inside.[5]

Todd explained that, after the milk is pumped out of the bulk-milk tank, the tank must be cleaned and sanitized to prevent contamination, and that the automated CIP system "does a rinse water, then it puts the soap in, then it rinses, then it puts the acid sanitizer in." Well water is used in the cleaning process, which by all accounts carries a sulfur smell.[6] According to Todd, the farm used "Principal," a detergent, and "Finalize," an acid sanitizer, in the bulk tank's CIP system.

The Sieler farm also had on hand a granular cleaner, Cold War, which they used to clean the pipeline system, but not the bulk tank.[7] A representative from Ecolab, a chemical company that serves the dairy industry, described Cold War as a chlorinated-alkaline cleaner used in CIP systems; a "[s]trong alkaline caustic" cleaner that is "too high [in] alkaline to really [be] used as a manual cleaner." According to the Ecolab representative, such a high-alkaline cleaner should be "automated dispensed" because the "risk of burns is high." Cold War, therefore, is recommended for use in only automated CIP systems, not in manual applications. Joe Packard, a milk specialist with the Michigan Milk Producers Association (MMPA) who worked with the Sieler farm for several years, similarly described Cold War as a "highly caustic substance."

Todd admitted that, before 2019, he had not read the Cold War label's warnings of the danger of "severe skin burns and eye damage," to "not breathe dusts or mists," to "[w]ear protective gloves/protective clothing/eye protection/face protection," that mixing Cold War "with acid or ammonia releases chlorine gas," and to read its safety-data sheet before use, which had comprehensive information regarding its use, and also "Do not breathe dust/fume/gas/mist/vapors/spray. Use only with adequate ventilation."

On April 30, 2019, Hodge visited the Sieler dairy farm to perform a routine inspection. The bulk-milk tank was empty, so Hodge climbed the ladder, opened the manhole, looked inside with a flashlight, and "saw a blue rainbow film towards the back of the tank on the left-hand side," at the end of the tank opposite the manhole. The film was indicative of a protein buildup. Hodge

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[5] Testimony indicated that Todd, Kurtis, and Brent had each entered the bulk tank on different occasions to clean the pipeline, using household dish soap to remove "milk stone buildup," which condition arose every three to four years.

[6] Defendant has alleged that Kurtis' death was caused by exposure to toxic levels of hydrogen sulfide emitted by the well water. Neither Todd nor Wilbert believed that the presence of hydrogen sulfide in the well water was problematic. They testified that they were not aware of anyone in the county who had experienced problems with the water's level of hydrogen sulfide, and no one ever expressed concern to Todd about that. Todd testified that Joe Packard, a milk specialist with the Michigan Milk Producers Association who worked with the Sieler farm, never advised him to sample the well water for sulfur. Wilbert and Brent stated that they were not aware of anyone ever being overcome with fumes from the well water.

[7] Todd purchased the farm's chemicals from the Michigan Milk Producers Association, a co-operative that pools its member dairy farms' milk to market it.

noted in her inspection report: "Bulk tank not clean—rainbow film," "unclean equipment cannot be properly sanitized," and indicated that, because of that condition, the farm would be re-inspected.[8] Hodge also noted that the farm used Clorox as a sanitizer, but she acknowledged on deposition that she was aware the farm used Finalize for sanitizing the bulk tank. Hodge issued the Sieler farm a permit to sell milk, but warned that the operators must take corrective action to clean the protein film by May 14, 2019, to avoid possible suspension of the permit, court action, or fines. The report further stated, "You may contact the MDA [Michigan Department of Agriculture] with questions concerning the instructions for the correction of items," and provided Hodge's phone number.

According to Todd, after reading Hodge's report, he and Kurtis looked inside the bulk-milk tank, but did not observe a film. Todd then personally observed the CIP system in operation, and opined that the "normal cleaning system" was working properly. The Sielers did not call Hodge.

On May 24, 2019, which was the Friday before Memorial Day, Hodge returned to the Sieler farm. She again looked into the bulk-milk tank and saw a protein film in the same place, but it "was not as strong or heavily present as it was in the April 30 inspection." Hodge noted in her report, "Bulk tank still isn't clean. Blue/rainbow film, likely protein build up. Unclean equipment cannot be properly sanitized." The report again invited the Sielers to "contact the MDA with questions," and provided Hodge's phone number. Hodge also handwrote that she would return in four days, and "[p]lease give me a call to discuss." The report warned that the failure to take corrective action by May 27, 2019, which was the Tuesday after Memorial Day, could result in suspension of the permit to sell milk, court action, or fines.

According to Todd, after reading the inspection report, he looked inside the bulk-milk tank, and observed no film. Afterward, he called Hodge, who told him that "a rainbow film . . . needed to be cleaned further," after which Todd told her that he had observed the CIP cleaning system operating properly. According to Todd, Hodge was "adamant that . . . there was this film, this buildup," which "needs to be cleaned further." According to Todd, he asked what he should do, and Hodge told him to "take a cleaner; generally a dry powder, granular, works best; to make a paste of it, apply it [to] the walls of the tank and scrub it." Todd replied, "I have a dry granular. I have Cold-War," and asked if that product would work. According to Todd, after hesitating, Hodge replied, " 'I'm not familiar with it, but if Cold-War's what you have, take the Cold-War, make a paste and apply it,' " adding, " 'You either have to take a long-handle brush or you have to get in the tank and manually scrub it. . . . [M]ake a paste, apply it to the side of the tank and scrub it." Todd stated that Hodge did not mention anything about taking safety precautions, and indicated that she would return the following Tuesday. Todd testified that Kurtis, who "was standing there with his phone," heard Hodge say, " 'There is a buildup. Needs to be cleaned further . . . . Use the Cold-War. Make a paste.' "

[8] Hodge noticed the strong sulfur smell in the milk house, which she understood was from the well water, but indicated that that was not a concern relating to milk safety. She did not identify any concerns with using well water in the dairy equipment and would have communicated that in her inspection report if she had any.

