STATE OF MICHIGAN

COURT OF APPEALS

RICHARD COSTA and CINDY COSTA,

Plaintiffs-Appellees/Cross-Appellees/Cross-Appellants,

v

COMMUNITY EMERGENCY MEDICAL SERVICES, INC., DAVE HENSHAW and SCOTT MEISTER,

Defendants-Appellees,

and

DONALD FARENGER,

Defendant-Cross-Appellant/Cross-Appellee,

and

LISA SCHULTZ,

Defendant-Appellant/Cross-Appellee,

and

JOHN DOE and JANE DOE,

Defendants.

FOR PUBLICATION
September 21, 2004
9:00 a.m.

No. 247983
Wayne Circuit Court
LC No. 02-202463-NH

RICHARD COSTA and CINDY COSTA,

Plaintiffs-Appellees/Cross-Appellants,

v

COMMUNITY EMERGENCY MEDICAL

No. 248104
Wayne Circuit Court
LC No. 02-202463-NH

Official Reported Version

SERVICES, INC., DAVE HENSHAW and SCOTT MEISTER,

Defendants-Appellants/Cross-Appellees,

and

DONALD FARENGER,

Defendant-Cross-Appellee,

and

LISA M. SCHULZ, JANE DOE and JOHN DOE,

Defendants.

Before: Saad, P.J., and Talbot and Borrello, JJ.

TALBOT, J.

These consolidated and expedited appeals stem from the trial court's denial of defendants' motions for summary disposition in plaintiffs Richard and Cindy Costa's[1] medical malpractice action. We affirm in part and reverse in part.

In Docket No. 247983, city of Taylor Fire Department emergency medical service (EMS) employee and defendant Lisa M. Schultz appeals as of right the April 7, 2003, order denying her motion for summary disposition premised on governmental immunity. MCR 7.202(6)(a)(v); MCR 7.203(A)(1). Pursuant to MCR 7.207(A)(2), city of Taylor Fire Department emergency medical service employee, defendant Donald Farenger filed a claim of cross-appeal from the same order, which also denied his motion for summary disposition premised on governmental immunity.

Plaintiffs also filed a cross-appeal in Docket No. 247983, challenging the circuit court's denial of their motion for summary disposition, a motion based on Farenger and Schultz's failure to file statutorily required affidavits that they possessed meritorious defenses to the complaint. Farenger and Schultz responded with a motion to dismiss plaintiffs' cross-appeal for lack of jurisdiction on the basis that the scope of the cross-appeal exceeded the limited portion of the order from which Farenger and Schultz appealed, namely, the circuit court's denial of their

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[1] Because Cindy Costa's claims are derivative of the injuries suffered by her husband Richard Costa, subsequent references to "Costa" will refer solely to Richard.

motion for summary disposition premised on governmental immunity. On July 14, 2003, this Court denied Farenger and Schultz's motion to dismiss, and deferred a decision of the jurisdictional question.

In Docket No. 248104, defendants Community Emergency Medical Services, Inc. (CEMS), and CEMS employees Dave Henshaw and Scott Meister appeal by leave granted the same circuit court order, which denied their motion for summary disposition on the issue of emergency medical service provider immunity. Plaintiffs filed a cross-appeal in Docket No. 248104, in which they again challenged the circuit court's denial of their motion for summary disposition based on Farenger and Schultz's failure to file affidavits of meritorious defenses.

According to plaintiffs' complaint, on August 2, 1999, Richard Costa and his coworker, Joe Baker, flew from Colorado to Detroit for a business meeting. Sometime late on August 2 or early on August 3, Baker and Costa became involved in a fight and Baker struck Costa, "causing him to fall backwards and strike his head on the pavement." At 1:18 a.m. on August 3, a woman called the Taylor Police Department and reported that a man was down and not moving, and that she did not know whether he was alive. Within approximately five minutes, defendants arrived at the hotel parking lot in response to the report, but by this time "Costa had been moved from his prone position on the pavement to the front passenger seat of his vehicle, but was still unconscious." Baker advised defendants that Costa, who did not respond initially to painful or verbal stimuli, had two to four drinks earlier that evening. According to plaintiffs, Baker also informed defendants that he had punched Costa once, "and that [Costa] had been knocked unconscious either by the punch or when he struck his head on the concrete pavement as he fell." Costa regained consciousness, and recalled his name, location, and reason for going to Detroit, but could not recall the altercation and had difficulty walking unassisted. Costa signed a form refusing medical treatment and returned, assisted by Baker, to his hotel room. Baker was unable to awaken Costa the next morning, and Costa later required an emergency craniotomy and sustained allegedly permanent damage.

