STATE OF MICHIGAN

COURT OF APPEALS

DONALD BARTALSKY,

Plaintiff-Appellant,

v

ZACHARY OSBORN, KAITLYN MOUG, and COMMUNITY EMERGENCY MEDICAL SERVICES, INC.,

Defendants-Appellees,

and

WILLIAM BEAUMONT HOSPITAL, JOHN DOE CONSTRUCTION COMPANY, and JOHN ROE, also known as JOHN DOE,

Defendants.

FOR PUBLICATION
May 27, 2021
9:00 a.m.

No. 349317
Oakland Circuit Court
LC No. 2018-164869-NO

Before: SWARTZLE, P.J., and JANSEN and BORRELLO, JJ.

SWARTZLE, P.J.

Defendants Zachary Osborn and Kaitlyn Moug are emergency-medical technicians (EMTs) who work for defendant Community Emergency Medical Services, Inc. (CEMS). The two EMTs were transporting plaintiff Donald Bartalsky on a stretcher in a hospital parking lot, and plaintiff injured his hip when the stretcher fell over. Plaintiff sued defendants under theories of ordinary negligence and medical malpractice, but the trial court dismissed the claims under the immunity provision of the Emergency Medical Services Act (EMSA), MCL 333.20901 *et seq*. On appeal, we conclude that the mere transportation of a patient is not sufficient to meet the requirement that the act or omission causing the injury occur "in the treatment of a patient" under MCL 333.20965(1). Accordingly, the EMSA's immunity for acts or omissions that do not rise to the level of gross negligence or willful misconduct does not apply here, and we reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND

This case arises from an injury that occurred in the parking lot of William Beaumont Hospital. Plaintiff needed transportation to the hospital for evaluation of a nonemergency condition. Osborn and Moug transported him to the hospital, where he was evaluated and discharged. After discharge, the EMTs began the process of returning plaintiff to his rehabilitation clinic. Defendants claim that, consistent with their training, the EMTs secured plaintiff "with a 5-point restraint system" and moved the stretcher in a "Semi-Fowler" position. A Semi-Fowler position is a clinical position in which a patient is placed on an ambulance stretcher or hospital bed on their back with the head and trunk raised to an angle between 15 and 45 degrees.

According to plaintiff, Osborn and Moug began to wheel him out, but "[w]hile still in the Beaumont parking lot . . . Osborn and Moug, caused the wheels on the stretcher to hit some debris," causing the stretcher to "tip over" and plaintiff's left shoulder and hip to strike the pavement. Plaintiff alleges that Osborn and Moug "were further negligent in somehow (unwittingly) enabling the already injured Plaintiff to fall a second time on the concrete." In contrast, defendants claim that "as the two EMTs were transferring their patient from the ER to the ambulance on a stretcher, one of the stretcher wheels came in contact with debris in the ambulance bay and began to tip." Defendants assert that "the EMTs were able to maintain a grip of the stretcher when it tipped, mitigating the impact with the pavement," but that "[a]fter Plaintiff disregarded the instructions of the two EMTs to remain on the ground while they attended to the stretcher, he stood up and fell to the ground, striking his left side on the pavement," and breaking his left hip. The parties' differing factual accounts of the incident were not resolved below and are not pertinent to the critical issue on appeal.

Plaintiff sued defendants, alleging both negligence and professional malpractice, but not gross negligence. Defendants moved for summary disposition based on the argument that, under MCL 333.20965(1) and (1)(d), unless the acts or omissions of a licensed EMT and life-support agency are the result of gross negligence or willful misconduct, no liability will be imposed on them for providing services consistent with their licensure or training. The trial court agreed and dismissed plaintiff's claims against defendants, and plaintiff appealed. The trial court also dismissed several claims against other defendants, though these are not the subject of this appeal.