Hodge, who was aware that a second person was present during the call and did not dispute that that person was Kurtis, admitted that Todd asked her what he could do to remove the protein film, and that she "advised him that he could manually apply a paste made with a chlorinated detergent to try to remove the protein film."[9] And, after Todd identified Cold War as the detergent on hand, she told him she was unfamiliar with it, but that "if it was a chlorinated detergent, it should remove the film . . . ." According to Hodge, they did not discuss whether the bulk tank should be entered to clean it, nor did she advise Todd that somebody should enter the tank for manual cleaning. Rather, she assumed that a long-handled scrub brush could be used to reach the protein film without having to enter the tank, even though she had never personally seen a brush that could have reached the back of the 10-foot tank. Hodge further admitted that she was unfamiliar with Cold War, had not read its label or safety-data sheet, was not aware that Cold War should be used in only automated CIP systems and in a diluted state, and had no knowledge how caustic Cold War was compared to other chlorinated-alkaline cleaners, that combining a Cold War paste with a sanitizer, such as residual Finalize, might create toxic fumes, or that using Cold War in that manner could subject the Sielers to a risk of chemical exposure. Hodge testified that she never advised plaintiffs that she had such expertise, nor made statements to Todd about the safety of Cold War, indicating that Todd did not ask whether they needed to take any safety precautions while applying the paste. Hodge denied *instructing* or *directing* Todd to use a particular product in a particular manner, and characterized her statements as mere advice.

According to Todd, after his conversation with Hodge, Kurtis told him that, because Hodge was returning soon, he would go ahead and clean the bulk-milk tank so they would not have to worry about it over the Memorial Day weekend. Todd admitted that he and Kurtis did not discuss ventilating the tank before entering it, using a monitor to check for hazardous fumes, whether Todd should assist Kurtis, or being especially careful about entering the tank.[10] Instead, according to Todd, he simply "did what I was told," and assumed that they did not need to take any safety precautions because Hodge never told them of any such need. Todd left to clean the barn, while Kurtis went to the milk house.

Todd recalled that, approximately 10 to 15 minutes later, he went to the milk house to "see if it's working," where he found Kurtis inside the bulk tank, unresponsive. Todd alerted Brent and then climbed into the tank, grabbed Kurtis, and "push[ed] [Kurtis] up through the manhole in the top" to Brent. Todd continued that he also handed a brush and a bucket containing the paste up to Brent or Wilbert. Todd administered CPR to Kurtis until paramedics arrived. The Sielers were transported to the hospital, where Wilbert, Todd, and Brent were evaluated and released, but tragically, Kurtis died. The medical examiner determined that the cause of death was "Volatile Chemical Toxicity," and experts subsequently retained by plaintiffs agreed.

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[9] Hodge's understanding of the troubleshooting guide at that time was that "manually applying a chlorinated paste to remove protein films was appropriate for use both in bulk tanks that needed to be manually cleaned and in CIP bulk tanks when the automated process had failed to properly clean that . . . tank."

[10] Wilbert, Todd, and Brent all testified that they were aware of the need to be careful while working in confined spaces, particularly regarding fumes present in the silo.

On June 5, 2019, Packard, the MMPA milk specialist, inspected the Sielers' bulk-milk tank and observed a protein film on its interior. Upon Packard's recommendation, Todd installed a larger soap jar in the CIP system, after which there were no further complaints about any protein films in the tank. On August 9, 2019, MDARD inspected the bulk tank again and deemed it clean. Packard characterized increasing the size of the soap jar as a "simple fix" to the protein-film issue.

Hodge testified that she did not believe that she was responsible for Kurtis's death because she did not instruct the Sielers to enter the bulk-milk tank, apply chemicals, or use Cold War in an unsafe manner. Hodge stated that it never occurred to her that plaintiffs, who were experienced and knowledgeable dairy farmers, would not follow safety warnings for hazardous chemicals, or enter a confined space without appropriate protection, or that her advice that the bulk tank might need to be manually cleaned using a chlorinated detergent would induce them to enter the tank, especially considering "how small the manhole was, the height of the bulk tank, and the lack of space between the ceiling and the top of the tank."

Packard testified that he was never trained to make a paste with Cold War as a means to remove a protein film from a bulk tank's interior, and agreed that "directing a farmer to make a paste out of Cold War . . . would be considered an off-label use" that he would not recommend. Nor would he recommend that a farmer enter a bulk tank to manually clean it, unless the "buildup [is] in an area of the tank that can be reached using a brush without entering the tank or breaching the plane of the manhole . . . ." When asked whether he was "aware of any brush . . . that could be used to manually clean [plaintiffs'] 1500-gallon tank without breaching the plane and entering the manhole," Packard responded "No."

The Ecolab representative testified that, in his 36 years at Ecolab, he had never recommended making a paste, and that Ecolab would recommend using Cold War in only CIP automated systems, as opposed to mixing it with water to make a paste to manually apply it to a tank's interior to remove a protein film. He cautioned that a user of a chemical product should never deviate from its label's use instructions, explaining that "the label is always specific to say where it can and would be used," and thus a chemical paste should be used only as the product's label recommended, and that a paste should not be used for manual application in CIP bulk tanks because of the lack of proper ventilation.

Joni Thompson, a regional dairy manager for MDARD, and Hodge's supervisor at the time of the incident, also did not "recall ever instructing or advising someone that [she] inspected to make a paste of any kind with a chlorinated detergent." Thompson, however, acknowledged that a dairy inspector might provide advice to a farmer about how to remove a protein film and refer to the troubleshooting chart, but cautioned that inspectors do not "instruct on any of this," and that ultimately it was the farmer's decision how to proceed. According to Thompson, MDARD dairy inspectors are trained not to endorse a particular product, or regarding specific chemical cleaners, and should therefore refrain from advising a farmer to use a certain product, but should advise the farmer to read the label or to contact the pertinent field or chemical representative, particularly if unsure of how to apply a product or its attendant risks. Barbara Koeltzow, an MDARD dairy-program manager, agreed that it was not improper for an MDARD inspector to give feedback, to answer a question regarding whether a particular approach would work, or to generally advise a farmer regarding the cleaning process, but that an inspector would never recommend that a farmer use a particular cleaner in a bulk tank, or provide explicit instruction regarding how to remove a

protein film. According to Koeltzow, the extent of an inspector's advice to a farmer regarding how to remove a protein film was generally to contact the pertinent "field rep," equipment dealer, or chemical-supply dealer. Thompson and Koeltzow both testified that an MDARD dairy inspector would *never* instruct, advise, or direct a farmer to enter a confined space, such as bulk tank.