In Docket No. 247983, defendants Farenger and Schultz argue on appeal that the trial court improperly denied summary disposition upon their claim of governmental immunity where plaintiffs did not present any allegations or evidence tending to establish defendants' gross negligence in treating Costa. We agree. This Court reviews de novo a circuit court's summary disposition ruling. *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003). Farenger and Schultz's claim of entitlement to governmental immunity derive from MCL 691.1407(2), which provides that governmental employees are immune from tort liability if all of the following are met:

> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's . . . [or] employee's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this

subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

Here, plaintiffs do not dispute that Farenger and Schultz's treatment of Costa was an act within the scope of their authority as EMS personnel with the Taylor Fire Department, and that the Taylor Fire Department's response to the distress call involving medical treatment for Costa constituted engagement in a discharge of a governmental function. MCL 691.1407(2)(a)-(b). The remaining issue is whether, assuming the veracity of plaintiffs' allegations, they state a claim for gross negligence by Farenger and Schultz that was the proximate cause of Costa's injury. We conclude that they do not.

"[E]vidence of ordinary negligence does not create a material question of fact concerning gross negligence." *Maiden v Rozwood*¸ 461 Mich 109, 122-123; 597 NW2d 817 (1999). "The plain language of the governmental immunity statute indicates that the Legislature limited employee liability to situations where the contested conduct was substantially more than negligent." *Id.* at 122. The Legislature also provided immunity unless the employee's conduct amounts to "'the one most immediate, efficient, and direct cause of the injury or damage, i.e., the proximate cause.'" *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000), quoting *Stoll v Laubengayer*, 174 Mich 701, 706; 140 NW 532 (1913).

Plaintiffs alleged that defendants Farenger and Schultz failed (1) to assess Costa's vital signs; (2) to conduct a physical examination of Costa while he remained unconscious; (3) on Costa's regaining of consciousness, to properly assess his competence to refuse treatment; (4) to explain to Costa the potential consequences of his refusal of treatment; and (5) to transport Costa to a hospital. Farenger and Schultz arrived on the scene after receiving dispatch information about a man lying unconscious in a parking lot. When they arrived, within four minutes of the dispatch, they found Costa reclined in the passenger seat of a vehicle. Costa's coworker, Baker, adamantly denied that Costa had ever lain on the ground, but admitted that Costa became unconscious after Baker punched him in the face. Baker believed that Costa had ingested four scotch and waters, but Farenger did not smell alcohol emanating from Costa. Farenger and Schultz observed a small spot of blood on one of Costa's nostrils. Although Costa did not immediately respond to Farenger's voice or to a painful stimulus, he became coherent after an ammonia inhalant was placed under his nose and correctly answered a series of questions to gauge his level of consciousness and mental capacity. Costa appeared competent to refuse treatment, signed a form refusing further treatment, and walked into the hotel where he was staying.

Despite plaintiffs' references in their complaint to "gross negligence," we find that the allegations here sound only in ordinary negligence. See *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). No reasonable juror could have found that Farenger and Schultz behaved so recklessly "as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c); *Tarlea v Crabtree*, 263 Mich App 80; ___ NW2d ___ (2004.) Further, given the undisputed evidence that Baker punched Costa in the face and knocked him down before Farenger and Schultz arrived on the scene, reasonable jurors could not have found that Farenger and Schultz's actions were the proximate cause of Costa's injuries. *Robinson, supra*, 462 Mich 463; *Tarlea, supra*. The trial court improperly denied Farenger and Schultz's motion for summary disposition on the issue of governmental immunity.

In Docket No. 248104, defendants CEMS and CEMS employees Dave Henshaw and Scott Meister also argue that the trial court improperly denied summary disposition because they were entitled to qualified immunity and plaintiffs failed to establish gross negligence or proximate cause. Again, plaintiffs alleged that the CEMS defendants failed (1) to assess Costa's vital signs; (2) to conduct a physical examination of Costa while he remained unconscious; (3) on Costa's regaining of consciousness, to properly assess his competence to refuse treatment; (4) to explain to Costa the potential consequences of his refusal of treatment; and (5) to transport Costa to a hospital. Under the emergency medical services act (EMSA), MCL 333.20901 *et seq*., emergency medical technicians and paramedics are not liable for services they provide absent gross negligence or willful misconduct. MCL 333.20965(1). EMSA and the governmental immunity act are read "in pari materia," and gross negligence is defined the same in each, as "conduct so reckless as to demonstrate a substantial lack of concern for whether injury results." MCL 691.1407(2)(c); *Jennings v Southwood*, 446 Mich 125, 136-137; 521 NW2d 230 (1994). The CEMS defendants arrived on the scene at a later time than defendants Schultz and Farenger, and supplied the ammonia inhalant that revived Costa to consciousness. Again, despite plaintiffs' references in their complaint to "gross negligence," the allegations here sound only in ordinary negligence and do not allege the gross negligence or wilful misconduct needed to overcome EMSA immunity. *Tarlea, supra; Smith, supra; Pavlov v Community Emergency Med Service, Inc*, 195 Mich App 711, 713-717; 491 NW2d 874 (1992).