II. ANALYSIS

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). Defendants moved the trial court for summary disposition under MCR 2.116(C)(7) (immunity), (8) (failure to state a claim), and (10) (no genuine issue of material fact). The trial court granted the motion on the ground that defendants were not subject to claims of negligence short of gross negligence under the EMSA, thus indicating that it granted summary disposition under MCR 2.116(C)(7) or (8).

In reviewing a trial court's decision under MCR 2.116(C)(7), we consider the record evidence to determine whether the defendant is entitled to immunity. *Poppen v Tovey*, 256 Mich App 351, 353-354; 664 NW2d 269 (2003). In contrast, "[a] motion for summary disposition under

MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone." *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998) (citation omitted). In this appeal, however, the specific facts necessary to resolve the matter are not in dispute, and therefore the question before us focuses on the legal meaning of the immunity provision of the EMSA.

When construing a statue, we do not defer to the construction adopted by a trial court or administrative agency. *Stirling v County of Leelanau*, __ Mich App __, __; __ NW2d __ (2021), slip op at 2 & n 2. Rather, we review the matter de novo. When doing so, we are required to give effect to the Legislature's intent. *Van Buren Co Ed Ass'n v Decatur Pub Sch*, 309 Mich App 630, 643; 872 NW2d 710 (2015). "The Legislature is presumed to intend the meaning clearly expressed, and this Court must give effect to the plain, ordinary, or generally accepted meaning of the Legislature's terms." *D'Agostini Land Co LLC v Dep't of Treasury*, 322 Mich App 545, 554; 912 NW2d 593 (2018) (citation omitted). "Only when ambiguity exists does the Court turn to common canons of construction for aid in construing a statute's meaning." *Id.* at 554-555 (citation omitted).

B. PURPOSE AND SCOPE OF THE IMMUNITY PROVISION OF THE EMSA

The focus of our review on appeal is the immunity provision found in MCL 333.20965(1) of the EMSA. The provision reads in relevant part:

> (1) Unless an act or omission is the result of gross negligence or willful misconduct, the acts or omissions of a medical first responder, emergency medical technician, emergency medical technician specialist, paramedic, medical director of a medical control authority or his or her designee, or . . . an individual acting as a clinical preceptor of a department-approved education program sponsor while providing services to a patient outside a hospital, in a hospital before transferring patient care to hospital personnel, or in a clinical setting that are consistent with the individual's licensure or additional training required by the medical control authority . . . or consistent with an approved procedure for that particular education program do not impose liability in the treatment of a patient on those individuals or any of the following persons:
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> * * *
>
> (d) The life support agency or an officer, member of the staff, or other employee of the life support agency.

Our Supreme Court has recognized that the Legislature enacted the EMSA "to (1) provide for the uniform regulation of emergency medical services, and (2) limit emergency personnel's exposure to liability." *Jennings v Southwood*, 446 Mich 125, 133; 521 NW2d 230 (1994) (citation omitted). As the Court elaborated in *Jennings*, "Before the statutory immunity, emergency personnel were liable for their ordinary negligence. The Legislature, dissatisfied with this situation, enacted the EMSA limiting liability to situations of gross negligence or willful misconduct." *Id.* at 134. Thus, by enacting the EMSA, "the Legislature intended to shield emergency medical personnel from the very liability they were previously exposed to—liability for ordinary negligence." *Id.*

Plaintiff does not dispute that Osborn and Moug qualify as EMTs under MCL 333.20965(1) and that CEMS qualifies as a life-support agency under subdivision (d). Moreover, the parties contend, and we agree, that Osborn and Moug were transporting plaintiff when they wheeled him on the stretcher from the hospital toward the ambulance. The parties disagree, however, on whether immunity applies to covered persons and entities even in situations involving "nonemergency transportation" of a patient. Related to this, the parties spend considerable time and resources focused on whether plaintiff's injury occurred during an emergency or nonemergency circumstance. And yet, as we explain, the key question on appeal is whether "transportation" alone—emergency or otherwise—qualifies for immunity under MCL 333.20965(1) of the EMSA.