Defendants moved for summary disposition. As to plaintiffs' negligence-based tort claims, defendants asserted that Hodge, as a government employee, was entitled to governmental immunity under the governmental tort liability act (GTLA), MCL 691.1401 *et seq.* Defendants argued that the parties' limited relationship did not give rise to a duty on Hodge's part of reasonable care in relation to plaintiffs, and that the risk of harm was not foreseeable because Hodge did not have any knowledge of the hazards of using Cold War, whereas plaintiffs knew of the risks of using hazardous chemicals and entering confined spaces. Defendants further argued that Hodge's conduct in advising plaintiffs how to clean their bulk-milk tank did not amount to gross negligence because it could not reasonably be characterized as so reckless as to demonstrate a substantial lack of concern for whether injury would result, given that Hodge had no knowledge of the hazards of using a Cold War paste to manually clean the bulk tank, and reasonably expected that plaintiffs would reach the protein film with a long-handled brush, or take appropriate safety precautions if they entered the tank. Defendants additionally argued that the evidence failed to establish that Hodge's conduct was *the* proximate cause of their injuries; rather, plaintiffs' negligent failure to protect themselves from exposure to known hazardous chemicals was the one most immediate and efficient cause of Kurtis's death and the surviving plaintiffs' injuries. Defendants also moved for summary disposition of the constitutional claim, arguing that plaintiffs failed to present any evidence showing that defendants intentionally harmed them, or acted with deliberate indifference to any such risk.

Plaintiffs responded that Hodge had a common-law duty of care, arising from the parties' inspector-farmer relationship, not to unreasonably endanger plaintiffs in instructing them how to clean the bulk-milk tank. Plaintiffs also argued that sufficient evidence existed to establish that Hodge was grossly negligent because she was aware of the danger in directing plaintiffs to enter the confined tank to clean its interior using a Cold War paste, and to establish that Hodge's having instructed plaintiffs to enter the tank with the Cold War paste was the one most immediate, efficient, and direct cause of plaintiffs' injuries. Plaintiffs additionally argued that summary disposition of their constitutional claim was not appropriate because factual issues existed regarding Hodge's knowledge, intent, and appreciation of the risks presented by her instructions to plaintiffs.

The trial court granted summary disposition of plaintiffs' constitutional claim, concluding that there was no evidence from which a reasonable juror could find that Hodge acted with the deliberate indifference necessary to establish a violation of their right to bodily integrity. However, the court denied summary disposition of the negligence-based tort claims, concluding that "Hodge did owe a duty of care under the circumstances presented, and that a genuine issue of material fact exists whether Hodge engaged in grossly negligent conduct that was the proximate cause of plaintiffs' injuries."

II. STANDARDS OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition to determine whether the moving party was entitled to judgment as a matter of law. *ER Zeiler Excavating, Inc v Valenti Trobec Chandler Inc*, 270 Mich App 639, 643; 717 NW2d 370 (2006).

> A motion made under MCR 2.116(C)(10) tests the factual support for a claim, and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ.
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> When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. [*Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 55-56; 744 NW2d 174 (2007) (quotation marks, citations, and alteration brackets omitted).]

Whether a duty of reasonable care exists presents a question of law subject to review de novo. *Cummins v Robinson Twp*, 283 Mich App 677, 690; 770 NW2d 421 (2009). This Court also reviews de novo constitutional issues. *Id*.

III. NEGLIGENCE-BASED TORTS UNDER THE GTLA

Defendants claim that the trial court erred in denying summary disposition of plaintiffs' negligence-based tort claims brought in reliance on MCL 691.1407(2) of the GTLA. We disagree.

Under the GTLA, "governmental employees are generally immune from tort liability when they are engaged in the exercise or discharge of a governmental function." *Dougherty v Detroit*, 340 Mich App 339, 345; 986 NW2d 467 (2021) (quotation marks and citation omitted). MCL 691.1407(2) provides a governmental employee immunity from tort liability while acting in the course of his or her employment if (a) the employee "is acting or reasonably believes he or she is acting within the scope of his or her authority," (b) "[t]he governmental agency is engaged in the exercise or discharge of a governmental function," and (c) the employee's "conduct does not amount to gross negligence that is the proximate cause of the injury or damage."[11]

[11] As the trial court found, the parties did not dispute that Hodge, as an MDARD dairy inspector, was a governmental employee acting in the course of her authority, or that she was engaged in the exercise or discharge of a governmental function while inspecting the Sieler farm's dairy equipment. Therefore, only the third requirement is at issue.

"[T]he tort of negligence consists of four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Cummins*, 283 Mich App at 692. "Under the GTLA, a governmental employee is entitled to governmental immunity against a claim of negligence . . . when the employee owed no duty to the plaintiff, the employee's conduct was not grossly negligent, or the employee's conduct was not the proximate cause of the plaintiff's injuries." *Dougherty*, 340 Mich App at 346 (citations omitted).

A. DUTY

Defendants first argue that the trial court erred by concluding that Hodge was under a common-law duty of care "to provide clear and informed cleaning instructions that would not expose [plaintiffs] to an unreasonable risk of injury or death." We disagree.

"It is axiomatic that there can be no tort liability unless a defendant owed a duty to a plaintiff." *Hill v Sears, Roebuck & Co*, 492 Mich 651, 660; 822 NW2d 190 (2012) (quotation marks, citations, and alteration brackets omitted). " 'Duty' is a legally recognized obligation to conform to a particular standard of conduct toward another so as to avoid unreasonable risk of harm." *Cummins*, 283 Mich App at 692.

> *Every person engaged in the performance of an undertaking has a duty to use due care or to not unreasonably endanger the person or property of others*. However, as a general rule, there is no duty that obligates one person to aid or protect another. Generally, the duty that arises when a person actively engages in certain conduct may arise from a statute, a contractual relationship, or by operation of the common law . . . . [*Hill*, 492 Mich at 660-661 (quotation marks and citations omitted; emphasis added).]

See also *Dougherty*, 340 Mich App at 347; *Cummins*, 283 Mich App at 692. "[T]he GTLA does not create any duty. Therefore, a plaintiff must establish that the governmental employee owed the plaintiff a common-law duty without regard to that defendant's status as a government employee." *Id*. (quotation marks and citation omitted).

> At common law, the determination of whether a legal duty exists is a question of whether the relationship between the actor and the plaintiff gives rise to any legal obligation on the actor's part to act for the benefit of the subsequently injured person. The ultimate inquiry in determining whether a legal duty should be imposed is whether the social benefits of imposing a duty outweigh the social costs of imposing a duty. Factors relevant to the determination whether a legal duty exists include the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented. . . . [H]owever, . . . the most important factor to be considered in this analysis is the relationship of the parties and also that there can be no duty imposed when the harm is not foreseeable. [*Hill*, 492 Mich at 661 (quotation marks, citations, emphasis, and alteration brackets omitted).]