In both Docket Nos. 247983 and 248104, plaintiffs argue on cross-appeal that the trial court erred in denying their motion for summary disposition or default, which was based on Farenger and Schultz's failure to comply with the statutory requirement to file an affidavit of meritorious defense, MCL 600.2912e. This Court has more than once rejected similar assertions that a medical malpractice defendant's failure to file an affidavit of meritorious defense pursuant to MCL 600.2912e mandates a default or other preclusion of the defendant from presenting a defense, and plaintiffs present no authority to the contrary. *Kowalski v Fiutowski*, 247 Mich App 156, 161-163, 165-166; 635 NW2d 502 (2001); *Wilhelm v Mustafa*, 243 Mich App 478, 483-486; 624 NW2d 435 (2000). Here, the trial court gave Schultz and Farenger additional time to file their affidavits, and we find no abuse of discretion. *Id.*

In Docket No. 247983, defendants Farenger and Schultz respond that this Court lacks jurisdiction to consider plaintiffs' cross-appeal because the trial court's denial of plaintiffs' motion is not a final order as defined in MCR 7.202(6)(a)(iii)-(v).[2] Although our ruling on the previous issue makes moot the jurisdictional question raised by defendants Farenger and Schultz, this Court may address an issue where, as here, it is likely to recur yet evade judicial review. *In re Martin*, 237 Mich App 253, 254; 602 NW2d 630 (1999).

The jurisdiction of the Court of Appeals is provided by law, and its practice and procedure are prescribed by the court rules and our Supreme Court. Const 1963, art VI, § 10. See MCR 7.202(6) and 7.203. Unlike that of our Supreme Court or the circuit court, the

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[2] Plaintiffs note that they filed cross-appeals in both cases specifically to avoid the jurisdictional question.

jurisdiction of this Court is "entirely statutory," *People v Milton*, 393 Mich 234, 245; 224 NW2d 266 (1974), and is generally limited to final judgments and orders. MCL 600.308. In its exercise of prescribing this Court's practice and procedure, our Supreme Court has limited appeals as of right "to the portion of the order with respect to which there is an appeal of right," and has determined that a "final" judgment or order includes certain nonfinal orders, including appeals from orders ruling on the issue of governmental immunity. MCR 7.202(6)(a)(v). We acknowledge this Court's decision in *Newton v State Police*, 263 Mich App ___: ___ NW2d ___ (2004). We disagree with *Newton* because we believe that the potential of immunity is at the core of virtually any case involving a governmental party, MCR 7.215(J), and that, regardless of the specific basis supporting the trial court's ruling on a motion for summary disposition, whenever the effect is to deny a defendant's claim of immunity, the trial court's decision is, in fact, "an order denying governmental immunity" that should be reviewable under MCR 7.203(A).[3] MCR 7.202(6)(a)(v). The decision in *Newton* is not necessary to our analysis here, however, as it did not address the ability to cross-appeal from orders defined by MCR 7.202(6)(a)(iii)-(v), i.e., orders that are nonfinal except by definition of that rule.

This Court considers de novo jurisdictional questions. *Jeffrey v Rapid American Corp*, 448 Mich 178, 184; 529 NW2d 644 (1995). The rules of statutory construction apply to court rules. *Grievance Administrator v Underwood*, 462 Mich 188, 193; 612 NW2d 116 (2000).

> When faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute. We give the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's intent only if the statutory language is ambiguous. Where the language is unambiguous, "'we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written.'" [*Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002) (citations omitted).]

If a court rule is unambiguous, it must be enforced without further judicial construction. *In re KH*, 469 Mich 621, 628; 677 NW2d 800 (2004). This Court will not "read in" language that is not included in the court rule. See *In re Forfeiture of 1987 Mercury*, 252 Mich App 533, 543; 652 NW2d 675 (2002).