We begin with the specific text of MCL 333.20965(1). The provision lists the occupations that are subject to immunity: "a medical first responder, emergency medical technician, emergency medical technician specialist, paramedic, medical director of a medical control authority or his or her designee or . . . an individual acting as a clinical preceptor of a department-approved education program sponsor." This list of covered occupations is followed by a description of the location where services are provided: "outside a hospital, in a hospital before transferring patient care to hospital personnel, or in a clinical setting." The statute sets forth two additional, necessary conditions before immunity will attach: the act or omission must occur "while providing services to a patient" and "in the treatment of a patient."

As noted, there is no question on appeal that Osborn and Moug were engaged in a covered occupation, nor is there a question that CEMS is likewise covered as a life-support agency. Similarly, it is not contested that plaintiff's injury occurred as Osborn and Moug were transporting plaintiff outside a hospital. Our focus thus turns to whether defendants have satisfied the remaining two relevant conditions for immunity here—did their acts or omissions occur (1) "while providing services to a patient," and (2) "in the treatment of a patient"?

Considering the first of these two conditions, the term "services" is not defined in the EMSA. The act does, however, include a definition for "emergency medical services." MCL 333.20904(4). A fair reading of the statute leads to the conclusion that the more specific term "emergency medical services" is encompassed within the more general term "services." The EMSA defines "emergency medical services" to include "the emergency medical services personnel, ambulances . . . , medical first response vehicles, and equipment required for *transport or treatment* of an individual requiring medical first response life support, basic life support, limited advanced life support, or advanced life support." MCL 333.20904(4) (emphasis added). Assuming for purposes of this appeal that there is at least a question of fact whether plaintiff would qualify as an "individual requiring medical first response life support, basic life support, limited advanced life support, or advanced life support," it is clear from the statutory definition that "emergency medical services" includes services involved in the "transport or treatment" of that individual. Because defendants unquestionably provided transportation to plaintiff, they would appear to have satisfied the "while providing services" condition of MCL 333.20965(1). Thus, if the statute provided that covered persons and entities (like defendants) were immune from liability for ordinary-negligent acts or omissions solely "while providing services" to a patient in a covered location, then immunity would appear to extend to acts or omissions involving transportation of a patient (like plaintiff).

But as previously noted, the statute does not stop at the requirement that the covered individual be engaged in "providing services." The statute further limits immunity to only the acts or omissions of a covered person "in the treatment of a patient." MCL 333.20965(1). Therefore, even though defendants may have engaged in acts or omissions "while providing services" to plaintiff, we must consider whether these acts or omissions further qualify as "treatment" under MCL 333.20965(1).

C. DOES "TREATMENT" ENCOMPASS "TRANSPORT" UNDER THE EMSA?

Neither the term "treatment" nor the term "transport" is defined in the EMSA, nor is there a relevant definition for either term elsewhere in the Public Health Code. See, e.g., MCL 333.13807(10) (defining "transport" solely in the context of medical waste). "When terms are not expressly defined anywhere in the statute, they must be interpreted on the basis of their ordinary meaning and the context in which they are used." *People v Lewis*, 302 Mich App 338, 342; 839 NW2d 37 (2013) (cleaned up). A dictionary may be consulted as one tool in the interpreter's toolbox, "[h]owever, recourse to dictionary definitions is unnecessary when the Legislature's intent can be determined from reading the statute itself." *Id.* (cleaned up). In other words, if the meaning of a statutory term is plain from the text and context of the statute itself, resort to a dictionary is unnecessary.

During the proceedings before the trial court, defense counsel urged that court to take instruction about the meaning of MCL 333.20965(1) from several unpublished decisions of this Court, including *Griffin v Swartz Ambulance Serv*, unpublished per curiam opinion of the Court of Appeals, issued November 29, 2018 (Docket No. 340480). Although we do not ordinarily consider unpublished opinions, see MCR 7.215(C)(1), we do so here because we find *Griffin* to be especially instructive, *Hicks v EPI Printers, Inc*, 267 Mich App 79, 87 n 1; 702 NW2d 883 (2005).