"Where the duty of a public official arises from his official authority, the duty is for the benefit of the public at large. A duty is owed to a specific individual only when performance would affect

the individual in a manner different in kind from the way performance would affect the public." *Harrison v Dir of Dep't of Corrections*, 194 Mich App 446, 456-457; 487 NW2d 799 (1992).

We agree that the parties' inspector-farmer relationship was sufficient to give rise to a duty on the part of Hodge to act for plaintiffs' benefit when she undertook to affirmatively instruct plaintiffs how to clean their bulk-milk tank to rid it of the protein film. Hodge, as the Sieler farm's MDARD dairy inspector, was directly responsible for inspecting the farm and enforcing legal regulations to ensure that the milk it produced was safe for consumption.[12] Testimony established that Hodge's job duties included inspecting the farm's dairy equipment for signs of unsanitary conditions to ensure that any milk coming in contact with the equipment did not become contaminated, and that protein films were removed. While performance of these duties clearly benefited the public at large, it is also apparent from the evidence that Hodge was in a position to provide advice or instruction to plaintiffs that would affect plaintiffs in ways beyond how the general public was affected. See *id.*

Specifically, Hodge, in her role as an MDARD dairy inspector, had apparent authority to bring about detrimental consequences to the Sieler farm if a deficiency identified on inspection was not rectified, including suspending the farm's permit to sell milk, court action, or fines.[13] And, Hodge's specific conduct of providing instruction to plaintiffs during the course of an inspection regarding how to rid their bulk-milk tank of a protein film fell within the scope of their inspector-farmer relationship. Even though Hodge was not *required* to instruct, direct, or advise plaintiffs on how to clean their bulk tank,[14] Koeltzow, MDARD's dairy-program manager, and Thompson, a regional dairy supervisor and Hodge's then supervisor, testified to the general practice of dairy-farm inspectors providing advice or instruction to farmers on such matters in the course of their relationship. Further, Hodge testified to her knowledge and training regarding the removal of protein films, and her reliance on a troubleshooting guide for pertinent information. And, the inspection report itself stated, "You may contact the MDA with questions concerning the instructions for the correction of the items listed," and provided Hodge's phone number. Further,

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[12] The Manufacturing Milk Law, MCL 288.561 *et seq.*, obligates "[t]he director" to "foster and encourage the dairy industry of the state and, for that purpose, shall investigate the general conditions of the dairy farms . . . with the object of improving the quality and creating and maintaining uniformity of the dairy products of the state." MCL 288.611.

[13] Under MCL 288.673(3)(j), the director may revoke or suspend a permit, or impose an administrative fine, upon determining that the permittee "[f]ailed to correct violations of this act noted on inspection reports after being given written instructions to correct the violations in a reasonable length of time."

[14] MCL 288.611 provides in part as follows:

> [T]he director . . . may cause instruction to be given in any dairy farm . . . in order to secure . . . the proper maintenance and sanitation of milk handling equipment, the proper maintenance of milk production facilities, . . . [or] the proper handling and storage of milk . . . . In order to secure a uniform and standard quality of dairy products in the state, the director shall furnish a sufficient number of competent and qualified inspectors for that purpose as provided for in this act.

on the report from May 24, 2019, Hodge handwrote, "Please give me a call to discuss" underneath her finding that the film indicative of a protein buildup was still present in the bulk tank.

In addition, there is no question that Hodge was "engaged in the performance of an undertaking," specifically, an inspection, during the times that she visited the Seiler's property, as well as the times she was interacting with the Seilers (regarding that inspection). In their brief on appeal, defendants fail to even argue that Hodge was not engaged in the performance of an undertaking, despite the fact that plaintiffs' primary argument in their brief in response to the motion for summary disposition, regarding the issue of duty, was to quote the following principle from *Berker-Witt v Bd of Examiners of Social Workers*, 256 Mich App 359, 364; 663 NW2d 514 (2003), where this Court said, " '[A] duty of care may derive from either a statute or the basic rule of the common law, which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his action as not to unreasonably endanger the person or property of others.' " Rather than present an argument as to why no duty existed in this matter pursuant to that basic rule of the common law, defendants simply ignored the rule.

For these reasons, we agree that Hodge was engaged in the prosecution of an undertaking – an inspection, as well as inspection follow-up. We also agree that Hodge's undertaking, in inspecting the farm, affirmatively directing plaintiffs to call her about the protein film she identified during two inspections, indicating on her reports that plaintiffs must take corrective action to avoid adverse consequences, and then providing specific, specialized instruction on how to clean the tank to rid it of the problematic protein film—by making a paste from Cold War and manually applying it to the tank's interior surface—plainly affected plaintiffs directly in a manner different in kind from the way such an inspection would affect the public.[15] See *Harrison*, 194 Mich App at 456-457. We therefore conclude that because Hodge was engaged in the prosecution of an undertaking, as described above, and because of the parties' inspector-farmer relationship, she owed a duty to plaintiffs to use due care or to so govern her action as to not unreasonably endanger them, i.e., she had a duty to act with reasonable care for plaintiffs' specific benefit.

We also agree that the harm was reasonably foreseeable. "Foreseeability depends on whether a reasonable person could anticipate that a given event might occur under certain conditions." *Iliades v Dieffenbacher North America, Inc*, 501 Mich 326, 338; 915 NW2d 338 (2018) (quotation marks and citation omitted).

The evidence established that Hodge was aware that the Sieler farm's 10-foot bulk-milk tank was enclosed and could be accessed only through an 18-inch manhole at the top of the portion of the tank located in the milk house, which was only 21 inches from the ceiling. Hodge also was, or should have been, aware that the protein film, which was located at the end of the tank opposite

[15] We disagree with defendants' assertion that the trial court erred in finding that Hodge directed the Sielers to contact her for instruction regarding how to remove the protein film from the bulk tank. Again, the inspection report explicitly stated, "You may contact the MDA with questions concerning the correction of items listed," and Hodge handwrote, "Please give me a call to discuss," on her report underneath her finding that the film indicative of a protein buildup was still present. And, in her deposition, Hodge stated, "I asked them to give me a call, yes," in response to the question "On this instance you did give a directive for them to call you, correct?"

the manhole, would have been difficult to reach through the manhole from outside the tank with a long-handled brush.[16] Further, Hodge testified that she had received training on the dangers of entering confined spaces. Importantly, in light of Hodge's status with the MDARD and apparent expertise, it was reasonably foreseeable that plaintiffs would defer to her specialized instruction on how to rid the bulk tank's interior of the problematic protein film, especially considering the fact that Hodge directed plaintiffs to call her about the issue, plaintiffs knew that Hodge could initiate consequences detrimental to their business if they did not rectify it, and that plaintiffs had only four days to rid the tank of the film before re-inspection.