MCR 7.203(A)(1) explicitly prescribes the scope of an appellant's appeal as of right from a final order under MCR 7.202(6)(a)(iii)-(v), such as an order denying summary disposition on the issue of governmental immunity, and limits an appellant's right to appeal under these circumstances "to the portion of the order with respect to which there is an appeal as of right."

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[3] We note that the court rule contains an error. MCR 7.203 states that this Court has jurisdiction over final judgments as defined in MCR 7.202(7). In May 2004, MCR 7.202 was renumbered and MCR 7.202(7) was changed to MCR 7.202(6), but MCR 7.203 has not yet been revised to reflect that change.

Here, Farenger and Schultz indisputedly filed their claim of appeal from the portion of the circuit court order that denied their motions for summary disposition in which they claimed governmental immunity. As Farenger and Schultz argue, the circuit court's denial of their governmental immunity-based motions plainly qualifies as a "final order" pursuant to MCR 7.202(6)(a)(v), from which MCR 7.203(A)(1) plainly authorized Farenger and Schultz to appeal as of right.[4]

But the court rules do not similarly restrict the scope of cross-appeals. MCR 7.207(A)(1) provides:

> When an appeal of right is filed or the court grants leave to appeal any appellee may file a cross appeal.

Unlike MCR 7.202(6)(a)(iii)-(v) and MCR 7.203(A), the court rule governing cross-appeals to this Court, MCR 7.207, does not contain any language of limitation. Instead, the clear and unambiguous terms of MCR 7.207(A)(1) authorize any appellee to file a cross-appeal whenever an appellant has either filed an appeal as of right, or when this Court has granted an appellant's application for leave to appeal.[5] The language of MCR 7.207 does not restrict a cross-appellant from challenging whatever legal rulings or other perceived improprieties occurred during the trial court proceedings. Indeed, MCR 7.207(D) states that even "[i]f the appellant abandons the initial appeal or the court dismisses it, the cross appeal may nevertheless be prosecuted to its conclusion." See *In re MCI*, 255 Mich App 361, 364-365; 661 NW2d 611 (2003).

Where, as here, the plain terms of the rules do not conflict with each other, we interpret them individually by their unambiguous terms. *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998). If we can construct two rules so that they do not conflict, "that construction should control." *Travelers Ins v U-Haul of Michigan*, 235 Mich App 273, 280; 597 NW2d 235 (1999).

We recognize that there is dicta in a previous opinion of this Court, *Roberts v Pontiac*, 176 Mich App 572, 574 n 1; 440 NW2d 55 (1989), that suggest a different result. However, in addition to the dicta, the case is not binding on this Court given its issuance before November 1, 1990. MCR 7.215(J)(1); *Carr v City of Lansing*, 259 Mich App 376, 383-384; 674 NW2d 168 (2003). Moreover, our Supreme Court reversed this Court's attempt to limit a cross-appeal in *Bancorp Group, Inc v Meister*, unpublished opinion per curiam of the Court of Appeals, issued January 20, 1998 (Docket No. 174566). In this Court's unpublished opinion, the panel opined that the defendants' "cross appeal was . . . limited to the order appealed, i.e., the trial court's decision to grant a new trial." Our Supreme Court subsequently issued an order, in *Bancorp Group, Inc v Meister*, 459 Mich 944 (1999), holding that there was "no basis for the Court of

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[4] As noted, although not at issue here, we disagree with this Court's decision in *Newton v State Police*, 263 Mich App ___: ___ NW2d ___ (2004), regarding the interpretation of the court rule. MCR 7.215(J).

[5] In Docket No. 248104, the CEMS defendants were granted leave to appeal. There is no question that plaintiffs were entitled under MCR 7.207 to file a cross-appeal in that case.

Appeals conclusion that it lacked jurisdiction to consider the issues raised on the cross appeal." The jurisdictional issue before us is virtually the same as that presented in *Bancorp, supra,* and we accordingly rely on our Supreme Court's direction in this case. Farenger and Schultz filed an appeal of right in Docket No. 247983, and the plain language of MCR 7.207(A)(1) does not limit plaintiffs' right to file a cross-appeal. There is "no basis" for Farenger and Schultz's claim that we lack jurisdiction to consider plaintiffs' argument. *Bancorp, supra* at 944.

In Docket Nos. 247983 and 248104, the trial court's denial of plaintiffs' motion for summary disposition is affirmed. In Docket Nos. 247983 and 248104, the trial court's order denying defendants' motions for summary disposition is reversed.

Saad, P.J., concurred.

/s/ Michael J. Talbot
/s/ Henry William Saad