In *Griffin*, an EMT who was driving an ambulance was involved in an auto accident while transporting the plaintiff to a hospital for medical treatment. *Griffin*, unpub op at 1. The auto accident caused a delay in treating the plaintiff's original injury, and resulted in the need to amputate a portion of the plaintiff's leg. *Id.* at 1-2. The panel majority observed that "MCL 333.20965(1) does not distinguish between emergency and nonemergency situations," noted that "MCL 333.20908(6) defines a 'patient' as 'an emergency patient or a nonemergency patient,' " and concluded that the EMSA does not "impose a condition that only services offered by first responders in emergency situations are entitled to immunity." *Id.* at 4. The panel additionally noted that "MCL 333.20965(1)(d) extends the immunity granted by the act to an ambulance service." *Id.* at 3. The majority considered a dictionary definition of the term "treatment" and concluded that the meaning of the term was not "limited to actual medical services rendered to patients being transported by ambulance," but included "the handling of a patient in an ambulance or techniques customarily applied when caring for ambulance patients, consistent with the training of first responders," including an ambulance driver. *Id.* at 4.

Judge MICHAEL J. KELLY dissented from the majority opinion in *Griffin*. In his dissent, Judge M.J. KELLY consulted a different dictionary and determined that the term "treatment" did not include the transport of a patient. *Id.* (M.J. KELLY, J., dissenting) at 2. He noted that the immunity provided by the statute applies only to actions taken "in the treatment of a patient," and he observed that, when the plaintiff in that case was injured, the ambulance driver was not actively attending to the plaintiff, but was merely driving the ambulance. *Id.* Because no negligent

"treatment" was alleged in that case, Judge M.J. KELLY concluded that the immunity provided in MCL 333.20965(1) did not apply. *Id.*

The plaintiff in *Griffin* subsequently filed an application for leave to appeal with our Supreme Court, which held oral arguments on the application. Ultimately, the Supreme Court denied the application for leave to appeal. *Griffin v Swartz Ambulance Serv*, __ Mich __; 947 NW2d 826 (2020). Justice ZAHRA (joined by Justice MARKMAN) and Justice VIVIANO issued dissenting statements to the order denying the application for leave to appeal. Justice ZAHRA expressed the opinion that transportation of a patient is not included in the scope of the term "treatment" as contemplated by MCL 333.20965(1), *id.* (ZAHRA, J., dissenting) at 828, and Justice VIVIANO would have granted leave to consider whether the term "treatment" is ambiguous, *id.* (VIVIANO, J., dissenting) at 830. Neither of these positions, however, was adopted by a majority of the Supreme Court, which declined to express an opinion regarding the extent of the immunity from liability granted by the statute. *Id.* (order of the Court) at 826.

We need not delineate comprehensive, exhaustive meanings of the terms "treatment" and "transport" to resolve the current appeal. We agree with the parties that defendants were transporting plaintiff within the meaning of the EMSA, and, therefore, we need go no further with that term. As for the term "treatment," we agree with the observations of Justices ZAHRA and VIVIANO that, were we to consult various dictionaries, it is possible that the term might include some form of transportation. See *id.* (ZAHRA, J., dissenting) at 828; *id.* (VIVIANO, J., dissenting) at 831. We decline to rely on dictionary definitions, however, for two reasons. First, as Justice ZAHRA noted, "the use of lay dictionaries on this subject is not helpful." *Id.* (ZAHRA, J., dissenting) at 828. Generally speaking, "[a] dictionary definition states the core meanings of a term. It cannot delineate the periphery." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West, 2012), p 418. None of the dictionary definitions of the term "treatment" cited in the various *Griffin* analyses explicitly include the word "transport" or a related term. Even if the term "treatment"—commonly understood to include "all the steps taken to effect a cure of an injury or disease," *Black's Law Dictionary* (5th ed)—could be construed to encompass some kind of transportation in some circumstance, the kind and circumstance would be, at best, near the periphery of any ordinary understanding of the term "treatment."