Under these circumstances, we conclude that it was reasonably foreseeable that following Hodge's advice and/or instructions would induce plaintiffs to enter the tank to manually apply the Cold War paste to remove the film, which could result in potentially toxic fumes being present in a confined space.[17] Even in the absence of any specific knowledge of Cold War's caustic or reactive properties, a person in Hodge's position should reasonably anticipate that instructing plaintiffs to manually apply a paste made from an industrial-use chlorinated cleaner to the inside of a confined tank might result in serious harm, especially given the obvious difficulty of accessing the protein film with a brush from outside the tank.

Moreover, obligating Hodge, a state-dairy inspector who voluntarily provided plaintiff-farmers specialized instruction on how to remove a protein film from their bulk-milk tank, to do so in a careful and informed manner so as not to expose plaintiffs to an unreasonable risk of harm would not overly burden defendants. There was testimony that MDARD inspectors were already trained *not* to endorse particular cleaning products, to refrain from advising a farmer to use a chemical cleaner if not clear about the proper application or potential risks, and to advise the farmer to contact the pertinent field or chemical representative. Further, the testimony was clear that an inspector should never recommend that farmers enter a confined space such as the bulk tank. In light of these existing operating standards, recognizing the duty of a dairy inspector, such as Hodge, who undertook to provide specialized instruction to milk producers regarding how to rectify a specific inspection issue, to do so in a careful and informed manner imposes no onerous or unworkable burden.[18] See *Hill*, 492 Mich at 670.

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[16] Hodge admitted that, at the time of the incident, she had never personally seen a brush that could have reached from the entrance to the back of the 10-foot tank. Thompson did not answer decisively when asked if a brush could reach the protein film located at the end of plaintiffs' bulk tank opposite the manhole, but indicated, however, that milk soils are generally reachable with a long-handled brush with extensions without entering the tank. Packard, however, testified that he was not aware of any readily available brush a person could use to manually clean the protein film in the subject tank without entering the manhole. We also acknowledge that the photographs of the bulk-milk tank illustrate the obvious difficulty presented.

[17] Although Hodge was not familiar with Cold War, she stated that she told Todd to make a paste from a chlorinated detergent.

[18] The testimony regarding these training and operating standards also provides evidence of the foreseeability of the danger that led to Kurtis' death, i.e., the inspectors were trained not to endorse particular products and to refrain from advising a farmer to use a chemical cleaner if not clear

Further, the nature of the risk presented by a dairy inspector's grossly negligent instruction is serious in light of the hazardous chemicals and conditions with which farmers work, even if that risk should undoubtedly be minimized by safety precautions or measures that farmers might reasonably be expected to take on their own initiative. Still, recognizing a duty of reasonable care on the part of an inspector who undertakes to provide affirmative instruction to a farmer on an inspection matter would encourage dairy inspectors to freely share their knowledge and expertise with farmers, while advancing the public policy of preventing harm that could result from grossly negligent instruction. See *Cummins*, 283 Mich App at 693 (the policy of preventing future harm is a relevant factor in determining whether a common-law duty exists).

We disagree with defendants' argument that recognizing such a duty will place an "impossible burden" on the state resulting in "massive liabilities." They assert that "[t]he result of finding such a duty is that state employees are now under a duty to provide instructions on how to safely carry out regulated activities." First of all, the implication of defendants' assertion is that they are permitted to ignore the basic rule of the common law in the present case; however, because Hodge was engaged in the performance of an undertaking, an inspection, and because performance of that inspection would affect plaintiffs different in kind from the way it would affect the public, she was required to act with reasonable care while performing that inspection. Second, the duty to use due care and caution when providing instruction arose from Hodge's affirmative undertaking to provide instruction, and thus it is not so broad as to generally expose defendants to expansive tort liability for failing to safeguard or protect persons situated as were plaintiffs.[19] In other words, Hodge was not under a general obligation to provide instruction to plaintiffs regarding the manner or method of cleaning their dairy equipment to remove a protein film, but once she undertook to do so, Hodge was obligated to act with due care.

In sum, weighing the parties' relationship, the foreseeability of the harm, the burden on defendants, and the nature of the risk presented, we agree with the trial court that when Hodge undertook to instruct plaintiffs regarding how to clean their bulk-milk tank to rid it of the protein film, she assumed a common-law duty to act with reasonable care. Further, while engaged in the undertaking of an inspection, she had a duty to use due care and to not unreasonably endanger the person or property of others.

Defendants raise several arguments against recognizing a duty of care, none of which we find persuasive. First, defendants argue that Hodge had no duty of care in relation to plaintiffs because "nothing in Michigan's dairy laws gave her any authority to require the dairy farmers to use certain detergents or to conduct cleaning in a specific fashion." While testimony established

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about the proper application or potential risks because endorsing products and advising farmers to use chemical cleaners when the inspector was not clear about proper application and risks was foreseeably dangerous. Likewise, inspectors were to never recommend that farmers enter a confined space such as the bulk tank because doing so is foreseeably dangerous.

[19] Although there is generally no "duty that obligates one person to aid or protect another," *Hill*, 492 Mich at 660 (quotation marks and citations omitted), "certain types of special relationships, such as common carrier and passengers, innkeepers and their guests, and doctors and patients, justify the imposition of a duty because a person entrusts himself or herself to the control of another person," *id.* at 666.

that Michigan's dairy regulations do not specify how dairy equipment is cleaned, or mandate which detergents be used, the duty at issue is based on the common-law, not statutory authority. As the trial court found, Hodge assumed that duty when she directed plaintiffs to call her about the protein film, and then provided specialized instruction regarding how to remove the film from their tank.

Defendants also argue that the parties' limited relationship was not sufficient to give rise to a duty of care because plaintiffs had no reason to believe that Hodge had any specialized knowledge concerning the removal of protein films from a bulk tank. Again, we disagree. Defendants point out that "Hodge never told the Sielers that she had any expertise in the means and methods to clean dairy equipment, the potential health hazards arising from detergents, or how to safely use those detergents," and that plaintiffs had no knowledge of Hodge's background, training, or expertise. Although plaintiffs might not have had *actual* knowledge of Hodge's expertise or knowledge, or lack thereof, regarding the cleaning a bulk tank, their reliance on Hodge's instruction was reasonable given Hodge's *apparent* professional expertise, in light of her status, authority, and experience as an MDARD dairy inspector, as well as the specialized instruction she actually provided.

Defendants additionally argue that Hodge had no duty to warn plaintiffs of the risks of entering the bulk-milk tank to clean it with a Cold War preparation when plaintiffs were independently aware of those potential hazards but took the risk even so. Defendants point out that the Cold War product contained a label specifically warning of inhalation risks, that plaintiffs testified to their awareness of the need to be careful while working in confined spaces, that plaintiffs knew that Hodge was not familiar with Cold War, and that MIOSHA requirements placed the duty to warn about hazardous-chemical exposure on plaintiffs.

As defendants correctly assert, "there is no duty to warn someone of a risk of which that person is aware." *Hill*, 492 Mich at 669 (quotation marks and citation omitted). However, it is not clear whether plaintiffs actually knew, or should have known, of the risks of using Cold War in the specific manner that Hodge instructed. Testimony indicated that making a paste from Cold War to manually apply it to a bulk tank with a CIP system was an "off label" use, and that plaintiffs did not normally use Cold War in their bulk-milk tank. Still, plaintiffs, as experienced farmers, who admittedly knew the risk of inhaling fumes in confined spaces, should have taken safety precautions themselves, such as ventilating the bulk tank before entering it, monitoring for hazardous fumes, using a safety harness, or otherwise assisting or observing Kurtis in the matter, but did not. Nevertheless, to the extent plaintiffs breached their own duty to exercise reasonable care for their own safety, that did not absolve Hodge of her duty to act with reasonable care when she instructed them to manually apply the Cold War paste inside a confined tank. Instead, any negligence on plaintiffs' part bears on the issue of comparative fault. See *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 33; 761 NW2d 151 (2008).

B. GROSS NEGLIGENCE

Defendants next argue that the trial court erred by concluding that the evidence, viewed in the light most favorable to plaintiffs, was sufficient to establish that Hodge's conduct amounted to gross negligence. We disagree.

To establish gross negligence in the context of the GTLA, plaintiffs must show that Hodge's conduct was "so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a). "Evidence of ordinary negligence is not enough to establish a material question of fact regarding whether a government employee was grossly negligent." *Chelsea Investment Group, LLC v Chelsea*, 288 Mich App 239, 265; 792 NW2d 781 (2010). "Rather, there must be evidence that the employee's conduct was reckless." *Id*. *Black's Law Dictionary* (10th ed) defines "reckless" as "[c]haracterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for indifference to that risk." Accordingly, "Grossly negligent conduct must be conduct that is substantially more than negligent." *Bellinger v Kram*, 319 Mich App 653, 659-660; 904 NW2d 870 (2017) (quotation marks and citation omitted). It has also been characterized as a " 'willful disregard of safety measures and a singular disregard for substantial risks.' " *Id*. at 660, quoting *Oliver v Smith*, 290 Mich App 678, 685; 810 NW2d 57 (2010). "It is as though, if an objective observer watched the actor, he could conclude, reasonably, that the actor simply did not care about the safety or welfare of those in his charge." *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004).

As to the element of gross negligence, the trial court found as follows:

> The Court also concludes that reasonable minds could differ as to whether Hodge's actions and omissions constituted gross negligence. There is evidence . . . that could sustain a finding that Hodge instructed Todd to clean the interior surfaces of the bulk milk tank using a paste made from the granular Cold War detergent, and that it must be done manually. There is also evidence that Hodge sanctioned the off-label use of Cold War, despite (1) her training to never endorse specific products; (2) her unfamiliarity with Cold War and its caustic properties, and with the other two sanitizing cleaners used to clean the bulk milk tank (Principle and Finalize)[4]; and (3) her lack of training regarding potential hazards associated with the use of chemicals on dairy farms. Further, Hodge recommended either entry into the tank and the use of a handheld brush, or the use of a long-handled brush. However, the size and configuration of the tank—twice inspected by Hodge—was such that use of a long-handled brush would not reach the affected part of the tank. Hodge also agreed in her testimony that she had never seen a long-handled brush long enough to have reached the film.[5]

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[4] Hodge conceded that she was aware the Sielers used Finalize for routine sanitization using the tank's CIP system.

[5] The 1,500-gallon bulk milk tank used by plaintiffs is oblong shaped and approximately 10 feet long. . . . The MMPA representative who inspected the tank after Kurt's death testified that there are no long-handled brushes that could have been used and that the only way to manually clean the tank would be to enter it.

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* * *

> The evidence reviewed above, if accepted as true, is sufficient to establish a question of fact as to gross negligence. That evidence establishes that: (1) Hodge is a dairy inspector with defendant MDARD; (2) Hodge enforces various regulations concerning the sanitary operation of dairy farms and had the authority to seek imposition of fines or a shutdown of the farm's milk operation; (3) Hodge told plaintiffs that the correction must be done within four days; (4) Hodge directed plaintiffs in writing to call her; (5); Todd called Hodge as directed and specifically inquired as to how he should remove the protein film from the interior surfaces of the tank; (6) Hodge directed Todd to make a paste from Cold War detergent, despite her training never to endorse specific products, her unfamiliarity with the caustic properties of sanitizing cleaners used to clean the bulk milk tank, and her lack of training regarding potential hazards associated with the use of chemicals on dairy farms; (7) Hodge instructed Todd that he could either use a long-handle brush to clean the tank from the outside of the tank or climb inside the tank and manually scrub it with the Cold War paste, despite the obvious difficulty, if not impossibility, of reaching the affected area of the tank with a long-handle brush; (8) ultimately, it was shown that there was no need for manual cleanings at all, since after the incident it was determined by another inspector that using a larger soap jar in the CIP would have resolved the problem; and (9) Todd and Kurt relied on Hodge's advice, directions, and professional expertise in undertaking the cleaning method. In addition, Packard . . . testified that an inspector should (1) never tell a farmer to "manually clean" a tank unless the area can be reached without having to breach the plane of the manhole; (2) never tell a farmer to enter a tank; and (3) never recommend or approve any particular cleaning product by name. Similarly, Barbara Koeltzow . . . testified that "we would never, ever tell somebody to go into a confined milk tank."
>
> This evidence, if accepted by the trier of fact, would be sufficient to conclude that Hodge acted recklessly or in willful disregard for plaintiffs' safety by improperly and erroneously directing use of the Cold War paste and manual cleaning which required entry into the tank. Thus, on the basis of the evidence presented, reasonable minds could differ as to whether Hodge's challenged conduct was grossly negligent.