Second and more importantly for this appeal, a fair reading of the EMSA confirms that the term "transport" means something different than the term "treatment" under the act. As Justice ZAHRA noted in his dissent, the EMSA repeatedly "uses the words 'treatment' and 'transport' in close conjunction, yet clearly denoting *separate and distinct* concepts." *Id.* (ZAHRA, J., dissenting) at 828. For example,

> An "ambulance operation," as defined by MCL 333.20902(5), "means a person licensed under this part to provide *emergency medical services and patient transport*, for profit or otherwise." "Emergency medical services" are defined under MCL 333.20904(4) as "the emergency medical services personnel, ambulances, nontransport prehospital life support vehicles, aircraft transport vehicles, medical first response vehicles, *and equipment required for transport or treatment of an individual* requiring medical first response life support, basic life support, limited advanced life support, or advanced life support." In this way, the EMSA uses the word "treatment" and then, *separately*, uses the word "transport"

> to describe different functions of equipment used to provide varying degrees of life support. Thus, as far as "emergency medical services" under MCL 333.20902(5) are concerned, "treatment" is not synonymous with "transport"—even if neither term is defined by statute. Turning back to the statutory definition provided for "ambulance operations," one should note that "emergency medical services"—which includes the equipment *used for* treatment and transport of individuals—is separate from "patient transport." [*Id.* at 828-829 (footnotes omitted).]

There are other instances where "transport" and "treatment" are used to denote separate and distinct concepts in the EMSA. See MCL 333.20969 (discussing whether an individual has the capacity to object "to treatment or transportation"); MCL 333.20925 (distinguishing between treatment and transportation with regard to police dogs); cf MCL 333.20921(4)(b) (discussing "patient transport" as distinct from a form of treatment, "life support to that patient"). As Justice ZAHRA summarized in his dissent,

> If the word "treatment" had been meant to include "transportation," the two would not have been used as separate terms in multiple places throughout the EMSA. To interpret the word "treatment" to include mere "transportation" for purposes of MCL 333.20965(1) would render the latter term meaningless and redundant in other parts of the EMSA. [*Id*. at 830 (footnotes omitted).]

Based on our review of the EMSA, we agree with the analyses of Judge M.J. KELLY and Justice ZAHRA in their respective *Griffin* dissents that the act uses the terms "treatment" and "transport" to mean different activities. The activities could occur at the same time, e.g., a patient could be transported in an ambulance while being provided with medical treatment, but the activities remain conceptually separate. Under the EMSA, a covered individual must be, among other things, engaged "in the treatment of a patient" for the immunity provision to apply. MCL 333.20965(1). Therefore, because plaintiff's ordinary-negligence and medical-malpractice claims are premised on defendants' acts or omissions involved with his transportation in the hospital parking lot and not any treatment provided to him, the immunity for negligent acts or omissions under MCL 333.20965(1) does not apply to those claims.

III. CONCLUSION

With the EMSA, the Legislature provided immunity to EMTs and other covered persons and entities for certain acts or omissions that do not rise to the level of gross negligence or willful misconduct. But to qualify for immunity, a defendant must show, among other things, that the act or omission was taken "in the treatment of a patient." MCL 333.20965(1). This requirement is fatal to defendants' claim of immunity here because, as the record makes clear, the EMTs were merely transporting plaintiff in a stretcher across a hospital parking lot. While defendants argue that public policy supports a broader meaning of the term "treatment," the EMSA treats the term "transport" separate and distinct from the term "treatment." It is for the Legislature, not this Court, to decide whether defendants have the better public-policy argument.

Reversed and remanded for further proceedings. We do not retain jurisdiction. Plaintiff, having prevailed in full, may tax costs under MCR 7.219(F).

/s/ Brock A. Swartzle
/s/ Stephen L. Borrello