Keeping in mind that "[t]his Court is liberal in finding genuine issues of material fact," *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008), we agree with the trial court's opinion that, viewing the evidence in the light most favorable to plaintiffs, reasonable minds might differ regarding whether Hodge's conduct was "so reckless as to demonstrate a substantial lack of concern for whether an injury results," MCL 691.1407(8)(a).

We disagree with defendants' argument that the evidence, at best, showed that Hodge committed only ordinary negligence by violating professional standards of practice or care when she instructed plaintiffs how to clean their bulk tank, not the gross negligence necessary to overcome governmental immunity.

> A claim that a defendant has violated an applicable standard of practice or care sounds in ordinary negligence. However, the plain language of the governmental immunity statute indicates that the Legislature limited governmental employee liability to "gross negligence"—situations in which the contested conduct was substantially more than negligent. . . . [A] violation of the standard of care of ordinary negligence . . . is a distinct and lesser standard of care than the gross negligence standard set forth in the GTLA. As such, even if a plaintiff could show that a government employee defendant's conduct breached "the applicable standard of practice or care," such a showing would not be sufficient to impose liability upon the employee. Rather, such a plaintiff would still have to make the additional showing that the employee's conduct amounted to "gross negligence" that was "the proximate cause" of the injury. [*Costa v Community Emergency Med Servs*, 475 Mich 403, 411-412; 716 NW2d 236 (2006).]

Here, Hodge's alleged gross negligence did not arise solely from her failure to conform to professional standards or practices. Rather, viewing the evidence in the light most favorable to plaintiff, the nonmoving party, the alleged gross negligence arose from Hodge's reckless conduct of instructing plaintiffs to use an industrial chemical cleaner, whose caustic properties she admittedly knew nothing about, in apparently an off-label and potentially dangerous manner, to remove the protein film located at the far end of the 10-foot tank opposite its only access point, making it obviously difficult to reach the film without entering the tank. Again, Hodge gave plaintiffs that instruction in her capacity as a presumptively authoritative and expert MDARD dairy inspector, after citing the farm for the protein film, threatening adverse action if that issue were not rectified, indicating that she would return in four days, and directing them to call her to discuss the issue, making it reasonable for plaintiffs to follow Hodge's instructions. If Todd's version of the facts is believed, a reasonable juror could conclude that Hodge's providing such blind instruction demonstrated a conscious disregard of, or indifference to, the risks presented, amounting to gross negligence.

We also disagree with defendants' contention that to demonstrate gross negligence plaintiffs were required to show that Hodge actually knew that her instruction to apply Cold War to the bulk-milk tank's interior presented a serious danger. They assert that the evidence established that Hodge had no such knowledge when she relied on a troubleshooting chart to advise plaintiffs to use a chlorinated paste to remove the protein film, and did not know that Cold War and Finalize, the farm's sanitizing agent, might react to create toxic fumes. Again, although defendants correctly assert that there was no evidence that Hodge had actual knowledge of Cold War's caustic properties, the evidence that Hodge affirmatively instructed plaintiffs to enter the bulk tank, while knowing of its obviously confined nature, to manually apply an industrial-use chemical product, without any knowledge of its caustic properties, supported a finding that she acted with a reckless indifference to the potential risk presented, and with a substantial lack of concern whether injury would result. MCL 691.1407(8)(a). That is, Hodge's admitted unfamiliarity with Cold War's

caustic properties in the application supported a finding that she acted recklessly by blindly instructing plaintiffs to manually apply a paste made of it in a confined tank.[20] A reasonable juror could conclude that Hodge's failure to refrain from instructing plaintiffs to use Cold War in that manner was reckless. Although, as defendants assert, Hodge never told plaintiffs to disregard safety measures when using Cold War, it was reasonable that plaintiffs, facing detrimental consequences to their business if they did not remove the protein film in short order, would confidently defer to their MDARD dairy inspector's apparent expertise, knowledge, and authority.

C. PROXIMATE CAUSE

Defendants next argue that the trial court erred by concluding that plaintiffs presented sufficient evidence to establish that Hodge's grossly negligent instruction was *the* proximate cause of plaintiffs' injuries. We disagree.

MCL 691.1407(2)(c) provides a governmental employee with immunity from tort liability if the "conduct does not amount to gross negligence that is the proximate cause of the injury or damage." Accordingly, "To be held liable under the GTLA, a defendant's gross negligence must be *the* most immediate cause of a plaintiff's injuries—it is not enough that the defendant's actions simply be 'a' proximate cause." *Tarlea*, 263 Mich App at 92. The grossly negligent conduct must be " 'the one most immediate, efficient, and direct cause.' " *Id*. at 89, quoting *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000). "Determining proximate cause under the GTLA, or elsewhere, does not entail the weighing of factual causes but instead assesses the legal responsibility of the actors involved." *Ray v Swager*, 501 Mich 52, 71-72; 903 NW2d 366 (2017). "[S]o long as the defendant is *a* factual cause of the plaintiff's injuries, then the court should address legal causation by assessing foreseeability and whether the defendant's conduct was the proximate cause." *Id*. at 74.[21] "This would require considering [the] defendant's actions alongside any other potential proximate causes to determine whether [the] defendant's actions were, or could have been, the one most immediate, efficient, and direct cause of the injuries." *Id*. at 76 (quotation marks and citation omitted).

Here, the trial court found that a question of fact existed whether Hodge's conduct was the proximate cause of Kurtis's death and plaintiffs' injuries, explaining as follows:

> [T]here is evidence that the primary reason the plaintiffs[] made a paste from the Cold War detergent is because Hodge told them to do so. There is also evidence that Kurt entered the tank because it was the only practical way to comply with Hodge's order to manually scrub the area, and to avoid the shutting down of their business and the sanctions that Hodge warned of in her inspection report. When one considers the actions of all the human actors, a reasonable juror could conclude that the one most responsible was Hodge, the person who made the judgment that

[20] We note that, although defendants rely on Hodge's referring to the troubleshooting chart to justify her conduct, that guide did not recommend using Cold War, but recommended using a chlorinated-alkaline detergent. Again, Hodge testified she was not familiar with Cold War.

[21] As the trial court recognized, defendants did not assert that Hodge's conduct was not a cause in fact of plaintiffs' injuries.

> (1) further cleaning was required; (2) it must be done manually and with a paste; and (3) Cold War would be an appropriate cleaner. In addition, it is not surprising that plaintiffs would seek to follow those directions as they came from the person who had the power to determine whether or not plaintiffs should be sanctioned or have their operation suspended. Given these facts, a fact-finder could reasonably conclude that Hodge's actions were the proximate cause of the injury.

Again, we agree. As defendants argue, a reasonable juror might find that Kurtis's conduct in entering the bulk-milk tank to manually clean it with a Cold War paste, without taking any safety precautions, despite plaintiffs' apparent awareness of the dangers of fumes in confined spaces, was a potential contributing cause to his death and plaintiffs' injuries. But a reasonable juror could also find that Hodge's conduct, in instructing plaintiffs to make a paste from Cold War, to enter the tank, and to apply it to the interior surface to remove the protein film, was the primary cause. Significantly, plaintiffs did not normally use Cold War in the bulk tank, which had an automated CIP system. And, given Hodge's status as an MDARD dairy inspector, with apparent expertise in cleaning dairy equipment, a juror could conclude that plaintiffs reasonably believed that using the Cold War paste as she instructed would not present a risk of serious harm. Indeed, Todd testified that, because Hodge did not say anything about taking any safety precautions, he assumed none was needed, and that "I did what I was told." Further, because Hodge was acting with the apparent authority to effect detrimental consequences to plaintiffs' farm and livelihood, a reasonable juror could also conclude that Kurtis would not have entered the tank to manually clean it using the Cold War paste had Hodge not directed plaintiffs to call her, and then instructed them to do that. As the trial court found, a reasonable juror could conclude from this evidence that the primary reason Kurtis entered the bulk tank with the Cold War paste was to comply with Hodge's instructions. Although reasonable minds might differ as to whether Hodge's conduct was the one most direct cause of the injuries, the existence of that factual question underscores the propriety of the trial court's refusal to decide the matter as a question of law.

For these reasons, we hold that the Court of Claims properly concluded that Hodge, having undertaken to instruct plaintiffs regarding the manner of cleaning their bulk tank, assumed a common-law duty to use due care. And that reasonable jurors could differ as to whether Hodge's conduct constituted gross negligence that was the proximate cause of Kurtis's death and the surviving plaintiffs' injuries. Accordingly, the court did not err in denying summary disposition of plaintiffs' negligence-based torts.

IV. CONSTITUTIONAL CLAIM

Plaintiffs argue on cross-appeal that the trial court erred in summarily dismissing their claim alleging a violation of their constitutional right to bodily integrity free from governmental interference under our state Constitution. We disagree.

"The Due Process Clause of the Michigan Constitution provides, in pertinent part, that '[n]o person shall . . . be deprived of life, liberty or property, without due process of law.' " *Mays v Snyder*, 323 Mich App 1, 58; 916 NW2d 227 (2018),[22] quoting Const 1963, art 1, § 17. "The

[22] Aff'd 506 Mich 157 (2020).

doctrine of substantive due process protects unenumerated fundamental rights and liberties under the Due Process Clause of the Fourteenth Amendment." *Id*. (quotation marks and citations omitted). "The substantive component of due process encompasses, among other things, an individual's right to bodily integrity free from unjustifiable governmental interference." *Id*. at 58-59 (quotation marks and citations omitted).

> Violation of the right to bodily integrity involves an egregious, nonconsensual entry into the body which was an exercise of power without any legitimate governmental objective. . . . However, to survive dismissal, the alleged violation of the right to bodily integrity must be so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.
>
> Conduct that is merely negligent does not shock the conscience, but conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level. At a minimum, proof of deliberate indifference is required. A state actor's failure to alleviate a significant risk that he should have perceived but did not does not rise to the level of deliberate indifference. To act with deliberate indifference, a state actor must know of and disregard an excessive risk to the complainant's health or safety. [*Id*. at 60-61 (quotation marks, citations, and alteration brackets omitted).]

The trial court disposed of plaintiffs' claim as follows:

> [I]n order to survive a motion under MCR 2.1116(C)(10) on this count, Plaintiff must present evidence from which a reasonable inference may be made that Hodge had affirmative knowledge that the use of Cold War paste would result in death or serious injury. Plaintiffs' complaint asserts that Hodge "knew or should have known" of the risk created by the use of the Cold War paste, and, nevertheless instructed or directed the Sielers to use it, knowing that to do so someone would have to enter the tank. In order to prevail on their constitutional claim, however, plaintiffs must show that Hodge knew of the risk, not merely that she should have known of the risk. Plaintiffs have not submitted any evidence from which this Court can conclude that Hodge was aware that the instruction to use the Cold War paste would result in the creation of toxic fumes, and Hodge denied any such knowledge in her deposition.

We agree. Here, the undisputed facts were that Hodge was unfamiliar with Cold War, and had no actual knowledge of its potential hazards, including its caustic properties, compared with other chlorinated-alkaline cleaners, such that the recommended application would expose plaintiffs to toxic fumes. Given the absence of any evidence that Hodge was aware of the risk her instruction presented, we agree that no reasonable juror could find that Hodge's conduct reflected an intent to injure plaintiffs, shocked the conscience, or otherwise constituted deliberate indifference.[23]

[23] To be clear, Hodge should have known that affirmatively instructing plaintiffs to enter the bulk tank, while knowing of its obviously confined nature, to manually apply an industrial-use chemical product, was a dangerous instruction that could result in injury. However, as the trial court

Accordingly, the Court of Claims appropriately granted defendants summary disposition of plaintiffs' claim asserting a violation of their constitutional right to bodily integrity.

Affirmed.

/s/ Randy J. Wallace
/s/ Stephen L. Borrello
/s/ Allie Greenleaf Maldonado

indicated, to support a claim of deliberate indifference under our state constitution, plaintiffs must prove that there is a question of fact as to whether she was aware of the risk of harm, see *Johnson v Wayne Co*, 213 Mich App 143, 153; 540 NW2d 66 (1995), not just that she should have been aware of the risk of harm.